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PRINCIPLE AND PURPOSE: TWO KINDS OF LEGAL
CONSISTENCY.

The City University of New York, Ph.D., 1975
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1975

PRINCIPLE AND PURPOSE: TWO KINDS
OF LEGAL CONSISTENCY

by
BENJAMIN FREEDMAN

A dissertation submitted to the Graduate
Faculty in Philosophy in partial fulfillment
of the requirements for the degree
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1975

This manuscript has been read and accepted for the Graduate Faculty in Philosophy in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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PREFACE

It is the custom, in writing prefaces, to begin with a disclaimer that limitations of space prohibit listing all who have contributed to the work; I do hereby so disclaim.

It will be obvious to whom are owing my major intellectual debts, but for those who will read no further than this preface, let me say that the writings of Albert Hart and Henry Sacks (The Legal Process), Paul Mishkin and Clarence Morris (On Law in Courts), and, preeminently, Lon L. Fuller, have influenced me most strongly.

But a greater intellectual debt is owed to those philosophers under whom I have studied. Thanks are due to Professor Elmer Sprague, who introduced me to philosophy; Marshall Cohen, who introduced me to philosophy of law; Bernard Baumrin, who introduced me to another kind of philosophy of law; and most importantly, to Martin Golding, who introduced me to the kind of philosophy of law I find most congenial.

Professor Golding, as my dissertation adviser and sponsor, was enormously helpful, professionally and personally, and showed extreme patience with a particularly trying student. Thanks are also due to the other members of my dissertation committee, Professors Virginia Held and Gertrude Ezorsky, and to Professor Abraham Edel: my brief acquaintance

with him was out of all proportion to the help he gave me, and the respect for him which I have.

Finally, I must thank my family; my greatest thanks of all are owing to my wife Barbara, for all kinds--too numerous to list--of help (past and future), and to my daughter Ariela, who chewed well over this paper and other papers of mine.

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INTRODUCTION

"All paths lead to the same destination." I do not know if this is true in general, but it certainly seems to be the case in legal philosophy; for no matter what original question is asked, its investigation ultimately proves to involve a discussion of most of the major problems of legal philosophy. Specifically, in regard to the following set of questions, a responsible investigation of any will lead to discussion of all:

- a. What is a law?
- b. What is a legal system?
- c. How are laws individuated?
- d. What is a good reason for a legal decision?
- e. Which requirements of rationality must a judge satisfy?
- f. Who makes law?
- g. What is the relationship between law and morality?
- h. What does 'justice', as used in a legal context, mean?

Other questions could, of course, be added to the list; indeed, that is precisely my point: any significant problem of jurisprudence requires, for its solution, consideration of all significant problems.

It is for this reason that legal philosophy lends itself to treatment in treatises, in tomes, rather than in isolated articles, (Perhaps I should say, rather, that it lends

itself to treatment in an oeuvre, which may be expressed in a connected series of articles.) Any good philosopher of law finds himself forced to construct a unified theory. These are all, of course, empirically-testable assertions. I would ask the reader, then, to think of the major figures in philosophy of law of modern times (for while I think the assertion holds true in general--for example, for Plato, Aristotle and Aquinas--its proof would be difficult, since we would need to translate--in a philosophical, as well as linguistic, sense--so many of their works and concerns before the enterprise could be carried out). Bentham, Austin, von Jhering, Savigny, Holmes, Pound,--and, in my own time, Hart, Fuller, Wechsler, Frank, Dworkin, among many others--all found themselves, I think, forced to construct a unified body of work. Unlike science, philosophy of law does not lend itself easily to progress by accretion.

And because this is so, works on philosophy of law (as, for example, this dissertation), tend to 'wander all over the map'. (In regard to some of the above I would say, with the anonymous French painter, "If I am nothing else, at least I am a contemporary!") But we can at least distinguish different styles of jurisprudence by reference to the question which serves as their point of origin, for that will, to a large extent, limit and color the kind of answer (by limiting the kind of evidence which is judged relevant) which this set of questions will receive. My own point of origin is "What

is a good reason for a legal decision?" In attempting to answer this question, I present an extended exposition and criticism of two theories: the first, the theory of neutral principles of law, maintains that a decision is good if it is consistent with some principle which the judiciary supports 'across-the-board', in a logically consistent fashion; the second, the theory of pragmatic consistency, maintains that a decision is good if it has results which further the purpose which the law was originally intended to serve.

I was fortunate in that the theory of neutral principles of law--whose foremost exponent is Herbert Wechsler--had received sustained attention by many prominent jurists, who produced a body of work which might serve as a context within which I might write. And I was fortunate in two other respects as well: First, in that the controversy over neutral principles had ripened; much of what is going to be said about this theory has already been said. Second, in that I have nowhere encountered a comprehensive discussion of the theory which would render the attempt made in these pages superfluous. Specifically, the relationship between the theory of neutral principles and generalization in ethics, the presuppositions made by Wechsler (and his opponents), and the advantages and shortcomings of the form of argument employed by the theory of neutral principles had not been dealt with in the sustained fashion to be found here.

A different situation prevailed with respect to the theory of pragmatic consistency. As will be shown, this is

in no sense a new theory: it is long familiar to jurists, albeit under different rubrics (e.g., ratio legis, equitable interpretation). However, the theory had not been worked out in a rigorous way by any writer with whom I am acquainted, and there was no single advocate of the theory whom I could discuss. I therefore had to develop the theory myself, which, while not a thankless task, was a confusing one--for it was necessary to shift back and forth between advocacy of the theory and reasoned scholarly evaluation of it. It was necessary to be judge, jury and defendant (and law-review writer about the case) all in the same work. So while my current intention is to develop the theory of pragmatic consistency in a critical fashion, I am afraid that a strong element of advocacy has entered as well; the reader will have to recognize this and deal with it himself.

In reviewing the work, it appears that there are certain ulterior concerns which perhaps do not find full voice in the dissertation. The first of these is the problem of what consistency means, and how it is to be applied in the jurisprudential context, and why it is required. It seemed to me that there were two kinds of consistency which might be demanded of a judge: that he be logically consistent, and that he be consistent in serving the purposes of the law. Both of these, I felt, were properly termed 'consistency', although 'logical consistency' is an expression which more easily trips off the tongue of a philosopher than 'purposive' or

'pragmatic consistency'. (I call it 'pragmatic consistency' because it must find expression in action; the decision is consistent if the results of the decision conform with the purpose of 'spirit' of the law.) And both of these types of consistency could be seen as requirements of rationality which are imposed upon the judge: for while it is irrational to be logically inconsistent, it is also irrational to claim to support X, while failing to support X in practice. Logical and pragmatic consistency intermix and combine in a strange and complicated way--in an intriguing way, in fact--when used with reference to courts: for logical consistency is intellectual consistency, and pragmatic consistency is practical consistency--and the task of the judge is one of achieving practical results by intellectual means. The judge does not only speak: in speaking, he does, as well. The concept of consistency--better, the concepts of consistency--served as a major, though largely unvoiced, concern in this dissertation.

The second ulterior concern was the problem of understanding jurisprudence, and, in particular, theories of legal reasoning, in light of the fact/value distinction. Are theories of legal reasoning normative proposals? (This is how the judge ought to reason.) Are they descriptions? (This is how the judge does reason.) Or are they some combination thereof, e.g., "This is how the judge sometimes reasons, and how he ought always to reason."? It might be thought that

this is an issue which might be settled easily; it might be thought that some philosophers hold one view, others hold different views, and all that needs to be done is to match up the different philosophers with the different claims. But I did not find this simplicity warranted. Owing, perhaps, to what Felix Cohen called 'the normative force of the actual', those philosophers who claimed to describe legal reasoning seemed to ascribe normative significance to the theory-described as well; and owing, perhaps, to a desire for credibility, those who put forth their theory as a proposal which the law ought to adopt, also claimed that the theory is the 'true' (though perhaps 'disguisedly true') theory which is in fact employed.

There is a sense--one which positivists would readily admit--in which what is, and what ought to be, the case in a legal system are inextricably entwined: the sense in which a legal system tries to be (or, at least, represents itself as being) the best it can be, as judged by certain publicly-recognized standards which, of course, vary as between different legal systems. These criteria have ontological status: they exist, and are used by scholars and participants in the legal system; and from the view of those subject to the legal system (with the exception of revisionists, of which they may be many), these are also the criteria which a legal system ought to satisfy. Because this is so, it is clear in our context--theories of legal reasoning--that no

simple fact/value dichotomy is likely to explain the positions in question. Blendings of these elements, with, perhaps, new elements, are needed to adequately characterize the theories in question.

The third unspoken theme in this essay is what I term the 'failure of understanding' of opponents which occurs in legal philosophy. This is deeper, and more philosophically significant, than simple misunderstandings. When one philosopher 'fails to understand' another, he completely misinterprets the other's theory, for he sees it through pre-suppositions and concerns foreign to the theory which he is examining. A philosopher may claim, for example, that a theory of legal reasoning is faulty because it fails to describe accurately the reasoning which courts actually employ; yet this criticized theory might never have represented itself as being descriptively true. This sort of criticism makes as little sense as criticizing a can-opener for not being an automobile; theories, as well as tools (perhaps, as a species of 'tool') are designed to do different jobs, and only by reference to their performance of the assigned task can theories be judged 'adequate' or 'accurate'. Sometimes, when this form of criticism (or 'miscriticism') is stated, it is also alleged or implied that there is only one task which a theory in a given area might (or ought to) seek to perform. This claim, express or implied, seems to be supported by positivists, for whom the only job for legal philosophy is a

certain sort of description of the legal system; yet the claim is rarely made in this form: for, put so baldly, the claim is seen to be blatantly mistaken.

It will be argued, then, that much of the criticism which has been made of the theory of neutral principles is in fact 'miscriticism', criticism which is entirely useless because founded upon a failure of understanding. Similarly, much of the criticism which has been made of the notion of the 'intention of the legislature' is faulty, because based upon a view of 'intention' which was not held by many of the users of that notion. Again, much that has been written on the question of the individuation of laws is defective in failing to recognize the different jobs which different theories of individuation might be attempting.

It goes without saying that I did not intend any of my comments on other philosophers to be miscriticism; it also goes without saying that I may have failed.

The order of the chapters is thematic: I discuss, in the first two chapters, the theory of neutral principles; in the third and fourth chapters, I introduce and explain the theory of pragmatic consistency, and its use in the solution of hard cases; in the fifth chapter, I attempt a more rigorous account of pragmatic consistency, and a solution to some of the more obvious difficulties it faces; and in the final chapter, I compare it with two recent theories of legal reasoning. A number of side issues are raised in the course of

discussion; I have provided an extended analytical table of contents, so that the reader might see where the argument is leading.

CHAPTER I

THE THEORY OF NEUTRAL PRINCIPLES:

ORIGIN AND CONTENT

The theory to be examined maintains that courts must, when deciding points of law, reach their decisions through the employment of 'neutral and general principles of law'. The principle used must be one which supports the decision reached in the 'instant' case (the case now before the court), and which is also such as to cause the courts to reach a similar decision in relevantly similar cases: that is, it must be a principle which the court supports wholeheartedly, and is willing to apply in a consistent fashion.

This chapter and the next will examine the background and meaning of the theory and the criticism which the theory has engendered. I shall attempt to show that while the theory does offer a significant basis for the criticism of judicial action, it could not aid the judge in his exercise of judicial authority; or, worse yet, it offers the judge guidance of the sort which is inconsistent with the view of the judicial process advanced by the proponents of this theory. The theory fails upon its own premises to constitute an adequate theory of legal reasoning.

A. Background: The Use of Deficient Principle

The wide interest¹ in the theory of neutral principles evolved in the context of increasing criticism of Supreme Court decisions by prominent jurists (mainly drawn from the academic world). The theory represented an attempt to explain just what requirement of law or of legal craft these decisions failed to satisfy. It was claimed that²

The Court's product has shown an increasing incidence of the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree . . . We get opinions that have the vacuity of desperately-negotiated documents.

The decisions of the Supreme Court are, of course, the most highly-visible decisions available, and the cases the Court deals with are among the hardest cases to decide;³ they are apt to be 'pathological cases' which demonstrate the weaknesses of the judicial organism in dramatic fashion. The Supreme Court in many ways represents the extreme test of

¹For an older similar view see Benjamin N. Cardozo, The Nature of the Judicial Process, in Hall, ed., Selected Writings of Benjamin Nathan Cardozo (New York: Fallon Pubs., 1947), p. 164: "Our jurisprudence has held fast to Kant's categorical imperative: 'Act on a maxim which thou canst will to be law universal.'"

²Alexander M. Bickel and Harry Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case" 71 Harv. L.R. 1, 3.

³For an extreme statement that the Supreme Court gets 'pathological cases' see Arthur S. Miller, "A Note on the Criticism of Supreme Court Decisions," 10 Journal of Public Law 139, 145 ff.

views of judicial reasoning; this in itself constitutes one explanation of why the discussion of neutral principles has revolved around questions about the work of the Court. As I shall deal with this theory, however, it is not merely an exercise in Supreme Court criticism, but rather is a theory of general applicability to the process of resolution of questions of law.¹ The examples used to demonstrate a failure to abide by the requirements of neutral principles need not, therefore, have been drawn from the Supreme Court; the problems they pose are not necessarily confined to constitutional interpretation, but go to the root of legal reasoning: they are failures in 'judicial quality'.²

The cases and opinions which have arisen in the course of argument have, however, been Supreme Court cases with constitutional dimension, and I shall confine myself to this sort of example. I am not, however, interested in the particular problems which the decisions and practices to be referred to raise, but rather with the more general deficiencies in judicial technique which they exemplify.

Two of the cases which Wechsler, the major protagonist in the neutral principles debate, claims to have been decided on the basis of deficient principles are Shelley v. Kraemer³

¹See the last section of this chapter, "The Scope of the Theory of Neutral Principles."

²Herbert Wechsler, "Towards Neutral Principles of Constitutional Law," 73 Harv. L.R. 1, 19. Hereinafter cited as 'Wechsler, Towards . . . '.

³Shelley v. Kraemer, 334 U.S. 1 (1948); Wechsler, Towards, 29-31.

and Brown v. Board of Education.¹ These two cases will be explained before passing on to what is perhaps a more serious example of the failure of the Court to supply an adequate principle of decision in some of its recent decisions regarding freedom of speech.

But it is first important to mention--especially with respect to Brown--some possible criticisms which are not being made.² The decisions are not being criticized because they violate, in some way, the principle of stare decisis (the principle that past decisions of courts should not be reversed). Nor are they being criticized because the framers of the Fourteenth Amendment did not intend the interpretation which the Court adopted in these decisions: "the words are general and leave room for expanding content as time passes and conditions change."³ Nor, finally, is the complaint that the Court did not give sufficient consideration to the probable effects of their decision upon society at large. Rather, the problem in these cases "inheres strictly in the reasoning"⁴ announced by the Court.

Shelley v. Kraemer involved the question of whether legal effect is to be given to covenants which are racially

¹Brown v. Board of Education, 347 U.S. 483 (1954).

²Wechsler, Towards, pp. 31-32.

³Wechsler, Towards, p. 32; compare Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L.J. 1 (1971).

⁴Wechsler, *ibid.*

restrictive. The property owners of a community had banded together and agreed to a covenant which provided that none of their land will be conveyed to Negroes. One signator broke the covenant and sold property to Shelley, a Negro. The other signatories to the covenant brought suit to prevent Shelley from taking possession.

The Court reasoned as follows: the property-owners involved have the right to discriminate on the basis of race in their capacity as private citizens. The restrictive covenant was therefore valid. It did not violate the Fourteenth Amendment, which only forbids discriminatory state action. However, in Shelley v. Kraemer the courts were being requested to enforce the covenant; the courts themselves were to be the agent preventing Shelley from taking possession. Were the courts to enforce the covenant, they would be acting in discriminatory fashion. This action by the courts would constitute state action, and therefore be subject to the strictures of the equal protection clause of the Fourteenth Amendment. Consequently, although, again, the covenant itself was valid, the courts nevertheless could not enforce it: Shelley must be allowed to take possession.

The problems with this decision are apparent. It made no distinction between court action which does, and court action which does not, constitute state action. To put it another way, the decision made no distinction between racial discrimination of the state, and the enforcement, by the

state, of private discrimination. Yet this distinction is vitally important. Consider a private citizen who only brings action for trespass against black trespassers upon his property. He is discriminating; and the courts, in upholding his action, would, in one sense, also be discriminating; yet surely the courts will not allow him redress in such a case. Similarly, the courts will surely not hold that a will which is in order yet which was shaped by motives of racial prejudice will not have legal effect. Sometimes, therefore, the courts will surely be permitted to give effect to private discrimination. A distinction must be made between state action which discriminates and the intervention of the state to give effect to private rights whose invocation is motivated by racial prejudice. Some sort of line must be drawn here; the Supreme Court was not prepared to forbid all court enforcement of private discrimination. Therefore, the apparent principle upon which this case was decided--court action is state action--is unacceptable in this unqualified form; and yet, the Supreme Court supplied no qualification of the principle.

The background of the Brown case, in which, again, Wechsler sees the Supreme Court as failing to adequately act upon principle, hardly requires detailed recitation. Plessy v. Ferguson¹ had held that racial segregation of services supplied by the government was constitutionally permissible

¹Plessy v. Ferguson, 163 U.S. 537 (1896).

despite the Fourteenth Amendment's due process and equal protection clauses, provided that the facilities available to black and white were equal. Brown posed the following question:¹

Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does. . . . To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community . . . Separate educational facilities are inherently unequal.

In its notorious footnote, the Court cited social psychological evidence in support of this view of the facts.

My purpose here is not to reconstruct the decision, nor to comment on the interpretations and addenda which have been offered.² Instead I want to reconstruct Wechsler's reading of the decision and the problems which, it appears, Brown may be said to pose, given the theory of neutral principles. On Wechsler's reading, Brown did not overrule the earlier 'separate but equal' doctrine, but rather held that today (or, perhaps, in the light of modern knowledge) that formula has no place in deciding about school segregation. School

¹347 U.S. 483, 492-495.

²See Martin P. Golding, "Principled Decision-Making and the Supreme Court," in Summers, ed., Essays in Legal Philosophy (Oxford: Blackwell's, 1968), p. 229. Originally printed in 63 Col. L.R. 35, 1963. See also Richard A. Givens, "The Impartial Principles Supporting Brown v. Board of Education," 6 Howard L.J. 179 (1960); Charles L. Black, Jr., "The Lawfulness of the Segregation Decisions," 69 Yale L.J. 421 (1960).

✓ segregation is special: it is 'inherently unequal', because it has harmful psychological effects upon the black minority (and not only because that is how blacks 'choose to interpret' the fact of segregation, per contra Plessy).¹ The reference, in scare quotes, which the Supreme Court makes to 'tangible' factors, alerts us to the fact that the Court felt that there were other factors to be found in the school situation; and these other factors, while not perhaps 'tangible', have constitutional dimension. In particular, the Constitution requires that the psychological effects of enforced discrimination upon black schoolchildren be eliminated.²

In the next section I want to suggest some problems which might have troubled the neutral principles advocates regarding the later use which was made of the Brown decision. Yet one need not turn to the opinion's aftermath: there are problems in the opinion itself. Wechsler reads the Supreme Court as saying that psychological as well as material factors must be judged in determining whether school facilities are unequal, and hence detrimental to blacks. Yet, as Wechsler notes, the psychological evidence was only considered

¹163 U.S. 537, 551 (1896).

²It must be noted that this psychologistic interpretation of the opinion does not entail that the opinion turned upon, or was decisively influenced by, the testimony of professional psychologists. As Cahn and Black have claimed, the psychological facts might have been considered as mere statements of what common sense tells us, although these statements were accompanied by a graceful nod in the direction of the field of social and developmental psychology.

insofar as it tended to prove harmful effects of enforced segregation. "What of the benefits that it [segregation] entailed: sense of security, absence of hostility? Were they irrelevant?"¹ And other possibly relevant psychological factors fail to appear in the Court's calculations, for example, the ratio of blacks to whites in the community. If we are to let psychological factors enter into a determination of constitutional equality, as no doubt we should, then we must assess all of the psychological evidence. To use some psychological evidence, and to ignore other equally relevant evidence, smacks of the ad hoc. It demonstrates a failure to import the element of principle into our process of judicial reasoning.

In both the Shelley and Brown cases, then, we find the Supreme Court employing deficient principles of decision. But the furor over these decisions has largely died down today; it may be that we no longer feel keenly the significance of the Court's departure from principles in these cases. Let me, therefore, briefly elaborate on one modern doctrine of the Supreme Court which openly fails to deal with constitutional adjudication in a principled fashion.

I am referring to the 'balancing of interests' test which the Supreme Court uses in judging the constitutionality of legislation which restricts freedom of speech. Starting

¹Wechsler, Towards, p. 33,

in the Douds case,¹ opinions and concurrences of the Supreme Court have often judged² legislation which restricts freedom of speech by an ad hoc balancing of the importance of the speech which is restricted against the probability and severity of the threat to our society which that speech might represent. It is sometimes claimed that this balancing test will only be used in reference to laws which have a merely incidental effect of restricting freedom of speech;³ but supporters of the test, and some cases in which the test has been employed, suggest that it is of general applicability to adjudication of problems of free speech.⁴

Some statements of this balancing test may suggest the extraordinarily loose guidance which it provides;^{5,6}

When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. . . . In essence the

¹American Communications Association v. Douds, 329 U.S. 382 (1950).

²See, among others, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar, 366 U.S. 36 (1961).

³See, e.g., Konigsberg v. State Bar, 366 U.S. 36 (1961).

⁴Thomas I. Emerson, Towards a General Theory of the First Amendment, (New York: Vintage, 1967), p. 54.

⁵From American Communications Association v. Douds, quoted in Emerson, p. 149.

⁶From Konigsberg, quoted in Emerson, p. 190.

problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that . . . [the proscribed conduct causes] substantial harm.

. . . general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First Amendment or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . . Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.

Two objections to this 'balancing test', which has largely superseded the 'clear and present danger' test, may be made. It may be claimed that the Supreme Court would not be prepared to follow even so evanescent a test as this to its logical conclusion. Justice Black, in his dissent to *Konigsberg v. State of California*¹ (in which he was joined by Chief Justice Warren and Justice Douglas), states

I cannot believe that the Court would adhere to the 'balancing test' to the limit of its logic . . . strict adherence to it would necessarily mean that there would be only a conditional right, not an absolute right, for any American to express his views to his neighbors. . . . All of these rights [to freedom of speech] would be dependent upon the accuracy of the scales upon which this Court weighs the respective interests of the Government and the people. It therefore seems to me that the Court's 'absolute' statement that there are no 'absolutes' under the First Amendment would be an exaggeration of its own views.²

And then, of course, the balancing test gives enormously loose guidance. Again, Black with concurrences of

¹Ibid.

²In Emerson, p. 194.

Warren and Douglas:¹

To apply the Court's balancing test . . . is to read the First Amendment to say 'Congress shall pass no law abridging freedom of speech, press, assembly, and religion, unless Congress and the Supreme Court reach the joint conclusion that on balance the interest of the Government in stifling these freedoms is greater than the interest of the people in having them exercised'. This is closely akin to the notion that neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is reasonable to do so.

How is this balancing to be made? What factors are to be considered relevant? What weight is to be assigned to the varied interests which must be balanced? In what sense are interests of society and of individuals commensurable? No semblance of a satisfactory answer to these questions has been supplied by the Supreme Court. It is not surprising that one respected commentator on problems of freedom of speech, Thomas Emerson, concludes that²

The principal difficulty with the ad hoc balancing test is that it frames the issues in such a broad and undefined way, is in effect so unstructured, that it can hardly be described as a rule of law at all. . . . The ad hoc balancing test contains no hard core of doctrine to guide a court in reaching its decision. Rather, a court is cast loose in a vast space, embracing the broadest possible range of issues, to strike a general balance in the light of its own best judgment . . . the lack of structure makes it realistically impossible for a court to perform its difficult function of applying accepted and impartial rules to hold in check the unruly forces that seek to destroy a system of free expression.

The neglect of principled methods of adjudication does not appear in isolated cases, then; an entire doctrine of law

¹Dissent in Barenblatt, quoted in Emerson, p. 186.

²Emerson, p. 54.

has been erected on the basis of elevating ad hoc decision making, the very negation of principle, into a principle itself. In addition, some practices of the Supreme Court show that the legal system is seriously infected with the denial of principle.

B. Background: Failure to Supply Principles

The Supreme Court has come under sustained attack for its practice of deciding per curiam; it has been claimed that this practice totally avoids the need for principled judicial-decision-making.¹ The Court today possesses, by statute, largely discretionary jurisdiction: it need not decide all cases which it is requested to decide. The reason for this is obvious: if the Supreme Court had to spend time on each of the thousands of cases brought before it, only cursory attention could be given to each case. Allowing the Court discretion in granting certiorari insures that the Court will have enough time for deliberation on important cases, and opportunity to formulate opinions which will be useful in guiding lower courts (so that, ultimately, there should be effected a reduction in the number of cases for the Court's attention).

In its practice of deciding cases per curiam, however, the Court seems to neglect these considerations. As used in

¹Among others, see Wechsler, Towards; Ernest J. Brown, "Foreward: Process of Law," 72 Harv. L.R. 77 (1958); Bickel and Wellington, op. cit.

the context of the neutral principle debate, a per curiam case is one which is decided by the Court without an opinion explaining the Court's grounds for decision; at most, a precedent, purporting to support the decision, will be cited by way of legal argument. In deciding per curiam the Court fails to supply the principle of law upon which the Court has reached its decision, and upon which we, as potential actors in the judicial process (lawyers, judges, litigants) may rely.

If the Court has decided a case with citation of a precedent, and that precedent is 'on all fours' with the instant case--if the cases are clearly similar in all relevant aspects--the problem raised by the practice of decision per curiam is not acute. But a case will seldom reach the Supreme Court, let alone successfully petition for a grant of certiorari, if the case is as clearly governed by precedent as the form of the per curiam order suggests. Is it likely that all of the lower judges have been mistaken, or that counsel have litigated a foredoomed case? It is therefore not surprising that some per curiam decisions have been found, upon examination, to be far from clear-cut deductions from previously-declared rules of law. The precedent cited does not always appear entirely 'apposite' (relevantly similar) to the case which the Court is now deciding.

One example of this is the per curiam order which extends the prohibition on state-enforced discrimination to

public beaches and bath houses.¹ The decision in Brown v. Board of Education was cited as precedent for this position. Yet the psychological situation in the public schools, which was of crucial importance in Brown, is, in many respects, relevantly different from the psychological context of public beaches. No one is obliged to use public beaches;² in public beaches, the children are often accompanied by adults, as they are not in school; and, perhaps most importantly, there is no cause to infer from segregation of public beaches that a stamp of intellectual inferiority is being placed upon blacks. In view of these differences, how could a judgment which addressed itself only to segregation at the primary school level be applied, without explanation or addendum, to public beaches and bath houses? Surely some argument to the similarities of the cases was required here, yet no such argument was even attempted.

A similarly disturbing practice of the Supreme Court is its decisions summarily reversing lower courts.³ In these cases, the Court acts upon a reading of the applications for certiorari alone. These applications are not intended, as the Court has repeatedly asserted, to constitute arguments on the merits of the case, but rather to establish the fitness

¹Mayor and City Council v. Dawson, 350 U.S. 877, affirming per curiam 220 F. 2d 386 (4th Cir., 1955).

²See Wechsler, Towards, p. 22.

³See Brown, "Foreward: Process of Law,"

of the case for review (for example, by reason of the importance of the case).¹ These summary reversals of the considered judgment of lower courts, which appear without opinions and, at times, in spite of dissent by some members of the Supreme Court itself, cannot possibly be cases simple enough to be disposed of without an opinion.

Cases involving summary reversal or decision per curiam raise the problem of finding the principle upon which the Supreme Court has acted. That is to say, these Court decisions may well be justifiable, but the Court has not identified their justification; these decisions could, perhaps, be justified in law, but the Supreme Court has simply not shown us that this is the case. These practices are sins of omission: they trouble lower courts and leave the law in an unclear state.

In two ways, then, the Court has shown itself neglectful of the demands of action upon principle. The Supreme Court makes a regular practice of deciding cases without giving any principle of decision; and the Court has often decided cases on the basis of declared principles which are obviously deficient.

C. A Preliminary Statement of the Theory of Neutral Principles

In the previous two sections were described some troublesome cases and practices. The question needs to be asked,

¹See Brown, pp. 79-81.

upon what theory of law are these cases troublesome? Wherein lies their deficiency? What requirement of legal reasoning have they violated?

An investigation of the theory which was designed to answer these questions most naturally begins with Herbert Wechsler's statement in his seminal article, "Towards Neutral Principles of Constitutional Law."¹

. . . I now add that whether you are tolerant, perhaps more tolerant than I, of the ad hoc in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment upon analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?

Although these 'general and neutral principles' which must be used are tempered by the language to be interpreted, by history, and by precedent,^{2,3}

is not the relative compulsion of the language of the Constitution, of history and precedent--where they do not combine to make an answer clear--itself a matter to be judged, so far as possible, by neutral principles--by standards that transcend the case at hand?

The courts have both the title and the duty when a case is properly before them to review the action of the other branches in the light of constitutional provisions, even

¹Wechsler, Towards, p. 15. ²Ibid., p. 17.

³Ibid., p. 19.

though the action involves value choices. . . . In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are--or are obliged to be--entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Some of the major characteristics of the theory of neutral principles seem, then, to be:

- a. Courts are bound to act in a fashion different from that which is appropriate to the legislative branch;
- b. Courts cannot act upon mere fiat;
- c. Courts must act upon reasons which will dispose of the instant case;¹
- d. The court's reasons must be 'adequately general and neutral';
- e. These reasons are to be tested by applying them to other cases, to determine whether it is the reason, and not the result of the case, which is determinative of the decision;
- f. Acting upon this theory does not preclude the courts from making value choices; and,
- g. This thesis does not purport to describe how courts actually behave, but is rather prescriptive of how they should

¹See Golding, "Principled Decision-Making and the Supreme Court", p. 215 (hereinafter cited as Golding, Principled SC). Golding states that principled decision requires that a reason be given for the decision, which reason must be held to be a proper one for deciding cases of this type. This seems overly vague.

behave. Courts are 'obliged to' abide by the requirements of this theory.

Points d and e are the main obstacles to understanding the theory of neutral principles. What does it mean to say that the courts have to employ 'neutral or general principles'? It is suggested that the first component is to be found in the idea of the neutral application of principles, rather than in any neutrality which may be ascribed to the principles themselves. The proper contrary to neutral principles is, then, the ad hoc decision, rather than the biased decision. A failure of neutrality imports a failure to apply a rule or principle. This failure may take the form of announcing a rule and then failing to apply the rule in a logically consistent fashion: this occurred in the Shelley and Brown cases, where the Court apparently used as its basis for decision a rule ('All court enforcement of private discriminatory action is subject to Fourteenth Amendment requirements'; 'All psychological factors are to be taken into account in constitutional determinations of equality') which that court itself was clearly not prepared to accept as a general basis for decision. On the other hand, the failure of neutrality may result from a failure to announce any rule or principle at all. This is the objection to per curiam decisions of the Court.

This major component of 'neutrality' is, as Lon Fuller

remarks,¹ identical with his own 'principle of the internal morality of law' that there be rules; in Fuller's terminology, this requirement is called 'generality of laws'.² To call for neutral principles is therefore to call for a rule of general applicability, a principle which shall be applied when applicable (and not merely when it is convenient to apply the principle)

In this theory, the requirement that the principle employed be 'general' imports the idea that the reasons for decision are to be tested by reference to their applicability in other cases, that the reasons 'transcend' the instant case. This is not a requirement that the principle be general in that it must not have too many exceptions--the sense in which we say that 'Do not murder' is a more general command than 'Do not murder unless you thereby will save many innocent lives'. Neither must the principle be general in that it must apply to many different kinds of acts or situations--the sense in which 'Do not kill' is a more general command than 'Do not murder', or 'Do not lie' is more general than 'Do not falsely promise'. The principle must transcend the instant case, must be general, only in that it must be applied in situations where it does, by its terms, apply. It need not be formulated so as to apply to case X; but if it is

¹See Lon L. Fuller, The Morality of Law (New Haven: Yale Rev. ed. 1969), footnote on p. 48.

²Ibid., pp. 46-49.

so formulated, the principle must be held applicable to case X.

The moral analogue¹ to these legal principles derives from the 'generalization principle'.² The generalization principle states that whatever is right for one person is right for anyone else who is in a relevantly similar situation ('equals must be treated equally'). This principle implies that whatever rule it is right to apply to one person should also be applied to other persons in relevantly similar circumstances. Transplanted to the legal context, this is the idea that 'the law is no respecter of persons'. Law cannot be used to decide in favor of the plaintiff on the basis of a principle of reason which could equally be applied to benefit the defendant.

There are two requirements in the evaluation of moral arguments (and, indeed, two entire moral theories) which have been associated with the generalization principle. The 'bare requirement of generality' is that the principle of action (maxim) which one employs must be capable of being generalized. For example, it is in theory impossible to generalize (or, as it is sometimes termed, universalize) the principle of action 'Always steal'. The act of stealing

¹I borrow this term (and notion) from Golding, *Principled SC*.

²See Marcus George Singer, *Generalization in Ethics* (N.Y.: Atheneum, 1971). See also Jonathan Harrison, "Utilitarianism, Universalization, and Our Duty to be Just," 53 *Proceedings of the Aristotelian Society* 105 (1952-3); and R. F. Harrod, "Utilitarianism Revised," 45 *Mind* 137 (1936).

itself presupposes some stable property arrangement which stealing violates. A land in which (to speak loosely) everyone always stole is incapable of developing stable property arrangements; it is a land which, therefore, cannot satisfy the preconditions necessary to enable one to (properly speaking) engage in theft. It has been frequently remarked that the 'bare principle of generality' and any theory constructed solely upon it can give only very minimal and inadequate restrictions upon moral action.

But there is a separate principle of generalization which has been emphasized by the theory of ethics known as 'general utilitarianism'.¹ That theory judges particular actions by placing them within the more general context of the types or classes of actions to which the particular actions correspond; and it then judges the particular action by asking whether the consequences of everyone's performing that type of action would be desirable or not.

In other words, the bare principle of generality requires only that it be possible that everyone perform that sort of action. This bare principle is often taken to be the Kantian requirement which moral maxims must satisfy. The

¹Cf. William K. Frankena, Ethics, (Englewood Cliffs: Prentice Hall 2d ed. 1973), pp. 37-39; David Lyons, The Forms and Limits of Utilitarianism (Oxford at the Clarendon Press, 1965). Singer claims (pp. 209 ff.) that this theory is not a form of utilitarianism; others classify it as utilitarian; but this seems to be a mere verbal dispute (in the pejorative sense). Let me say, then, that arbitrarily and in possible opposition to precise usage I choose to characterize the theory as utilitarian.

utilitarian requirement of generalization, on the other hand, is that the consequences of everyone's acting in the way in which it is proposed to act must be desirable (or acceptable, or, in some theories, not-unacceptable).

The theory of neutral principles appears to be the form which general utilitarianism takes when transferred to the legal context. For one to judge the morality of an action in general utilitarianism it is first necessary to formulate one's principle of action, and then to judge whether the consequences of everyone's adopting that principle of action would be desirable (or acceptable etc.). Analogously, when the theory of neutral principles judges court action (the determination of a point of law) it first formulates the court's principle of action, and then judges whether the consequences of consistently adopting that principle are desirable. In this way, the theories of general utilitarianism and of neutral principles of law insure that action will only be taken pursuant to a rule of principle which is, in some degree, justifiable.

Despite this close formal similarity, these two theories are not identical. In particular, the temptation to think that whichever argument applies against one of the theories will apply with equal force against the other must be resisted. The fundamental difference between these theories lies in the fact that the theory of neutral principles is embedded in a pre-existing well-defined institutional structure, the legal

system; this is not the case with general utilitarianism. This difference in the contexts in which the theories operate in turn yields further differences when we seek the points of weakness of these theories. For example: General utilitarianism is commonly supposed by its adherents to follow from the principle of consequences ('right action is action with good consequences') coupled with the original generalization principle ('treat equals equally'). This derivation is disputable. The theory of neutral principles, on the other hand, needs no such strong support. While it may be argued that we do not have a moral duty to be rational, in the sense of rationality which the generalization principle forces upon us (treating equals equally, only distinguishing cases on the basis of some relevant difference between them), it could be said that the judge has, by virtue of his institutional position, a special duty to abide by this form of rationality.¹ Any justification of general utilitarianism entails that that theory is binding upon any moral agent, judges included; the reverse is not true: if judges have a duty to be rational (in the sense described), it does not follow that all of us have this duty.

¹While Wechsler's language seems to indicate that the need for rationality derives from legal and institutional considerations, Golding sees it as deriving from logical considerations. See Martin P. Golding, "Principled Judicial Decision-Making," 73 *Ethics* 247 (1963); reprinted in Kent, ed., *Law and Philosophy* (New York: Appleton Century Crofts, 1970), p. 445. All references will be to the Kent reprinting; the article will henceforth be cited as Golding, *Principled Judicial*.

Another possible difference between these theories lies in the criteria which they adopt for saying that consequences are 'undesirable'. It may be that the judge will have (or ought to abide by) some specified institutional criterion for judging 'undesirability' which does not constrain the general utilitarian. This shall be developed more fully in a later section.¹

D. The Form of Argument Employed by the Theory of Neutral Principles

An extended form of the argument by reductio ad absurdum is used in order to determine the acceptability of principles.² The reductio ad absurdum argument has this form: from principle P, it follows that result R. Result R is absurd. Therefore, by modus tollens, it follows that principle P is unacceptable. In the extended form of the argument, we do not require that the results of the principle be 'absurd'. Although it is psychologically satisfying and effective to be able to show that the consequences of a principle which one wishes to deny are absurd, this is not logically required. All that is needed to defeat a principle by modus tollens is that its results be unacceptable or unwanted. I will call the extended version the 'modus tollens argument', or, more simply, 'the tollens' (and shall avoid the more intriguing 'reductio ad unacceptabilitum'). It is clear that this is

¹Chap. II, section entitled 'The Need for a Substantive Criterion for Principles'.

²Golding, *Principled SC*, p. 216.

the argument form which has been used by the advocates of neutral principles in arguing against some Supreme Court decisions.

Since the tollens argument form assumes a peculiar importance at many points in this thesis, some points about it ought to be noted:

1. The argument cannot be used to establish that a principle must be accepted (except in the anomalous case where there are a finite number of alternative principles exhaustive of our possible choices, all but one of which fail due to the tollens).
2. The tollens argument can, rather, only be used to show that a principle which is purportedly accepted is in fact unacceptable; 'when followed to the limits of its logic' the principle would not be sustained.
3. Therefore, the tollens argument, to be successful, must be employed relative to some principle and some person who purports to accept that principle. Without knowing who is supporting the principle, we cannot determine whether a tollens does or does not succeed in disproving the principle. Rather, in general, any principle¹ could be adhered to with draconian consistency. What we must determine is whether the individual advancing the principle would, himself, accept the consequences of consistent application

¹With the exception of those principles which fail under the bare universalizability requirement; see preceding section.

of the principle.¹

Let me supply a simple illustration of this point. Let us say that Brown refuses to vote, pleading that he is too busy to take the time. We say to him, 'If everyone who felt himself too busy would refuse to vote, democracy would collapse. Therefore, you have no right to refuse to vote on this account.' But this argument, as it stands, is enthymematic: we require at least the additional premise (which, it is true, may ordinarily be assumed) that it is accepted by Brown that it would be bad for democracy to collapse. If Brown is not disturbed by this eventuality--if Brown is, let us say, a Fascist or an Anarchist--then our argument by tol-
lens simply does not work.

This point has ramifications for some actual arguments employed by the advocates of neutral principles. We have seen that among the logical consequences of accepting the principle in Shelley v. Kraemer (the racially restrictive covenant case) was the acceptance of the idea that the courts could never give effect to assertions of rights on the part of individuals when those assertions are motivated by reasons of racial prejudice. Anyone who is unwilling to accept this proposition cannot accept the unqualified principle of Shelley; but there is no obvious logical problem involved in accepting the latter.

¹Compare Bruce Lee Miller, Principles, Rules and Cases: The Logic of Judicial Decisions, Ph.D. dissertation, Case Western Reserve University, 1970, p. 220: "What kind of a standard is it that one appeals to when he urges that a principle would treat a case in a way it must not be treated?"

There could be, in theory, a court which is hell-bent upon achieving racial equality come what may, which would accept this consequence.

And yet, Wechsler's tollens argument against Shelley does work. While, in theory, a court could accept the logical consequences of the Shelley principle, the court involved was in fact not prepared to accept them. The tollens argument is always relative to some individual or group upholding the principle to be argued against. In this case, relative to the concerned party (the Supreme Court Justices sitting in 1948), the tollens works.

4. The tollens argument may only be employed against a reason which is held to be determinative of, or decisive in, the case at hand. We may not use the tollens to argue against a principle which only constitutes one consideration which inclines us towards the given decision. This is so because, for the argument to work, the undesirable result must follow from the principle (else modus tollens does not apply). In the sort of case hypothesized, the result does not, strictly speaking, follow from the consideration, but only gains credence from it.¹

E. The Scope of the Theory of Neutral Principles

Before proceeding to analysis and criticism of the theory of neutral principles, there is one final point which must be

¹If there are a number of such 'inclining considerations' which jointly determine the result then the tollens may be used against that class of principles.

clarified. The problem has already been raised by inference: it is, what limits are to be placed upon the scope of this theory? Discussion of the theory has revolved around the Supreme Court's constitutional adjudication process. Is it necessary, or even possible, that the theory be restricted in this way? Is the judge only required to abide by the requirements of neutral principles when interpreting and applying the Constitution?

It seems clear that the theory cannot, in this way, be confined; and it does not appear that its advocates intended for it to be so confined. Wechsler has stated that the requirement that the judge use neutral principles is "the main constituent of the judicial process."¹ This is a requirement of 'the courts',² and not merely of 'the Court'. The claim that neutral principles of law ought to be employed "must be fought on wider fronts than that of constitutional interpretation."³ Why then has the theory been restricted to this limited area?

One historical reason for this has already been given: the Supreme Court cases involving the Constitution are the most highly-visible cases on the American judicial landscape. They therefore afford a natural point of departure for discussion of more fundamental issues of jurisprudence.

A more particular reason may also be supplied. Wechsler

¹Wechsler, *Towards*, p. 15. ²*Ibid*.

³Wechsler, *Towards*, p. 12.

wrote the article which touched off the neutral principles controversy as a response to Judge Learned Hand's lectures (since published as The Bill of Rights).¹ Hand had argued that the Supreme Court should exercise its power to invalidate legislation only when it is 'compelled' to do so. In Hand's view, there is no warrant from the Constitution itself that the courts have the power of judicial review. This is only an inferred power, made necessary so that the Court may continue to fulfill its true functions. As a consequence, Hand argued, those 'open-ended' concepts to be found in the Constitution, like the guarantees of due process and of the equal protection of the laws, and of freedom of speech, should not be used as the basis for a finding of unconstitutionality.

Wechsler disagreed with Hand on the question of the derivation of the power of judicial review. He felt that power is to be found in the words of the Constitution itself. Hence, Wechsler disagreed with Hand on the extent to which this power may properly be used. According to Wechsler, there exists a duty incumbent upon the Supreme Court to enforce all sections of the Constitutions, including, if necessary, the invalidation of legislation on constitutional grounds.²

¹ Learned Hand, The Bill of Rights (New York: Atheneum, 1965).

² Herbert Wechsler, "The Nature of Judicial Reasoning," in Hook, ed., Law and Philosophy (New York: New York University Press, 1964), p. 293: "Thus they cannot escape the obligations of interpreting the open-ended concepts framed as limitations upon government, like the guarantees of 'the freedom of speech and of the press', 'due process of law', or

Given this duty, however, are there any limits upon the way in which the Court may fulfill it? It is at this point that the notion of neutral principles of law is introduced. Certainly, there are many alternative ways in which the Court might choose to apply the open-ended clauses of the Constitution; for example, First Amendment protection of freedom of speech might or might not be 'absolute'. Various rules in fulfillment of these principles can be argued for in a colorable fashion. Yet by requiring that whichever rule is finally adopted by the Supreme Court must have the qualities of neutrality and generality, Wechsler believes that we may ensure that constitutional adjudication will retain a 'legal quality'.¹

In short, it may be said that the peculiar importance which the theory of neutral principles has for constitutional adjudication is a consequence of the fact that in these cases the guidelines furnished by neutral principles are the only guidelines which the courts have. When all other guidance fails, we may still require the courts to abide by neutrality; if the courts are constrained in no other way, they are constrained in that their decisions must be made on the basis of some general principle which is put forth in good faith. That there are in fact no other constraints upon the Court's

'equal protection of the laws', even though it involves passing upon actions of the other branches resting on a choice of values, as invariably action does."

¹Ibid.

power in these cases is emphasized by Wechsler when he says that the open-ended provisions of the Bill of Rights should be read as "an affirmation of the special values they embody rather than as finite statements of law"¹--so that if the judge is to use these clauses, as he must, he is inevitably involved in making value judgments. As a result, as Golding argues, "constitutional interpretation by the Supreme Court . . . most closely approximates moral decision-making. . ."² in which we are restricted only by the need to abide by the utilitarian principle of generality.³

This reasoning in support of a distinction between constitutional and other forms of adjudication is, however, not sufficient to establish the point. It is argued that in constitutional adjudication the judge is left without a clear-cut basis for decision; that their decisions are necessarily predicated upon value choices; and that the judge's decision-process is so little restricted that only the requirements of neutral principles serve as limiting factors, to distinguish judicial decision-making from, e.g., legislative decision-making. But can it not be argued that in many sorts of cases which do not involve constitutional dimension the judge is in a similar position?

¹Wechsler, Towards, p. 26.

²Golding, Principled SC, p. 218.

³See Golding's discussion of Kant and Bentham in Principled SC, pp. 211-14.

It is commonly believed that this situation occurs from time to time;¹ we think in this connection of a judge who is faced with a novel, 'first impression' case, and we assume that the judge is not bound in this matter by any pre-existing rule of law, but has, rather, the option of himself developing the law in this area. Examples of this are to be found in the development of the law of strict liability in torts² or in the right of privacy.³ Does the judge in these cases have significantly less freedom than he would in constitutional cases? To be sure, the judge is bound by the general framework of tort law; the rules which he enunciates must not deviate too drastically from the pre-existing law in this area. Still, similar bounds may be present in constitutional adjudication. The open-ended clauses of the Constitution are not so open-ended as to include anything which the judge would like them to include. I should think that if there is a difference between the development of tort law and

¹For a dissenting view see my discussion of Ronald Dworkin, Chap. V.

²See Edward H. Levi, An Introduction to Legal Reasoning (Univ. of Chicago Press, 1949).

³An excellent discussion of these matters is to be found in Paul Mishkin and Clarence Morris, On Law in Courts. An Introduction to Judicial Development of Case and Statute Law (Brooklyn: The Foundation Press, 1965). That discussion flows from the line of thought established by Albert Sacks and Henry M. Hart in their The Legal Process (Cambridge, Mass.: Mimeo-graphed tentative ed. 1958). Both of these works have influenced my thought in these matters enormously; those who have encountered them will, I think, understand what I mean by saying this.

and of constitutional law, the difference is only a question of degree.

The same freedom and restraint may exist in the interpretation of statutes which fail to clearly delineate the judge's necessary course of action (e.g., ambiguous statutes).

If all this is not admitted, some theory must be supplied showing that only constitutional cases are hard cases; and this has not been generally admitted. I would say, then, that neutral principles theory shows how, even in the outer bounds of judicial discretion, judicial action remains bound by institutional constraint. One obvious class of cases which allow the judge this extreme discretion are those cases involving open-ended provisions of the Constitution. It is not, however, obvious that only these are the hard cases, and until it is shown that they are the theory of neutral principles need not be restricted to constitutional cases.

F. Conclusion

In this chapter it was argued that the theory of neutral principles requires that the judge act on the basis of principles, reasons, or rules whose universalized consequences are acceptable. The method used to show that the judge has failed in this duty is the use of the modus tollens argument. This doctrine of neutral principles need not be confined in applicability to constitutional adjudication by the Supreme Court, although it may assume in those cases a peculiar importance.

CHAPTER II
CRITICISM, ELABORATION, AND EVALUATION OF THE
THEORY OF NEUTRAL PRINCIPLES

A. Miscriticisms of the Theory of
Neutral Principles

The theory of neutral principles is of course open to criticism, which has not been slow in coming.¹ Yet one of the more intriguing aspects of the debate has not been so much the criticisms which have been made of the theory, as it has the miscriticisms which have been made. A miscriticism is a criticism which is made of a theory and which is based upon a fundamental misunderstanding of the theory. These misunderstandings and miscriticisms may usually be traced back to a basic incompatibility between that which is presupposed by the adherents of the theory, and that which is presupposed by the theory's miscritics. These presuppositions are usually left unstated.

Some of the miscriticisms which have been made of the theory of neutral principles have been based upon the idea that it constitutes a return to Blackstonianism,² to the view

¹See following section, 'Criticisms of the Theory of Neutral Principles'.

²See Martin Shapiro, Law and Politics in the Supreme Court (Free Press of Glencoe, 1964); Shapiro, "The Supreme Court and Constitutional Adjudication: Of Politics and Neutral

that the legal process effects eternal verities, a view which leaves the judge no room to consider and give effect to social needs and values. It has been further alleged that the theory advocates a return to the "good old days" of mechanical legal reasoning.¹

These comments, and some others to be examined, are the sort of comment which reveals a failure of understanding, not merely a misunderstanding; and this failure is consequent upon presupposing a different conception of courts than that held by the advocates of neutral principles of law.

For the basic difference between those who support and those who deny the theory of neutral principles has to do, I believe, with the question of whether courts are seen as primarily problem-solvers or as primarily reasoned problem-solvers. Those sympathetic to the demands which the theory makes upon the courts are committed to a view which requires courts to give reasoned resolutions of conflict. The 'mis-critics', however, like Arthur Miller and Eugene Rostow,² believe that all that is required of courts is that they reach good decisions--by which I take it they mean decisions which they would approve of. In this view, the process of reaching

Principles," 31 G. Wash. L.R. 587 (1963).

¹See Anton-Hermann Chroust, "Law: Reason, Legalism and the Judicial Process," 74 Ethics 1 (1963).

²See Miller, "A Note on the Criticism of Supreme Court Decisions"; Eugene V. Rostow, The Sovereign Prerogative: The Supreme Court and The Quest For Law (New Haven: Yale Univ. Press, 1962).

that decision should only be constrained to the extent that constraint is necessary to reach good decisions; when reasoned decision can be abandoned with good results still forthcoming, it may be abandoned.

And because this view of the courts is so basic a credo, the miscritics feel that (in the face of evidence to the contrary) the real motive behind advocacy of neutral principles is the desire to insure a particular kind of decision. (Generally, the miscritics feel that the advocates of neutral principles seek to assure that the Supreme Court reach conservative decisions.)

Miller, for example, writes¹

But is the quality of opinions the truly important matter here? Isn't it, rather, the quality of decision-making? Can it be that the critics are hiding their dislike of the results reached through an attack on the opinion written to explain and/or justify those results? After all, the end we want from the judiciary is wise decisions, not well-parsed window dressing.

At this late stage, no extensive argument need be offered to show that this is a miscriticism of the theory of neutral principles. Wechsler admits that some cases which he has criticized "have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years."² In his criticism of Brown v. Board of Education he claims that "the problem inheres strictly in the reasoning of the opinion."³ We might almost say that rather

¹Miller, *ibid.*, p. 143. ²Wechsler, *Towards*, p. 25.

³*Ibid.*, 32.

than misread Wechsler, Miller did not believe Wechsler. It is characteristic of our most deeply-held beliefs that we believe them to be held by all, denials notwithstanding. Miller, Rostow, and others believe that the courts' work should be judged by immediate reference to social well-being; herein, I would claim, is their fundamental point of opposition to the theory of neutral principles.

It is important to understand this point of difference. Wechsler and his co-advocates need not claim that the ultimate test of a theory of legal reasoning does not concern itself with results. The claim might be a more modest one: that the immediate test of judicial opinions is not one of results. All they need claim is that the judge is required to justify his action in a procedural as well as a substantive fashion. He must show that, judged by its social consequences, a decision was not only good, but that it was in addition judicially sound. The judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness."¹ But this in itself does not necessitate the belief that the legal system (of which the judge is only a part) is not "result-oriented" (although there may be other reasons for thinking this). It does not even mean that the judge's task itself is not, in the final analysis, result-oriented. What it does mean is that the judge has restrictions on his power of seeking the immediately beneficial result for

¹Cardozo, op. cit.

society. (These restrictions themselves could, perhaps, have a social-value justification.)

The advocates of neutral principles, then, share a certain view of the role of the judge: they agree that the judge has institutional constraints upon his exercise of power, that he cannot justify a decision (ordinarily) solely on the grounds that the decision will have good consequences, that among these constraints are a need to act in a rational way. This view is, I think, defensible; but it is not my purpose here to defend it. It may fail when taken as an accurate description of the current operation of the judicial system; even so, I think it must be admitted that it is part of our 'judicial mythology', which ought to lend it some normative force. It is, at any rate, a view of law which I share in common with the adherents to the neutral principles theory.

Those who feel that courts must give reasons for their actions will, I believe, find that they are committed to a large part of this 'theory' of law. In giving a reason, one presupposes that the reason may be 'universalized' (in one sense); and in admitting the need to give reasons, one admits that the judge has some institutional obligations. They are at least committed to the view that the judge cannot proceed solely upon his 'judicial hunch'. And those who, taking a broad view of morality, feel that the requirements of morality are always (at least potentially) relevant to any

reasoning which will issue in action may be brought around to this view. For moral decision-making is an activity where 'reason-giving' plays an important role--reason-giving, not rationalization.

A full explication and justification of this view of the judicial process could not, however, be attempted here. Consequently, I cannot show that criticisms of the theory of neutral principles whose validity is contingent upon denying this view of the legal process are false. What I shall instead attempt to do is to expose the point at which they rely upon some unstated presupposition which is denied by the neutral principles advocates. I shall put these mis-criticisms in a rough order of misunderstanding, with the most extreme case coming last.

Much miscriticism of Wechsler results from a very natural, but false, assumption; that when Wechsler and the others speak of the need for 'neutral principles of law', 'neutrality' bears its ordinary dictionary definition.¹ Miller and Howell, for example, look into their dictionaries and find that 'neutrality' means either 'indifference' or 'the taking of a middle ground between extremes'.² The

¹See Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," 27 U. Chi. L.R. 661, 663: "The word 'neutral', according to the Oxford English Dictionary, . . ."; and see Benjamin F. Wright, "The Supreme Court Cannot Be Neutral," 40 Texas L.R. 599, 600: "Yet the word has, if Webster's and the Oxford English dictionaries can be relied upon"

²Miller and Howell, *ibid.*, p. 663.

authors therefore claim that it is "anthropomorphism of the worst sort" to attribute neutrality to principles: People, they say, are neutral, not principles. Besides, they argue, it seems clear that neither sense of neutrality can be satisfied by the courts. The courts cannot be indifferent as to which inevitably takes one of two alternative sides, between which there is no middle ground: judgment must be entered for plaintiff or for defendant.

Once it is granted that the dictionary definition of 'neutrality' was intended by the neutral principles advocates, these points of criticism are obviously right; so obviously right, in fact, that their neglect by the framers of that theory indicates that the dictionary definition was never intended to be applicable. By no possible reading did these writers adopt Miller and Howell's interpretation of neutrality.

Let me offer an alternative to that definition, one which, I think, approaches the meaning intended by the proponents of neutral principles. In my understanding, it is the judge, and not the principle, who must be neutral. In the process of decision, the judge must not neglect the rule which he has adopted, whose results are now found to be unacceptable. He must rather adopt a new rule. The judge's neutrality reveals itself when he resolves that a rule is correct, and ought to be applied, without regard to its immediate results in any particular case. These rules and

principles which are adopted will, however, certainly dictate results (else they would be worthless)--the rules and principles do not take a middle ground (nor, of course, are they 'indifferent'). Neutrality, therefore, is only in question once a principle or rule has been adopted: no more value choices than those already in the rule may be imported into the decision. To put it more precisely, we require the neutral and general application of principles, not principles which are themselves neutral.

A second miscriticism is similarly easy to deal with (if not to dispose of). This miscriticism construes the call for neutral principles as being a tactical maneuver in the war for 'judicial modesty', which is the view that judges should whenever (in some sense) possible decline jurisdiction over controversies, and should especially avoid the invalidation of actions by the other branches of government. 'Judicial modesty' is motivated by an emphasis (or overemphasis) on certain political facts about the place of courts in our society. Rostow summarizes this view of the facts as follows: "That the Supreme Court's power is limited is perhaps the key to its extraordinary influence. Of course the Justices should give the utmost consideration to the views of other branches of government, in civil rights as in other constitutional cases. Of course the Court should keep its powder dry and avoid wasting its ammunition in petty quarrels."¹

¹Rostow, The Sovereign Prerogative, p. 177.

Judicial modesty is, then, seen as a politically prudent stance for courts to take, and 'neutral principles', insofar as they are part of the drive of judicial modesty also derive from a politically 'savvy' view of the Supreme Court. On this view the real issues between Wechsler and his critics concern "the politics of the Supreme Court, not the nature of law and legal reasoning."¹

This misunderstanding is so gross as to be all but inexplicable. To be sure, Martin Shapiro, the foremost of these miscritics, is aware that the advocates of neutral principles call for a replacement of judicial ipse dixits with the reasoned elaboration of judicial decisions. This, claims Shapiro, everyone would accept.² But, he thinks, beyond this 'simple level' (his term) there lurks a political realpolitik. "That higher courts should give clear and consistent instructions may be looked upon as a moral imperative of justice. That is not the point here."³ The 'real' point of enforcement of the standards of neutrality is the creation of a method which will enable the courts (and especially the Supreme Court) to convince others to go along with their decisions. By means of the requirement of neutral principles we shall maintain the judicial power of persuasion.

¹Shapiro, "The Supreme Court and Constitutional Adjudication," p. 599.

²Shapiro, *ibid.*, p. 591; Shapiro, Law and Politics in the Supreme Court, p. 17.

³Shapiro, "The Supreme Court and Constitutional Adjudication," 599.

Although, says Shapiro, 'real' neutrality--totally reasoned opinions--can never be had, still, decisions of the judiciary must be cloaked in this persuasive language. In short, he is claiming that rather than using neutral principles in good faith, the courts are required to use 'neutral principles' (an ersatz substitute) in bad faith.^{1,2}

The distinction between what the Court tells the public about its activities and what scholars tell one another must be held firmly in mind. . . . Suicide is no more moral in political than in personal life. It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests. . . . Insofar as the [neutral] standardists' writings are to be taken as counsel to the Court on how its opinions should be written, they constitute sound political advice.

Lower courts do not like to be reversed. Their role is easiest when they know precisely how the issues before them are likely to be treated on appeal. It is for this reason that unclear opinions, ipse dixits, and a multiplicity of opinions make the lower courts unhappy. Therefore, neutral principles in the sense of standards which will be applied uniformly case after case, reasoned explanations as to just how the Supreme Court reached its decision, and a clearly enunciated majority view are, no matter what their abstract validity or philosophical feasibility [my emphasis] politically powerful weapons for the Supreme Court.

It is again made clear elsewhere³ that neutrality in fact, rather than in façade, cannot be attained: it is a 'myth'. Shapiro's view, then, constitutes a peculiar reversal: those criticizing the theory of neutral principles in the name of a politically aware and involved 'result-oriented

¹Shapiro, Law and Politics in the Supreme Court, p. 27.

²Shapiro, "The Supreme Court and Constitutional Adjudication," p. 599.

³See, e.g., *ibid.*, pp. 595-96.

jurisprudence' have neglected some fundamental political considerations which Wechsler and other 'formalists' have accommodated. The theory of neutral principles, which had been read as the essentially moral and legal, is in fact quintessentially political in nature and motivation.

Despite the attraction which this holds for our sense of the ironic, the reversal must not be allowed. It has already been noted that Wechsler's dissatisfaction with those cases which he criticized was 'strictly' with the reasoning found in them, not with any ill effects upon the court's prestige which they may have had. In yet a stronger fashion has this view of neutral principles been denied. In writing of *Brown*, Wechsler declares that his complaint is not "that the Court may have miscalculated the extent to which its judgment would be honored or accepted; it is not a prophet of the strength of our national commitment to respect the judgments of the courts."¹ On Shapiro's account 'the extent to which its judgment would be honored or accepted' is precisely what the Court must take into account. Reasoned opinion is a means to achieving this end, and if this end will not be served reasoning becomes mere window-dressing.²

¹Wechsler, *Towards*, p. 32.

²Of course, Shapiro could say that Wechsler inserted this to call attention away from the ('in reality') hard-headed nature of the thesis; this might even have been necessary to keep the 'real' neutral thesis esoteric and, hence, effective. In that case, only disproving evidence of Shapiro's thesis would count in its favor: a curious outcome.

Although the maintenance of a successful imitation of good reasoning would commonly necessitate good reasoning itself, the distinction between Shapiro's reading of the neutral principles theory and the reading which I have defended is not a distinction without a difference. On my reading, 'neutral principles' is a sine qua non for properly deciding points of law. On Shapiro's account, however, neutrality may be abandoned whenever the courts may do so with impunity, and neutrality must be abandoned whenever the loss in prestige which this entails is outweighed by other factors (e.g., the good social effect of the decision, which will ultimately result in a net gain in the court's prestige). "In any given area of law, exposure of arbitrariness is not the single deciding factor. This loss must be balanced against the gains in prestige that may flow from the same opinions that expose the arbitrariness."¹ In addition, those decisions of courts which will retain low visibility need not be neutral decisions.²

There is one last miscriticism to be examined in this section. I mention it not so much because of its importance as a criticism as to demonstrate how fundamental the

¹Shapiro, Law and Politics in the Supreme Court, p. 233.

²It should be noted that this view of Wechsler held by Shapiro is shared by other writers: cf. Jan Deutsch, "Neutrality, Legitimacy and the Supreme Court: Some Intersections Between Law and Political Science," 20 Stanford L.R. 169, 183 ff. (1968).

presuppositions in miscriticisms may be (and how hard they are to get at). This is the criticism of neutral principles on the grounds that, should the theory be followed, it would yield harmful consequences. This is not a claim that the advocates of neutral principles use that theory as a means to the achievement of judicial modesty or conservative decisions. The claim is rather that the effect of adopting the theory of neutral principles would be that judicial modesty would be effected.

Eugene Rostow, for example, recognizes that there is in theory a vast difference between eliminating or restricting judicial review and advocating that neutral principles of law be employed while engaging in judicial review. After all, the advancement of the theory of neutral principles was precipitated by a response to Judge Hand's case for the limitation of the power of constitutional review. But despite this, Rostow believes that in practice neutral principles are so difficult to find that, if it is a necessary precondition to judicial review, this power will never be exercised. The effect of judicial neutrality, though not its intent, is judicial modesty. In reference to articles by Herbert Wechsler and Henry Hart (among others) Rostow claims that "Several, who disagree with Judge Hand about the legitimacy of judicial review, would so encumber its exercise with rules and principles of exegesis so as to accomplish nearly the

same end--that of limiting . . . judicial influence. . . ."1

Rostow's belief that neutral principles are nearly impossible to formulate is based upon the view that a neutral principle can only be reached after every aspect of every case which could be governed by it is considered. I shall argue in the following sections that no such strong requirement is imposed by the theory; so if this was all that was involved, Rostow's contentions could be left to be answered by implication there.

But Rostow has, in making this criticism, raised another problem--one of the most important, and most neglected, problems which legal philosophy faces. It may be put in several ways, each calling attention to a different aspect of the same problem: Are the criteria by which theories of legal philosophy are to be judged those of truth or those of value? Are legal theories subject to some cognitive test, or to some test of usefulness?

Rostow believes that it is always the usefulness of the theory which must be in question when evaluating legal philosophy. He quotes Holmes' dictum that "all thought is social, is on its way to action; . . . every idea tends to become first a catechism then a code."<2 For Rostow, the debates of legal philosophy are "not an academic issue of political

¹Rostow, The Sovereign Prerogative, xviii.

²Quoted in Rostow, pp. 6-7, from Holmes, Collected Legal Papers 270-271 (1920).

philosophy. Like most abstractions, [they have] far-reaching political consequences."¹ And these practical consequences are the basis upon which to judge theories of law. If the practical effect of abiding by neutral principles is, as Rostow believes it is, "the doctrine of judicial self-restraint carried to the point of complete passivity"² it must on those grounds, be rejected.³

This thesis is not the place to discuss the extremely broad and complex questions suggested by the above quotations. Yet, when a problem as important as this comes up it should not be ignored. The contrast between those who view legal philosophy as useful and those who view it as true (or an

¹Rostow, p. 148. He is discussing, however, judicial review, which of course is upon all accounts less academic than most 'philosophical' disputes.

²Rostow, p. 38.

³This is a view of legal philosophy which is shared, it appears, by Lon L. Fuller. For Fuller, legal philosophy is special in that "it demands not only that we shall philosophize about the law, but that we shall to some extent philosophize about our own philosophizing to see what it is we are ultimately aiming at." On this pragmatic conception of the philosophy of law, a theory is to be judged by its practical effects: what it tells lawyers and judges to do, and the value of this direction. Of his bane, positivism, Fuller wants to know "Just what are the positivists trying to do?" "The question is whether drawing a sharp line [between law and morality] is important" for the "drawing of distinctions is certainly not an activity which can be justified as an end in itself." Fuller, of course, believes that he knows just what the positivists are aiming at--a securely conservative, rigid legal system whose chief advantage is predictability. Fuller judges this a bad aim, and hence positivism is bad--not necessarily 'untrue', but bad in the way in which legal philosophies are bad--through being harmful. (For references see Lon L. Fuller, The Law in Quest of Itself (Boston: Beacon Press, 1966), p. 2, and pp. 84-86.)

aid to clarifying how we think about the law) accounts for, I believe, most of the enduring debates of jurisprudence. It is on this point that the interchanges between philosophical and lawyerly writers on jurisprudence bog down.

One last miscriticism of the theory of neutral principles, which alleges that the theory of neutral principles constitutes a rejection of result-oriented jurisprudence, will be examined in later sections; discussion of it leads far afield. Apart from this charge, though, the major miscriticisms--criticisms based upon a fundamental misunderstanding of or disagreement with the theory--have been dealt with in this section, and will not be returned to.

B. Criticisms of the Theory of Neutral Principles

In contrast to the previous section, this section will examine criticism of the theory of neutral principles which is valid upon the presuppositions which that theory itself assumes. In the course of this section, some expansion and clarification of the theory will be attempted by way of responding to these criticisms.

There appears to be one basic criticism of the theory which has been held, in varying forms, by nearly all of the commentators sympathetic to neutral principles theory.¹ The

¹Cf. Rostow, The Sovereign Prerogative; Golding, Principled SC; Louis Henkin, "Neutral Principles and Future Cases" in Hook, ed., Law and Philosophy; Arthur Miller and Murray Schwartz, "The Principle of Neutral Principles" 7 U.C.L.A.L.R. 5 71 (1960); Alexander M. Bickel, "The Passive Virtues" 75 Harv. L.R. 40 (1961).

criticism involves an attempted demonstration that decision by means of neutral principles violates the 'case-method' form of adjudication current in this country. In a less extreme, and more usual form, the criticism is made that some (though not all) supposed benefits of the case-method would be lost if the theory of neutral principles were adopted.

Edward H. Levi takes the first, stronger line of attack.¹ Levi's own theory of legal reasoning, briefly stated,² is that the law uses a 'moving classificatory system'. When a judge creates a rule, or explores a rule which is given to him to use (e.g., when he interprets a statute), he creates or explores a document which is ambiguous in nature; further, which is designedly ambiguous. In the course of litigation to which these rules are material, the rules' ambiguity is gradually resolved, so that the rules involved will yield a definite result. But, because this ambiguity is resolved in a highly piece-meal fashion, future judges are left with wide discretion in deciding in accordance with the rule. The judge is often given the freedom of rendering a lawful (and, in one sense, rule-governed) decision by resolving the ambiguity in that fashion which the judge finds most desirable.

Although the problem now confronting the judge may have

¹See Edward H. Levi, "The Nature of Judicial Reasonings" in Hook, ed., Law and Philosophy.

²A full statement of Levi's theory is in his An Introduction to Legal Reasoning, cited above.

been noted, as a hypothetical example, in previous cases, the judge is often still not bound by whatever decision may have been reached in the preceding case. That discussion may be treated as obiter dicta which lack binding force. Still, previous judicial pronouncements of this nature permit a 'foreshadowing of results'. Therefore, the legal reasoning

has built into it the likelihood of a period of preparation so that future decisions appear as a belated finding and not a making of law. The joint exploration through competing analogies has the advantage of permitting the use in the system of propositions or concepts saved from being contradictory because they are ambiguous . . . it has the advantage, also, of postponing difficult problems until they arise and of providing an inner discipline for the system by forcing an analysis of general propositions in terms of concrete situations.¹

These claims may be developed into a criticism of the sort which could be accepted by those who do not adhere to Levi's theory.² On this analysis, the theory of neutral principles is deficient in that decisions which should be made in concrete situations are dealt with in the abstract, and the law has, therefore, little or no opportunity to learn from experience. In the declaring of a rule of general applicability, neutral principles adjudication freezes the law into premature stasis. Facts which had not yet come to light could not have helped to shape the rule, but the rule cannot develop

¹Levi in Hook, ed., pp. 212-13.

²On this question of 'true' criticism vs. miscriticism: a parallel distinction may be found in Clives Staples Lewis, The Abolition of Man (New York: Macmillan, 1965), pp. 54-61. Lewis distinguishes between 'mere Innovators' and genuine critics of moral theory; or, between proper internal vs. fatal external criticism.

to accommodate these facts or changed circumstances. The use of neutral principles necessarily involves a loss in the flexibility of the judicial system.

Less extreme criticism of the same genus is not lacking. Mueller and Schwartz, e.g., question how many cases must be considered when we test a proposed principle for neutrality. How many consequences of the proposed principle must be investigated, to determine whether the judge would find them acceptable? Must the judge consider those (hypothetical) cases which were presented in the course of argument on this case (by counsel or the lower courts); or must he consider any case which can be thought up, by dint of sustained and conscientious effort, which might fall under the proposed principle; or must he consider only 'obviously similar' cases?¹

It seems to be the common feeling of many commentators that all conceivably relevant cases would have to be considered before a principle could be justifiably adopted; and those who share this feeling have been forced to the conclusion that, since this requirement is impossible of fulfillment, the theory of neutral principles cannot be employed.² This is especially so with regard to the invalidation, on constitutional grounds, of legislation. For when dealing with legislation, the courts make a presumption that the legislation is

¹Mueller and Schwartz, pp. 272-73.

²See Rostow, The Sovereign Prerogative, p. 28; Mueller and Schwartz, pp. 584 ff.; Bickel, "The Passive Virtues," p. 48.

constitutional. The burden of proof is upon the one who argues for the invalidity of a law. To overcome the burden of proof it would appear that a strong, clear and consistent principle of constitutional interpretation must be forthcoming; and, upon the view that the judge must anticipate all of the possible applications of a principle before adopting it, principles for the invalidation of legislation are not forthcoming.¹

A more moderate, but still troubling, criticism of this nature is that there are at least some fields of law which should not be governed by enunciated principles. With respect to some problems, the case-by-case, step-by-step system of adjudication ought to be employed, in which judicial decisions are addressed solely to the case at hand. This is Martin Golding's criticism: "I suggested . . . that there might be areas of the law, such as procedural due process, in which it is inadvisable to lay down criteria or standards of the type under consideration here. There is an almost immeasurable variety of cases which could conceivably involve the notions of 'state' and 'private' action. . . . Perhaps this, too, is an area in which it is best to proceed on a case-by-case basis, and the Court, in refusing to lay down a criterion, has chosen wisely."²

Our understanding of the theory of neutral principles

¹See Mueller and Schwartz, "The Principle of Neutral Principles."

²Golding, *Principled SC*, pp. 228-29.

needs to be clarified at this point if we are to hope to deal with these criticisms.¹ For on a basic level, as I have interpreted this theory, it is not clear that it may be argued that the neutral principles theory fails because it requires overly-broad principles. How broad does a general and neutral principle have to be? This is the problem; we need not concern ourselves with principles which are neutral and fortuitously over-broad. I have been describing the theory as requiring that there be rules or principles which will constitute the reasons for court action. How many cases, however, must a rule or principle apply to before we may call it a rule?

There does not appear to be a requirement that principles apply to a number of cases; on a currently popular view of rules, the rules remain rules no matter how detailed and minutely descriptive of a unique case they are. This is the sense which R. M. Hare adopts when he writes that "it is always, analytically, possible to find some universal rule according to which [any given person] has lived--if only the rule 'Live thus: . . . ' followed by a minute description, in universal terms, of how he has lived."² (Hare happens to reject this rule, but he does so on grounds which are irrelevant in this context.)

¹Ibid.

²R. M. Hare, Freedom and Reason (Oxford Univ. Press, 1969), 3.2, p. 31.

Yet if a rule need not apply to many cases we may say, in response to Golding and other critics of Wechsler, that the courts could adopt a neutral principle which would only apply to one case. If they did this, of course, the law would not be prematurely 'frozen'; later principles could be announced which would apply to other cases and which could be formulated in the light of our earlier experience. If the court is willing to accept the result which it reaches in the instant case--which is definitionally true--then, in announcing a principle which is only applicable to this instant case (albeit couched in universal terms) it will have satisfied the requirements of the theory of neutral principles that those principles adopted must be used whenever, by their terms, the principles apply. We may imagine, that is, degenerate instances of principles which satisfy the requirements of the theory of neutral principles but which are 'particularized' so as to apply to only one case.

While this point about particularized principles answers the objections of those who see a need for case-by-case adjudication, it does so at the cost of rendering the theory of neutral principles virtually worthless. To be sure, in the cases discussed--Brown and Shelley--the tollens argument still shows us that principles have been adopted which are faulty. In theory, though, the value of the tollens argument (which is necessary in order to argue against the neutrality of principles) would be lost. The court could always adopt the

expedient of adopting particularized principles in deciding cases, and the consequences of a particularized principle are definitionally acceptable. Testing principles by means 'not only of application to the instant case' but to implied cases as well could not be done, for there would be no implied cases. In short, has our discussion neglected some crucial element of the concept of generality, which might avoid these consequences?

There are some considerations¹ which suggest that generality in the sense now being called for is required of the Supreme Court (and of appellate courts) on grounds separate from those of legal theory. One of the things which we want from these courts is that they supply guidance for other courts, and for the benefit of potential litigants. Particularized principles are excluded under this guidance-requirement. I want to suggest, however, that there are some other supplementary points which the adherent to the theory of neutral principles might make from within the theory in response to the problem of how many cases must the judge anticipate and deal with before he may adopt a principle. There are two responses to this problem which come from opposite extremes. One is that the judge must anticipate all conceivably relevant cases before adopting the principle (this is the standard criticism which this section began

¹Golding, *Principled SC*, p. 229; see also Henkin, "Neutral Principles and Future Cases."

with). Another is that the judge need deal with no other cases (this is the criticism of particularized principles). Neither extreme is acceptable.

C. Response to Criticism of the Theory of Neutral Principles

Much of the criticism explained in the previous section is predicated upon the belief that the theory of neutral principles requires the judge to anticipate, in writing his opinion, all future cases imaginable to which the principle could be held applicable. This raises two separate issues: What must the judge include in his opinion? And how many cases must the judge anticipate in his deliberation on the case? In this section it will be argued that the theory of neutral principles does not require that any cases (other than the instant one) be dealt with in the opinion. In response to the second question, a minimal requirement to anticipate other cases in deliberation will be explained.

First, how much must be included in the court's opinion? We find (apparently) a claim by Martin Golding that principled decision-making requires an explicit statement of the reasons for or principle of the decision: ". . . a reason for the disposition of the case [must] be given."¹ But need there in fact be an explicit statement of principle in order for there to be a principled decision? Why should we impose such a requirement?

¹Golding, *Principled SC*, p. 214.

It would appear that a statement is only necessary because of the difficulty which we encounter in attempting to supply the principle of a case in the absence of a statement by the judge. How can we be sure, when we attribute a principle to a decision, that it is that principle, and not some other, which is being used? Yet Wechsler's own method indicates that, despite the difficulties, this can be done. For Wechsler has criticized court decisions when the court failed to supply, in any clear fashion, its principle of decision. This was accompanied by supplying the decision with a principle which was necessary for the decision.

Let me describe this method by reference to an analogy. A distinction has been drawn by philosophers of science between what have been termed the 'context of discovery' and the 'context of justification'. If, for example, we maintain that a scientist's reasons for believing in some theory must consist of colorable reasons consciously held by the scientist which must predate that theory, we are in danger of saying that scientific endeavor is fundamentally irrational. It is irrational for Kekule to believe in the existence of carbon rings as a result of a vision which he has of objects dancing in a row and then forming a circle. Examples like this one force us to conclude that the rationality of science must be sought in a theory's context of justification, the point when the scientist lays out his evidence for belief in his theory.

This distinction between these two contexts could be

transplanted to the field of law in two ways. We could say that the judge's context of discovery is the point at which he reaches his decision, for whatever reason (or lack of reason, e.g., hunch), and that the writing of the opinion is the judge's context of justification.¹ Jerome Frank, among others, draws the distinction in this way.²

There is a second way in which the distinction may be made in law which has been indicated by Bruce Lee Miller.³ Miller argues that the formalist (mechanical) model of judicial decision-making does not require that the decision which the judge reaches be in fact deduced from the extant legal rules and other legal materials, but merely that the decision be deducible from them. We may take this point further (than perhaps Miller would wish) and view as the context of justification the reconstruction of the judge's opinion itself, to see if it may fit what we regard as the appropriate canons for judicial decision-making. (The context of discovery, then, would be either the original reasons for decision, or the opinion itself.) No process of reconstruction would, of course, be necessary if the appropriate canons of judicial craft and those which the judge supports coincide, but it will be necessary if we choose to judge the judge's work in

¹Cf. Joseph H. Hutcheson, "The Judgment Intuitive: The Function of the Hunch in Judicial Decision," 14 Cornell L.Q. 274 (1928).

²Jerome Frank, Courts On Trial (New York: Atheneum, 1963), p. 184.

³Bruce L. Miller, Principles, Rules and Cases, p. 11.

the light of a theory which is novel.

A distinction may therefore be made between a principled decision of a court, which is a decision which contains in the opinion a (correctly) principled justification for the result; and a principled position of a court, i.e., a judicial decision which is supportable on grounds of principle, but which the judge has failed to argue for in this way. Our original question might then be stated as "Does the theory of neutral principles require principled decisions or merely principled positions?"

It would seem that a principled position is theoretically admissible. The reasons which have been advanced in favor of requiring principled decision have focused solely upon the court's guidance function.¹ But when, in view of what we know about the court whose decision is in question, we may supply the necessary or intended principle with assuredness, there is no reason for us to require anything more than that the court have adopted a principled position. Wechsler in effect concurs when he writes that "when there is a theory that becomes apparent on reflection though it may not be articulated by the court"² he would dispense with the need for a principled justification of the decision given by the court. Opinions in extensu need not, therefore, be supplied in every case, even

¹See Golding, *Principled Judicial*, pp. 443-44; Golding, *Principled SC*, p. 229: ". . . a narrowly formulated principle might supply no guidance to a lower court. . . ."

²Wechsler, "The Nature of Judicial Reasoning," p. 297.

✓ upon the theory of neutral principles; they need not, e.g., be supplied for those decisions *per curiam* whose issues are clear, those in which the court acts only to correct an error of a lower court (rather than to articulate or develop the law).

The second question was, how many cases must be anticipated in the judge's deliberation? And is it clear that if the theory of neutral principles is to succeed it must be possible to leave some possibly relevant cases out of consideration, or deliberation would be unending. Ernest Brown suggests¹ that the judge need consider only those sorts of cases which are likely to be litigated in the near future. But this response would only follow upon the theory that neutral principles of law are only required in order to grant guidance to lower courts. By saying that the judge must consider all and only those cases which are likely to appear soon, we have found ourselves a criterion which will automatically satisfy the guidance requirement. But if, as I have argued, the theory represents a general requirement of legal theory (and rationality), it is merely fortuitous that the observance of the theory gives guidance to lower courts. Any criterion whose support lies in the view that the guidance-function is of essential importance to the theory must be rejected.

Wechsler has responded to the question by saying that

¹Brown, Book Review, 63 Col. L.R. 386, 391.

the courts must anticipate "other cases that it is now clear are covered by the principle affirmed in reaching judgment and indistinguishable upon valid grounds . . . the principle of the decision must be viable in reference to applications that are now foreseeable; and that viability implies a similar decision of the existence of a possibly acceptable decision."¹

To the extent that these remarks give us guidance, they imply that hypothetical cases need not be sought out. Only those cases which come to mind in connection with the principle need be dealt with. The criterion is, then, negative, not positive. The judge is limited in that he may not put forth a principle in the face of his own, current knowledge that there exist cases to which he would not be willing to apply the principle. It may fairly be said that those decisions which Wechsler criticized did not satisfy this requirement. But, while this requirement does have some teeth to it, it is not as strong as we might have thought it would be. In advancing this criterion Wechsler was in conscious opposition to those who felt that neutral principles require the judge to consider 'all' future cases.

It should also be said that this criterion corresponds with our ordinary feelings about what it means to 'act on principle'. We feel that one has not adopted a principle,

¹Wechsler, "The Nature of Judicial Reasoning," pp. 297-98.

claims to the contrary aside, if it is currently known by all concerned that the principle will not always be followed. However, consistency becomes the 'hobgoblin of little minds', and a thing to be avoided, when consistency is maintained to a principle in the face of circumstances which had not been anticipated when the principle was adopted. This would be an obstinate 'standing on principle', which is resorted to so as to avoid the discomfort of having to rationally re-think positions.

This discrimination helps to explain how it is that principled decision-making may retain flexibility without falling into inconsistency. It shows that there may be development of old principles or formulation of new ones even though one is acting in a principled fashion. When, through the intervention of unforeseen circumstance, an accepted principle is outdated, a new principle may be adopted. Yet the abandonment of the old principle and acceptance of the new one is itself a reasoned, principled decision. Whenever our principles are shown to be inadequate in this way they are changed.

The two points which have been established--that principled positions, not principled decisions, are required, and that the principle formulated must only be consistent with what the judge currently knows he would be willing to do--offer us a response from within the theory of neutral principles to those who claim that the system posited by

neutral principles is inflexible, or impossibly difficult to satisfy. Yet one further point should be added, to satisfy those who feel that it is best, in some areas of law, that no principles at all be employed. My response to this is drawn from remarks made by the late Alexander M. Bickel, who wrote that there could be decisions which are "unprincipled on principle, because we think that 'the job is better done without rules'."¹

Professor Bickel had adopted that view of neutral principles--which we have already rejected--which holds that the judge must abstain from decision until 'all' conceivable cases falling under the proposed principle have been evaluated. We have seen (in reference to Mueller and Schwartz) that this would lead to a general abstention from judging legislation to be unconstitutional. Yet this is unacceptable. After all, the court always holds for either one or the other side. If neutral principles of law to support the invalidation of legislation cannot be found, then, because of the general presumption of the constitutionality of legislation which the courts make, legislation would always be upheld. Hence, in a situation in which there is doubt (albeit an inchoate doubt) about the legitimacy of a legislative act, the courts would still be forced to, in the absence of a (unattainable) neutral principle, 'legitimate' the legislation. To put it another

¹Alexander M. Bickel, The Least Dangerous Branch, (New York: Bobbs Merrill, 1962), p. 186.

way: the court decision, in this situation, ought to be that the legislation is not found to be unconstitutional; and while this is, in theory, greatly different from finding legislation to be constitutionally valid, in practice the two would amount to the same thing. A finding of constitutionality has, so to speak, crept in through the back door; for while we do not have a theory of the constitution which invalidates this law, we do not know that it is valid either.

To avoid this result, Bickel has recommended that judicious use of the 'passive virtues' be made.¹ These passive virtues are the devices whereby the Supreme Court (Bickel's chief interest) manages to avoid making a decision. These devices include the use of the doctrine of 'ripeness' or 'maturity', which holds that the Court ought to decline jurisdiction over a case when the factual situation surrounding it remains so very cloudy that it is unclear what the Supreme Court's decision will mean in practice. (An example of an immature case would be one in which the constitutionality of a law is brought into question when it is still unclear whether or how the state intends to enforce the law.) Another such device is the doctrine that the Supreme Court will not deal with 'political questions'.²

Take as an example the first device, the requirement of maturity. Here we may indeed have an unprincipled decision

¹See Bickel, "The Passive Virtues."

²See Bickel, *ibid.*, esp. pp. 45-46.

which was reached upon principled grounds. The declining of jurisdiction which this doctrine entails is in many ways unprincipled: e.g., because the decision does not rest on all of the relevant issues of the case. And yet in an important sense the decision is principled, for the courts would find deciding unacceptable in all cases wherein the controversy before the Court has not yet 'ripened'.

To Golding's argument that cases which involve substantive due process, and cases which turn upon the definition of state versus private action, should be decided in an unprincipled fashion, Bickel's views offer a response. The reasons which Golding has advanced for not adopting principles in these cases could themselves serve as a principle of decision for these cases. The principle would maintain that these sorts of cases should be handled in an individualized, case-by-case fashion.

D. The Need for a Substantive Criterion for Principles

The last point made, that decisions could, on principled grounds, be decided in an unprincipled fashion, brings up in stark fashion what I see as the chief nemesis of the theory of neutral principles. For the suggestion that there may be 'unprincipled decision-making on principled grounds', if accepted, yields us a principle which is itself the reductio ad absurdum of this theory. I should like to begin by developing the problem with reference to one final miscriticism of the

theory of neutral principles, before proceeding with responses to the problem.

We have taken it for granted that the principles which must be used in neutrally principled decision-making are not themselves subject to any restriction (it is the judge, not the principle, who needs to be neutral). Those who have charged that the theory of neutral principles is at odds with result-oriented jurisprudence--that it is conservative, Blackstonian, etc.--are, therefore, simply wrong.¹

Martin Shapiro, for example, writes that for a neutral principles theorist the judge's "chief concern should not be whether a given decision will for the next twenty years facilitate or hinder the rise of the Negro to a position of equality; rather, it should be whether the standard of equality which he enunciates today will in the next twenty years maintain him in the path of logic and rationality or lead him into the temptation of irrationality."²

Insofar as Wechsler's primary concern was with these cases in which the judge is most free to adopt new principles of law, namely, those involving constitutional standards, we have good reason to believe that the very reverse of Shapiro's claim is true. In these cases, as Cardozo has shown, when

¹See Shapiro, "The Supreme Court and Constitutional Adjudication," p. 592; Rostow, The Sovereign Prerogative; Miller, and Howell, "The Myth of Neutrality in Constitutional Adjudication;" and Chroust, "Law: Reason, Legalism and the Judicial Process."

²Shapiro, *ibid.*

the judge lacks authoritative legal guidance, he is most free to adopt that rule which will best satisfy our felt standards of justice.¹ Wechsler has termed those attacks which purport to show that neutral principles theory is unable to encompass social effects of the law "canards";² worse yet, they are mistakes. He writes in response to these charges, "By no possible reading did I say that the Supreme Court 'should have cast out of its reckoning the likelihood that a decision one way rather than another would effect an enduring contribution to our society.'"³ The very reverse is true. The only way in which the judge may adjudicate in his free area of choice is by judging his feelings as to the effect which a rule will have upon society. I would contend that, if anything, Wechsler has erred on the side of an overly result-oriented jurisprudence.

For neutral principles are essentially and unavoidably subjective in nature. As has been emphasized, the tollens argument needs a subject to work on; the results of a principle must be, relative to that subject, unacceptable. The point of this, which, to my mind, constitutes the strongest criticism to Wechsler's thesis, is that he has failed to

¹See generally the writings of Cardozo in Hall ed., Selected Writings of Benjamin Nathan Cardozo.

²Wechsler, "The Nature of Judicial Reasoning," p. 296.

³Quoted in Louis Pollak, "Constitutional Adjudication: Relative or Absolute Neutrality," 11 Journal of Public Law 48, 60-61 (1962).

eliminate wide-ranging judicial discretion. The judge is bound to adhere to neutral principles, which is to say, once he has the principles, he must apply them by their terms (neutrally). But at the point at which his discretion most needs to be limited--when he is to adopt a new constitutional principle--what is being suggested?--That he get these neutral principles through a thoroughgoing exercise of personal feeling as to what constitute acceptable results. If all that we require is that the judge adhere to some standard whenever he decides--if this is the way in which we propose to limit discretion¹--then we have it. But this standard may be derived entirely from the prejudices and biases of the judge. The limitation of discretion which is most sought, the elimination of the judge's biases from his judgments, would not be achieved in this way. If we are to criticize decisions by the standards furnished in neutral principles theory, all that we may claim is that the judge has not been consistently biased. All that is left to us to say is that he has not adhered to his principle with draconian consistency. How very far from the mark, then, are those critics who contrast neutral principles to an experientially-based legal theory!²

¹A goal correctly attributed to Wechsler by Golding. See Golding, *Principled SC*, p. 218: "But we still demand that, so far as possible, courts be principled in their exercise of this discretion."

²Shapiro, "The Supreme Court and Constitutional Adjudication," p. 593: "The neutral principles or standards are really the objective and eternal rules embedded in a 'Blackstonian' body of law."

The problem, then, is to determine what content must be present in these principles, and how that content is to be delimited. Without doing this, we cannot hope to eliminate 'particularized principles', nor the thoroughgoing exercise of judicial subjectivity in the process of decision. One natural (and unphilosophical) response I mention only to dismiss.

We may call this the empirical answer to the problem of content. Those who see the discretion of the judge as limited by personality factors which may influence (I would include here Karl Llewellyn¹ and Thomas D. Perry²) might adopt this position. Llewellyn, e.g., maintains that the training which judges undergo creates in them certain habits of thought, or ways of viewing things (the 'situation-sense' of the judge). This renders judicial action highly predictable; it could perhaps also be said to make it likely that the judges will only accept principles of a broadly-acceptable content.

This causal or empirical view of how judicial discretion is limited seems to suggest more of a program, a line of investigation, than a theory. More important, though, is the fact that the very existence of the neutral principles controversy indicates that some are not satisfied with the results

¹Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (Boston: Little, Brown, 1960).

²Thomas D. Perry, "Judicial Method and the Concept of Reasoning," 80 Ethics 1 (1969); "Moral and Judicial Reasoning: A Structural Analogy," 22 Buffalo L.R. 769.

of the judicial training process.

We remain, then, with the problem: given a formalistic account of neutral principles, how may we ensure that the principles will have acceptable content? The answer which I want to suggest is that even in the extreme cases of judicial discretion the judge is bound to abide by the values and aims of the law. These values must not be 'made up' by the judge, although he does have a role in determining their order of precedence, and in determining how they are to be given effect. The judge is not free to ignore any value which does have legal dimension, i.e., which can be objectively ascertained to be a value or goal of the legal system; conversely, the judge is not free to use any principle based upon a value not to be found in the legal system.

As Golding notes, principled judicial decision-making is distinguished from other forms of principled decision-making by the fact that in the former the values which the judge must accept are stipulated by the legal system itself.¹ In speaking of constitutional cases, Wechsler similarly writes that the consequences which may be taken into account (in determining the acceptability of principles) are only those "values that can reasonably be asserted to have constitutional dimension."²

¹Golding, *Principled SC*, p. 217.

²Wechsler, "The Nature of Judicial Reasoning," p. 294.

In other words, when trying the tollens out on a principle, the judge must determine not that the results of the proffered principle are unacceptable to him but, rather, that they are unacceptable to the legal system. Results may be said to be unacceptable to the legal system if they serve to defeat or subvert some purpose which is to be found in the law. That this is so may be more easily recognized in reference to the development of new tort rules, or the interpretation of ambiguous statutes, although it is equally true in the development of constitutional standards. If a new tort principle may be developed, which the judge would find acceptable but which would tend to defeat the purposes of tort law, then the principle yields results which are unacceptable to the legal system. If a proposed resolution of ambiguous statutory language would lead to a defeat of that statute's own purpose, then the principle which yields that resolution has results which are unacceptable to the law.

This is, I take it, close to what is meant by Golding and Wechsler when they speak of the need for the judge to adhere to legal values; for in the context in which these claims were made, there were no definitive, finite legal rules which could be appealed to in the decision. Even at the far end of judicial discretion, that is, there is still a requirement that the judge remain true to the law. In these cases, this may only be done by reference to something beyond the written law to which the judge may be faithful ('the spirit of the law').

The transition from the theory of neutral principles to the theory which emphasizes purposes in and of the law (which I call the theory of pragmatic consistency) may be viewed in another light. In the chapters on neutral principles, I have concerned myself with one kind of consistency which may be required of the judge: logical consistency in applying an accepted rule. In the following chapters, it will be argued that consistency in following a rule or principle necessarily involves following that rule in such a way that the reason for its adoption will be fulfilled (or, as I shall sometimes put it, that pragmatic consistency be retained). These two sorts of consistency are not so far apart as might be imagined.¹ And purposive consistency, with all of its difficulties, holds out some hope of removing judicial discretion, a goal which, while posited by the theory of neutral principles, could not be achieved by that theory.

¹See Singer's discussion of the relationship between consistency in following a Kantian maxim (logical consistency) and consistency in adhering to some purpose or intention: Generalization in Ethics, pp. 275-79.

CHAPTER III

THE THEORY OF PRAGMATIC CONSISTENCY

A. Introduction: The Meaning of
Pragmatic Consistency

The discussion, in the preceding two chapters, of the theory of neutral principles established two points of departure for the remainder of this thesis. The first point is, that the 'legal quality' of judicial decisions requires, as a necessary condition, that these decisions be "entirely principled,"¹ in that those principles which are adopted must be applied to the limits of their terms. No exceptions not to be found within the principle itself may be allowed, if we are 'acting on principle'. The second point was that this requirement is, in itself, insufficient as a criterion for valid legal reasoning, even in circumstances where, it would appear, the judge is most free in his exercise of power. The problem confronting us is to determine exactly which principles the judge is required to adhere to, i.e., neutrally apply; a substantive criterion of principles needs to be supplied.² Consistency with the original motivation behind the

¹Herbert Wechsler, "Towards Neutral Principles of Constitutional Law," 73 Harv. L.R. 1, 19 (1959). See Chap. I.

²Cf. Bruce Lee Miller, Principles, Rules and Cases: The Logic of Judicial Decisions, Ph.D. dissertation, Case Western Reserve Univ., 1970, pp. 250-51.

controversy over the theory of neutral principles requires in addition the development of guidelines which will serve to indicate when the judge is, and when he is not, being faithful to those principles. What is needed, that is, is a theory of legal reasoning which may be used to criticize (as well as validate) legal decisions.

I believe that a theory or schema to fill these gaps can be constructed. Although I do not think that there is any entirely mechanical method for discovering principles which a judge is bound to accept, or for determining how those principles must be used in all concrete cases, the schema which shall be developed here (with suitable illustrative cases) aspires to a decision-procedure for handling these problems which will be precise enough as may be called (in one sense) objective. On the basis of this theory, in fact, many supposedly 'hard' cases can be disposed of fairly easily, and in such a fashion that it may be determined whether the judge has fulfilled the demands of his judicial office. A fortiori, the theory will be capable of providing decision mechanisms for easy cases. The schema is, furthermore, consistent with much classical theory of judicial decision-making. This is all that may be hoped for, for the 'classical' theory contains within itself contradictions and obscurities.¹

The best brief statement of this theory or method, which

¹Cf. the discussion on the interpretation of statutes, Chap. IV.

I refer to as 'pragmatic consistency', is given by Llewellyn in his discussion of the "steady quest for rules which satisfy the needs of the Grand Tradition,"¹ that is, rules which are worked out by the masters of the judicial craft. These rules are controlled "according to the double maxim: the rule follows where its reason leads: where the reason stops, there stops the rule."²

To understand the method of pragmatic consistency, we might try to place it within a certain theoretical framework: Once it is granted that the legal materials which we possess (including, aside from ordinary legal rules, those definitions, principles, and policies which are sometimes felt to differ from legal rules in important ways)³ include a great number of prescriptive rules, it is tautologous to claim that the legal system is intended,⁴ to a great extent, to guide behavior within society. This guidance-function presupposes that certain limits are placed upon the kinds of things which members of the given society (better, those who are subject

¹Quoted from Karl Llewellyn, The Bramble Bush, 2d ed., 1951, in Albert Sacks and Henry M. Hart, Jr., The Legal Process (Cambridge: mimeographed tentative edition, 1958), p. 579. Hereinafter referred to as 'Hart and Sacks'.

²*Ibid.*, italics in original.

³Compare, e.g., the usages in Roscoe Pound, An Introduction to the Philosophy of Law (New Haven: Yale Univ. Press, pb. ed. 1971), p. 56, with Ronald Dworkin, "The Model of Rules," 35 U. Chi. L.R. 14 (1967-68).

⁴See Chap. V, in which the idea of the 'intention of a legal system' will be discussed.

to the legal system) are permitted to do. But rules are not designed to achieve a purpose, i.e., any indifferent purpose. It is the conviction of this thesis that each rule is supposed to fulfill some goal or goals, or to contribute to some desired state of affairs.

(To say that rules or other legal materials are purposive is not necessarily the same as to claim that they are teleological or forward-looking in nature, in the sense in which these terms are sometimes understood.¹ A purposive theory of law need not be utilitarian; it could admit (what I term) 'deontological purposes' into the law as well, e.g., the purpose of a law might be the retention of some standard of fair play. This concept will be explained and argued for in chapter V in the section entitled "Intentions, Purposes and Effects in the Law.")

Rules, then, are tools for achieving certain states-of-affairs.² These desired states-of-affairs are, if you like,

¹Cf. Ronald Dworkin, "Wasserstrom: The Judicial Decision," 75 Ethics 47 (1964), also published as "Does Law Have a Function?" 74 Y.L.J. 640 (1965). This point will be expanded upon below.

²It might need to be added here that sometimes rules are only 'tools' when considered from a certain standpoint (a standpoint which, however, the judge must always adopt). I am unsure of this point, but an example of what I mean might help. Rules of games, e.g., might not appear, from the standpoint of the participant, to be purposive in nature, but rather as 'enabling devices' which allow the game to proceed. From the standpoint of the inventor of these rules, however--and from the standpoint of the referee who must make a decision in a hard case (for he, too, is a partner in the 'creation' of the game)--there certainly are purposes which the various rules are designed to achieve; if you like, there are reasons why

the very reason-for-being of the rules. But, as is the case with all tools, rules are imperfect; they imperfectly achieve that goal (or, it must always be remembered, goals) which they were designed to serve. This problem may be variously attributed to imperfections of the language in which rules are couched, or to imperfections in our knowledge of the world and of human beings; but that there is such a problem is admitted on all accounts. There are, after all, many ways in which rules may fail of perfection, for to do this they need not supply bad guidance. If a rule gives us equivocal (ambiguous) guidance, if we are sometimes in doubt as to what actions the rules require of us, then the rule must be imperfect: in a state of suspended decision, nothing, and certainly not any goal which may be attributed to a reasonable person, is being served.

What is to be done, then, when there exists a rule which apparently defeats its own purpose, or at least does not serve that purpose?¹ Rule R is designed to serve goal G, yet, in the particular case confronting us, should the rule

this rule rather than another is chosen. Think, in this connection, of those proposals which appear from time to time to change the rules of baseball, in order to make it a more exciting spectator sport.

¹This may occur with a teleological goal, e.g., if false facts about the world are used. It may occur with a deontological goal if the components of the deontological goals are wrongly specified, or if incorrect facts about the world are assumed; all this will be more easily understood when compared with the later discussion of teleological and deontological goals.

✓ be applied G will not be achieved.¹ When a defect is found in a tool, or when a tool cannot be used for our purpose because it was not designed for that purpose, we either take up another tool (we put down the screwdriver and take up the chisel) or else we modify the tool (we file the screwdriver). And we are, when adopting the second alternative, mindful of the fact that the tool is needed in many situations, that it will be needed in the future to serve in 'standard' cases once again; so we do not modify the tool in such a way that it may no longer be used in the standard case (to mix metaphors: this last point is one way of viewing the origin of the dictum 'Hard cases make bad law.')

To take an example of one such defective 'tool':² In Bologna, a statute forbade, upon pain of severe punishment, the shedding of blood in the streets. A barber (read: surgeon) who opened a vein of a patient in the street (by way of emergency treatment) was arraigned for violating this statute. The statute itself stood without any form of qualification: its scope of delinquents included all who drew

¹In the extreme case, G's contrary, rather than merely its contradictory, will ensue. We try to make all cases of this sort of inconsistency into extreme cases when we say of any rule in the legal system which is simply not achieving its goals that it is, in fact, achieving the opposite. "It was to serve justice, and instead it is serving injustice" is supposed to supply a law of the excluded middle in an inapplicable context; for the rule may simply not be serving justice, without advancing injustice.

²Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) at 511.

blood in the street. Yet the goal of this statute was, clearly, the protection of people from bodily harm. In this case, the barber had not only not violated this goal-- on the long view he has not caused bodily harm (in the belief of medical opinion of that time) any more than has a modern doctor who performs a tracheotomy on the street in an emergency. Rather, had the barber followed the rule in a literal, unthinking fashion, the rule would have served to defeat the rule's own purpose,¹ it would have served to cause bodily harm. (The barber, of course, was acquitted.)

The Bologna case is one in which the fact of obedience to a rule tends to defeat the goal which the rule serves: in this sort of case, where the rule actually subverts its own goal, I will say that the rule achieves the opposite of its own goal, or simply, that the rule achieves opposite-G.² Judged by the same standards which called for the adoption of the rule, the rule is harmful. On the other hand, rules might merely be useless: some rules might neither further nor hinder the achievement of their goals. In that case, I shall speak of the rule's not achieving its goal (of a rule

¹On the notion of the purposes of a rule (as opposed to the purpose of a rulemaker) see Chap. V.

²Compare Bentham's practice of converting verbs into nouns whenever possible. Instead of 'to straighten' we ought to speak of 'to give straightness to'; and, in his own burlesque of his system, Bentham states that 'to ring' should be replaced by 'to give ringtion to', or 'to make ringtion'. On this Benthamian program, and its subsequent influence on legal language, see David Mellinkoff, The Language of the Law (Boston: Little Brown, 1963), p. 269 and ff.

achieving not-G).

In either of these situations, I shall say that following the rule in a literal fashion yields pragmatic inconsistency. The method of interpreting rules in such a way that they effectively serve their goals, and the theory which underlies this method, I term pragmatic consistency.

Some may find this terminology difficult. It may be argued that a decision by a judge can in no way be inconsistent with a goal or desired state-of-affairs; a judge's decision can only be consistent or inconsistent with another decision (or perhaps statement). I do not, myself, see any difficulty in saying that a statement may conflict with an action or with a goal. We would, I think, find it natural to hear that someone had acted inconsistently in, e.g., advocating that victimless crimes be enforced and then failing in this enforcement (should the opportunity come to hand). If someone's avowed goal is to be a good Christian, we may say that he is acting inconsistently in pursuing Mammon instead. The same may be said (with less assuredness) about the word 'contradiction'. One can say that an action or a statement contradicts a goal; it is self-contradictory to pursue Mammon while claiming to be a good Christian; it is contradictory to claim to grade students' papers by their quality, and then to assign grades on the basis of the length of the papers. Similarly, it may be said that the literal application of the Bolognese statute would have contradicted

the purpose or goal of that rule (though it is possible that here a non-ordinary, perhaps Marxian, usage of 'contradiction' is intruding).

In any event, this cavil is nothing more than criticism of the term 'pragmatic consistency' and my usage of the word 'contradiction'; this criticism is an attack upon terminology itself. One may, if one likes, substitute 'pragmatic consonance' for 'inconsistency'. If there is no contradiction involved in holding a goal and not serving it, there is yet inconsonance; something does not quite 'fit together', the goal and action are (in the old French sense of the word) 'inconvenient'.

The method of pragmatic consistency can be applied to any sort of legal material which has a purpose to it, or which has a legally-recognized function. Our most natural recourse, when talking of legal materials, is to the standard, prescriptive legal rule, which forbids certain actions (felonies), or enjoins certain actions (tax laws), or discourages certain actions (some misdemeanors, most torts), or encourages desirable activities (tax benefits for religious institutions, patent and copyright laws). Not all of these rules--e.g., laws granting tax benefits to certain institutions--can easily be written in prescriptive form, nor can we say, without much preliminary argument, that they allocate obligations. Still, it is clear that these laws all guide, if not control, human conduct, so as to help achieve some state of affairs which

have been considered desirable (by the framers of the law, or by those who adopted and lent legal force to the law).

Legal rules of this nature can sensibly be said to have goals, and indeed goals beyond the immediate adherence to these rules. To find their goal(s), we may need to look beyond the form of the rule: laws granting tax benefits may be addressed to enforcers of tax laws, rather than to those who must abide by these laws. Still, although reflection is needed, investigation into the history of the rule, its application, etc. (and the explication of this "etc." is of course a considerable task for this thesis) will yield some aim (sometimes, several aims) which the law serves.

Those who speak loosely might say that the rule is its goal; but this cannot be taken secundum litteram. Yet it requires some thought to discover how, exactly, a rule differs from a goal which the rule serves. For does not the rule follow, in near-deductive fashion, given the goal and what we know about the world (when we apply what Fuller has termed 'eunomics', the science of discerning appropriate means to given ends)? I suggest that the difference is that a rule represents one way of achieving the goal, which could have been achieved by other means, i.e., through other rules. There are many ways of encouraging churches; a rule granting them tax benefits represents a choice of one road to this goal. By choosing this rule, then, we are both giving expression to the fact that we possess some (determinate) goal,

and we are choosing a preferred path to that goal. Not every rule which has, as its intended effect, the protection of churches, is identical with every other rule with the same aim.

This is not the case with other legal materials; specifically, with regard to principles and policies, as these terms are currently understood in jurisprudence.¹ Policies are "that kind of standard that set out a goal to be reached;² principles are standards observed because required by justice or morality. "Freedom of the market place is to be preserved" would be a policy; "no man may profit from his own wrongdoing", a principle. The precise distinctions between principles, policies and rules cannot here be attempted; for our purpose, one distinction should be noted. As opposed to rules both principles and policies are goals (the latter being deontological goals, which concept will be explained later). Rules state that a goal must be achieved, and achieved in a certain way; principles and policies state that certain goals are to be achieved, without specifying which route to follow (which results in their hazy, indeterminate nature).

Aside from single norms, what I call institutions and categories of the law might be purposive or avowedly

¹See Dworkin, "The Model of Rules," p. 23; and Harry Wellington, "Common Law Rules and Constitutional Double Standards," 83 Y.L.J. 221, 222-29 (1973).

²Dworkin, *ibid.*

functional in nature, and would therefore, in theory, be subject to the method of pragmatic consistency. Institutions of the law are complexes of legal norms which govern the conduct of a restricted set of individuals. Examples of such institutions are the institutions of contract, of rules of standing, and of courts themselves, all of which have (at times) been seen as purposive. Categories of the law are norms affecting a wider class of persons who, ordinarily, have not voluntarily entered into the class which subjects them to these norms (in contrast to institutions). Examples of such categories would include the law of torts and the laws of taxation.¹ It is a controverted question as to what purpose or purposes the law of torts fulfills, for example.² The fact that this is a controverted question is a problem for the general thesis defended here, which is apparently required to submit a satisfactory account of these purposes; but the fact that it is a controverted question serves to support the theory of pragmatic consistency, for it has apparently been felt that there is some unifying goal behind the various laws of tort.

Finally, it has been claimed by some that the entire legal system, taken as a whole, is designed to serve some

¹See further in this chap. V.

²See George P. Fletcher, "Fairness and Utility in Tort Theory," 85 H.L.R. 537 (1972), for a good discussion of this problem.

identifiable goal, be it simple or complex.¹ This completes the progression from basic, concrete norms to the most broad or 'highest' level on which the law may be investigated. Pragmatic consistency, if not further specified, will refer to that method as applied to rules (statutory or common law); when discussing this method's application to institutions or categories of the law I will refer to high-order or high-level pragmatic consistency. When speaking of goals attributed to the legal system in toto, I will speak of the highest level of pragmatic consistency.

The theses introduced--that 'legal materials' have purposes which may be identified--provide one way of completing the theory of neutral principles. Accordingly, a major requirement of the method is that it provide a solution to the problem of limiting judicial discretion. As the problem of 'hard cases' has been taken as the chief stumbling-block to any theory which proposes to limit discretion, a major portion of this thesis will examine the solution to this problem which is offered by the method of pragmatic consistency. It will be claimed that reference to an objectively identifiable purpose(s) of the legal material in question may be used to resolve ambiguities, fill lacunae, etc.

In the following two chapters, I shall develop the theory of pragmatic consistency in a positive fashion. After concluding this chapter with a statement of the method which will be

¹R. A. Wasserstrom, The Judicial Decision (Stanford, 1961).

here employed, I shall deal with some problems in the determination of the purposes of legal materials, and the differential use which the logic of purposive interpretation entails in solving the hard case. Criticism of and limitations upon the theory will, in the main, be reserved for discussion in the fifth chapter; until then, the positive aspects of the theory shall be stressed.

B. A Statement of Method

The reader is apt to feel lost in working through some parts of this thesis. Part of this, no doubt, is endemic to legal philosophy, which juxtaposes detailed discussion of legal points and cases with far broader philosophical discussion. Much of the difficulty, however, is due to the method of argument which I will employ. Some explanation of this method is in order.

In this section, two aspects of the method employed will be discussed: the first, concerning the thesis as normative or empirical, and the second, concerning the use which will be made of examples. This description would be more easily understood if it were offered after the problems which it anticipates had arisen; but it is also needed before the body of the thesis, so that the problems will not seem insuperable. (Perhaps it would be best to read this statement of method at the end, as well as the beginning, of the thesis.)

The method, and accompanying theory, of pragmatic consistency is not purely descriptive of legal reasoning (in the

United States or anywhere else), nor is it purely a prescription of how legal reasoning should proceed. It is not even put forward as a program for the reform of legal reasoning.

What is being attempted here is a description of one attractive, though problematical, theory of legal reasoning. This endeavor is perhaps more of a thought-experiment than anything else. An idea has been advanced by a number of writers on jurisprudence: legal materials are best understood and employed with a view towards their purposive character. This method has not, however, been developed in a consistent fashion for use in interpretation of all legal materials. Some writers have defended the theory with respect to the interpretation of statutes, but have wholly neglected common-law rules; and even when writing of statutes, have allowed non-purposive notions to appear in their analysis.¹ Judges have, at times, used the method of pragmatic consistency in solving cases, but have done so in an inconsistent fashion, and without the benefit of a well-developed theory.

What shall be attempted here, then, is the articulation of such a theory. Elements of the method have been anticipated; much of what is said here is not new. This is, I believe, desirable, for there is in general a presumption against an individual developing de novo an adequate theory.

¹See, e.g., Gerald McCallum, "Legislative Intent," in Summers, ed., Essays in Legal Philosophy (Univ. Cal., 1968), pp. 240-45, where he takes Landis to task for failing to distinguish between a statute's purpose and its intended meaning, the latter of which is not a 'purposive concept' in the required sense.

And insofar as the method of pragmatic consistency is not new, the criticism of the method, and the misunderstandings of it which have developed must be laid to rest. In this interplay between thesis and criticism, the thesis' claims shall be modified.

The normative power of the thesis is to be found in my claim that, if accepted and used in a consistent fashion, this method would largely eliminate judicial discretion, and would yield, in the main, acceptable decisions. It is hoped that in the final chapter, where the relationship between this theory and two other theories of judicial reasoning is examined, the normative force to be attached to the theory will be strengthened. In relation to some currently popular theories of legal reasoning, this theory shows promise of solving the problem of judicial discretion.

There is, though, descriptive import to the thesis. For the theory has been accepted by some judges, and has sometimes been used in judicial decision. Accordingly, some judicial opinions which would, without this theory, remain obscure, can be easily understood given this theory. These cases also illuminate the limited truth to the claim that this method cannot currently be used in judicial practice, due to its (assumed) inconsistency with well-established judicial doctrines (e.g., the idea that the judge should not inquire into the 'motives' of the legislature in interpreting statutes).

In the course of discussion, therefore, examples of cases using this method of reasoning will be presented. These examples are not meant to constitute a demonstration that this theory is invariably, or even most often, the method of reasoning employed. They demonstrate, rather, aspects of the logical form of this mode of argument, the fact that the method is consistent with good judicial practice, and, not of lesser significance, the fact that the method is a practical one. In this connection it should be noted that Wasserstrom, in developing a fully normative theory of judicial reasoning, also ties his discussion, to a considerable extent, to the criterion of practicality; as he notes, "a procedure which could not be put into operation under any circumstances has appreciably less significance, even as an ideal, than one which could be so employed."¹ The examples demonstrate that the theory presented here can be used in practice.

It is hoped that many of the cases referred to will immediately be recognized as employing the method of pragmatic consistency. Sometimes, a certain amount of 'reconstruction' of the opinion is necessary to demonstrate this; the use of pragmatic consistency may be 'veiled'. Lest it be felt that I am not being true to the reasoning actually employed in these cases, three points must be made: First, it must be remembered that the method as developed here is not available

¹Wasserstrom, The Judicial Decision, p. 13.

to the judge. A certain amount of translation into the categories which I employ is therefore understandable. Second, the cases should be read without an overlay of other theories of legal reasoning, in order to see whether the explanation of the case which I supply is a more or less exact fit. Some of the cases which shall be instanced could be accommodated by other theories, and if read through the spectacles of those theories other explanations will seem faulty. But if there is a question as to the propriety of my importation of theory into the data, there exists a similar question as to this being done by other theories. It is hoped that an originally unbiased appraisal of these cases will result in their being interpreted along the lines suggested here.

Third, some elements of the theory are to be found in writings on jurisprudence with which legal personnel are acquainted; if this should be forgotten, a certain amount of shorthand reference to these cognate doctrines will have their significance obscured.

Numerous instances of these anticipations of the theory could be mentioned. Among the texts which have constituted much of the source and inspiration for the common law, the idea that statutes have purposes which should be used in legal interpretation was extremely common. Blackstone says ". . . the most important and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering

the spirit and reason of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."¹

This method is sometimes called the method of ratio legis (reason of the law), although ratio legis is sometimes used to refer to principles or goals which are outside of the law, rather than to those goals which emerge from within the law.² It is sometimes called the method of interpretation through the intention of the legislature (though, as we shall see, the term 'intention' may have been an unhappy vehicle for the conveyance of this theory), as in Bacon: "Such Construction ought to be put upon a Statute as may best answer the Intention which the Makers had in view; for qui haerat in Litera, haerat in Cortice."³ Following Plowden, the method is often⁴ termed the equitable method of interpreting laws. His statement is worth quoting: "It is not the words of the law but the internal sense of it that makes the law . . . and the sense and reason of the law is the soul of the law . . . [if]

¹Quoted in Hart and Sacks, op. cit. n. 4, from 1 Bl. Comm. 59-62 (8th ed. 1778).

²John Dickinson, "The Law Behind Law," 29 Col. L.R. 114, Part II 284 (1929), pp. 120-21.

³Quoted in D. J. Llewellyn Davies, "The Interpretation of Statutes in the Light of their Policy by the English Courts," 35 Col. L.R. 519, 520 from Bacon's Abridgment (1759), 647, sub. tit. Rules to be Observed in the Construction of Statutes. Davies' article was of great value.

⁴See Black's Law Dictionary (West; Rev. 4th ed., 1968), pp. 635-36, 'the equity of a statute'.

the lawmaker would have followed the equity notwithstanding the words of the law . . . you may safely do the like, for while you do no more than the lawmaker would have done, you do not act contrary to the law, but in conformity with it."^{1,2}

Apart from these examples from texts, there may be instanced a number of similar rules which were announced in the course of deciding court cases.³ The most widely quoted of these rules is known as 'the rule in Heydon's Case':⁴

¹Quoted in Davies, op. cit. n. 20, p. 521, from Plowden's Rep. 467.

²It should be noted that in all these citations, though clearest in Plowden, is the idea that when following the equity of the statute, which may result in broadening, narrowing, or otherwise abandoning its 'natural', literal interpretation, you are in fact remaining in conformity with the law. It was felt, that is, that the law itself contains, in some sense, the principle which you are using, so that the law itself requires that a non-literal interpretation be adopted (n. 24). This is in contrast to the 'interposition' model proposed by Kadish and Kadish, which will be discussed in the final chapter of this thesis.

³See Mortimer R. Kadish and Sanford H. Kadish, Discretion to Disobey (Stanford Univ. Press, 1973). Hereinafter cited as 'Kadish and Kadish'.

⁴Compare with the following rules, quoted in C. K. Allen, Law in the Making (Oxford Univ. Press, 7th ed. 1964), pp. 491 ff.:

a) The 'Golden' Rule (Parke B.): "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further"

b) Tindal's Rule: "The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary meaning. The words

it concludes, "the office of the judges is always to make such construction as shall suppress the mischief, advance the remedy [of the statute] and to suppress subtle inventions and evasion for continuance of the mischief . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the Act."

In view of these well-known statements advocating the use of purposive interpretation (similar but less conclusive dicta may be found which only concern common-law rules, but statutes are usually the target), the correspondence which I shall allege to exist between the reasoning employed by courts and the reasoning advocated by pragmatic consistency should not be seen as merely coincidental, as something to be explained away. It would, rather, be surprising if these ideas about purposive interpretation had not found their way into practical application.

In concluding this section on method, something must be said about the elements which may be found in a judicial opinion, which serve as indicia of the fact that pragmatic consistency or a similar method is being employed. There are three such indicia:

- 1) The most oft-encountered clue that pragmatic consistency is the method employed is present when the judge states in his

themselves alone do best declare the intention of the Legislature.

opinion that should we adopt some proffered rule or principle terrible or absurd consequences would ensue. As we have already had occasion to note (chap. I), the natural argument-form when investigating the acceptability of a rule or principle is the attempt to formulate a reductio ad absurdum (or, failing in that, a modus tollens) in refutation of that rule. If one is not willing to follow the rule to the limits of its logic, then one is not following it at all; rather, it is being used, in an ad hoc fashion, because convenient.

That this is an argument of pragmatic consistency is shown by the following points: The rule which is advanced, and then judged to be absurd, is most often not absurd at all. Why then is it rejected? The reason is that it is felt that, upon the principle or purpose which would establish the proffered rule, other, unacceptable rules would also follow. The judge resorting to the tollens feels that these other rules necessarily follow, once the first rule cum its presupposed principle or reason is accepted.

One such case, which illustrates, besides this point about the tollens, the contribution which this form of argument makes to the slim annals of judicial humor, may be supplied--for, when using this argument-form, the judge may give his imagination free reign, and allow his analogical gifts to come to the fore. The case is that of Reynolds v. United States.¹ The issue which was before the Supreme Court was

¹Reynolds v. U.S., 98 U.S. 145 (1879).

whether or not a prohibition of bigamy as applied to Mormons constituted an unconstitutional limitation of the Mormons' freedom of religion. In his opinion, Chief Justice Waite did not shrink from what appeared to him to be the logical conclusion: "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent such a sacrifice?"¹

The Mormons were, of course, contending no such thing. Yet Waite felt that a necessary element of their position is that freedom of religion is a principle strong enough to overturn the criminal law. The reasonable distinction which could, and perhaps should, have been made would say that laws which are primarily motivated by religious or moral considerations are different, at least as regards First Amendment protection, from laws primarily motivated by a need to preserve an ordered and secure body politic. I do not, therefore, necessarily accede to all decisions whose reasoning is plausibly construed as an application of the method of pragmatic consistency. One of the limitations of the thesis has been ignored by Chief Justice Waite; and yet, it is pragmatic consistency which was employed, to find behind a proffered rule an insupportable principle.

One 'absurd' consequence, it should be noted, which is very often alleged, is that should a proffered rule be accepted

¹Ibid. Also confounded were bigamy and perversion, and bigamy and 'barbarism'.

by the courts, the 'floodgates of litigation' would be opened, i.e., the courts would be inundated with litigation should some rule or principle be adopted. This, it would appear, is a justification by what I have called 'high-order pragmatic consistency'. It is not claimed that there is anything intrinsically wrong with the rule, but only that the rule must be rejected so that the judicial system will be free to deal with other, more important, forms of litigation. It goes without saying that this argument is only successful if there is good reason to suppose that the bad consequence might materialize.¹

2) When a judge says, in effect, 'By the same reasoning that A, we must get B', he may again be indicating by this a reference to the underlying reason for some rule; and that, should the rule be adopted, we would be adopting a reason or goal of that rule, which would require more than does this rule itself. This may be viewed as the minimal case of the tollens. In this form, the judge need not be attributing harmful consequences to the additional 'B'; he may, for example, wish to call attention to the fact that B has already

¹Compare the position taken by Chief Justice Willard Bartlett in Macpherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050. In his dissent to this case, which allowed automobile consumers to sue manufacturers (although the purchase was made from a dealer), Bartlett predicted that the flood gates of litigation would be opened. He quotes Lord Abinger from Winterbottom v. Wright, 10 Meeson and Welsby 109, who writes that "unless we confine the operation of such contracts as this to the parties who enter into them the most absurd and outrageous consequences, to which I can see no limit, would ensue."

been rejected by the courts, 'without prejudice' to the question of whether he believes that B ought to have been rejected. He may even wish to make the point that A is a necessary prerequisite for B, which is a valid rule of law, so that since we accept B, we must also accept A.

3) There are a number of terms or expressions which, should the judge use them, very often indicate that he is using the method of pragmatic consistency. These include references to the intention of the law or of the legislature, to ratio legis, or to the equity of a statute, as explained above. Also, references to the 'basis of the rule', 'the purpose', 'aim', 'goal', 'idea behind', 'end', and 'underlying principle' of the legal material in question may indicate the use of this method.

CHAPTER IV

HARD CASES AND PRAGMATIC
CONSISTENCY

In this chapter, a (very rough) taxonomy of the sorts of hard cases which have been investigated by philosophers of law shall be provided, and an attempt made to show how the method of pragmatic consistency provides solutions to them. Without a number of illustrative applications of a theory of legal reasoning, evaluation is a difficult or impossible task;¹ the interpretation of the theory itself is made difficult if examples are not supplied. Aside from this need to provide examples, illustrations are required to demonstrate certain features of the method of pragmatic consistency--the different ways in which the method is used when modifying legal materials in various ways--which are best explained with immediate reference to cases. Two needs, then, should be met in this chapter: instantiation of the method, and some examination of the features possessed by reasoning which makes references to purposes, goals, or effects of law.

¹Compare Rolf Sartorius, "The Justification of the Judicial Decision", 78 Ethics 171 (1968); "Social Policy and Judicial Legislation", 8 American Philosophical Q. 151 (1971). His writings, and those of Bruce L. Miller, seem very much open to this charge.

Two problems that will not be dealt with in this chapter must be mentioned, lest it appear that I am unaware of these difficulties. The first is the problem of proliferation of purposes to be found in legal materials. Quite often we are confronted with a rule which has, or may be said to pursue, several goals. The need for a procedure to choose one of these goals becomes acute when the goals, in some way, conflict. This choosing-procedure will be one experimentum crucis for the more general difficulty of how purposes are properly to be discovered (upon a realist account, attributed) to legal materials. In this section, notwithstanding the difficulties, I will proceed on the basis of an unexamined intuitive account of purposes in the law.¹

The second difficulty which will not now be handled is that of functions or effects, as opposed to purposes, of the law. We, as outside observers, may say that some goal is being fulfilled by some law which was not its intended goal (although once conscious of this effect of the law, it might become one of the law's purposes; or conversely, a reason for rejecting the law). The relations between effects and purposes will not be examined at this time.^{2,3}

¹This is made more easy by the fact that, by and large, I shall adopt the judge's choice or finding of goals in the law under discussion.

²For an interesting analysis of some functions in the law, see John T. Noonan, Jr., and Cynthia Dunlap, "Unintended Consequences: Laws indirectly Affecting Population Growth

Once again our intuitive sense of this distinction will be relied upon.

A. A Taxonomy of Hard Cases

The first thing to be determined is, 'What exactly is a "hard case"?' For 'hard case' is an equivocal term; and, indeed, the concept of the hard case which has grown up in recent writings on jurisprudence, it must be noted, is quite different from the traditional concept which the term had denoted in ordinary legal usage. Its traditional legal usage is given in Black's Law Dictionary as follows:¹

Hard Cases. A phrase used to indicate decisions which, to meet a case of hardship to a party, are not entirely consonant with the true principle of the law. It is said of such: Hard cases make bad law.

It is perhaps not altogether lacking in significance that while, for a judge, a hard case is one where the law appears to be about to cause a hardship to some (presumably blameless) party, for current jurisprudents a hard case is

in the United States" in Aspects of Population Growth Policy, Parke and Estoff, eds., U.S. Government Printing Office, 1972.

³Note the problem of tax deductions for dependents. While the purpose might be that of encouraging population growth (pronatalism), its function is in fact to limit the family size of, at least, poor Americans. Compare Noonan and Dunlap, *ibid.*, who look at the functions, with another article in the same volume, Judith Blake, "Coercive Pronatalism and American Population Policy." The latter seizes upon the purpose of the law, not realizing that in fact its function defeats its purpose.

¹Black's Law Dictionary, op. cit. n. 21, p. 847. Hereinafter cited as 'Black's'.

one where the law has made it hard (for the jurists) to supply an adequate theory of the legal reasoning employed in the case. For this does seem to be the way in which the phrase 'hard case' is used in modern jurisprudential discussion.

It becomes apparent, therefore, when one investigates the different taxonomies (lists of types) of hard cases in jurisprudential writings, the taxonomies are inextricably tied up with the theory of reasoning which the writer is supporting; which is to say, the concept 'hard case' is nearly entirely theory-dependent. In theories which claim to have descriptive significance, this usage would tend to collapse into a more natural usage, wherein a 'hard case' is one which is (cognitively) difficult for judges to decide. Yet, to the extent that the description is faulty, even here there would remain a divergence between those cases which are 'hard' (to explain, accommodate, or solve) for the legal philosopher, and those which are 'hard' (to decide) for the judge.¹ In general, therefore, those cases which X's theory has trouble in accommodating are called by X 'hard cases', although these cases may neither cause a hardship to an individual, nor are viewed as hard by the deciding judge.

¹Much of Llewellyn's The Common Law Tradition: Deciding Appeals illustrates this nicely; for in the ordinary 'mine run' of cases which are easy for the judge to decide are cases which fall under one or another of those characteristics supposed by legal philosophers to constitute a hard case (e.g., cases where a legal rule is expanded in scope).

There exists a great temptation to establish, similarly, the meaning of 'hard case' in terms which are natural to the theory of pragmatic consistency. I would prefer to differentiate hard cases from easy ones through the notion of pragmatic consistency, that is, by making essential reference to the relation between the effect of following a literal interpretation of the rule and the achievement of that purpose which the rule is designed to serve. Further, I would claim that often a case which others describe as 'hard' is hard owing to an imminent danger of pragmatic inconsistency which the case represents, rather than to any other characteristic which the case might possess.

It has been said, for example, that ambiguity in the language of statutes is a common source of hard cases in the law.¹ I shall argue, however, that the difficulty posed by some cases which is attributed to ambiguity is rather owing to a difficulty which the cases present in having applied to them the method of pragmatic consistency: because, perhaps, the goal is unclear, or owing to the fact that the literal interpretation of the statute would yield pragmatically inconsistent results the case is felt to be 'hard' and not owing to any purported ambiguity. It is indeed difficult to understand how one could maintain that ambiguity or

¹The doctrine of H.L.A. Hart, that the open texture of words is a major source of hard cases, is intended here. See his The Concept of Law (Oxford U. Press, 1961), pp. 124-131. My comments which follow are consistent with Fuller's criticism of Hart in this regard; see Lon L. Fuller, "Positivism and Fidelity to Law" 81 Harv. L. Rev. (1958).

equivocity of the language of a statute (as opposed to its 'ambiguity' of purpose) does, alone, suffice to make a case hard, for most often statutes with exceedingly ambiguous terms employed in them give rise to no problems at all. How may dictionary definitions may be found for 'consideration'? For 'administration'? For 'solicit'? Ambiguity is so common, and so harmless, in day-to-day life that we tend to forget this.

✓ The response to this that might be expected--that words in general are ambiguous only in the absence of a context, but once the context is supplied the ambiguity disappears--is well-taken. Yet supplying the context in which a term is used is helpful precisely because it tells us something of the intentions and purposes of the speaker. Think of the various contexts which may be supplied: e.g., spatio-temporal reference, when and where the word was used; but will this context tell us anything about how to interpret the utterance? Another way to 'place an act in context' would be by specifying the casual antecedents of the act: in the case of an utterance, the specification would tell us which neurons were fired, etc. Would this help? Surely not; because 'context' itself is ambiguous (or equivocal; I have been using the terms interchangeably), and it is only the purposive or intentional context, those surroundings which will supply a clue to the purposes and intentions of the speaker, which is ordinarily meant when we seek the 'context' of an action (rather than that of an occur-

rence).¹ There is, therefore, some reason to believe that many hard cases have their difficulty attributable to problems in determination of purpose, problems of the sort dealt with by pragmatic consistency.

But rather than list the categories of hard cases which are suggested by the theory of pragmatic consistency, it will be useful to provide a taxonomy of hard cases which would be easily recognized by other writers on jurisprudence. As should be expected, there is no simple taxonomy which is universally, or even widely, accepted. Some writers,² for example, include as a hard case one which the judge decides contrary to that decision which would be required by an 'objectively closer' rule of law. Others,³ not so concerned with judicial practice as with proper judicial theory, respond that a case does not become hard simply because a judge fails to use the applicable rule of law (to put it bluntly, the case is not hard whose only special characteristic is that the judge decided it wrongly; what the British call cases decided per incuriam). Rather, it could be said, one has a hard case only when there exists something other than the (prima facie) misapplication of law which justifies

¹Not always, of course; scientists will frequently mean by 'context' the two deviant usages supplied in the text.

²Cf. Leonard Boonin, The Concept of a Valid Legal Decision: A Study in Twentieth Century Legal Philosophy, unpub. Ph.D. dissertation, Columbia U., 1963, pp. 68 ff.

³Cf. Miller, op. cit. n. 2, p. 160.

the decision in question; and this 'something' must itself be a judicially proper reason, rule, or principle. Since the theory of pragmatic consistency does not view actual judicial practice as given data which must be accommodated, I shall adopt the second alternative: all of the hard cases which will be examined will be such as may be considered to possess a prima-facie justification for departing from 'valid law'.

With these preliminaries aside, the list of types of hard cases which I shall deal with may be supplied; a full explanation of these types will appear in the ensuing subsections.

1. Cases where some precondition for following the rule is lost, while yet the rule retains formal validity (it has not yet been 'stricken from the books'). In these cases, a judge fails to follow the rule because the facts which the rule presupposed have changed (or are now known never to have existed); in view of the judge's knowledge, the law cannot any longer accomplish what it set out to.

2. Cases where a law with an authoritative written form is to be applied, which contains ambiguous language; i.e., where the judge's decision will turn upon answering which, among the possible interpretations, the judge ought to adopt. This type of hard case includes the problems raised by the 'core and penumbral' meaning of words;¹

¹See n. above on Hart.

but it is not confined to problems arising from the ambiguity of (single) clauses, sections, etc. (The problem of defining 'ambiguous' which these remarks raise will be dealt with in the appropriate section.) Nor is this type confined to statutory interpretation, for it may arise in the interpretation of any legal document with an authoritative written form, e.g., constitutions, administrative regulations, and, sometimes, private legal instruments, such as wills and contracts.

3. Cases where some legal material, generally a rule (and never, so far as I can see, a principle or policy, in the sense intended by Dworkin and Wellington),¹ is expanded to include situations, or to govern situations, to which the rule had not been previously applied. This type includes many of the hard cases sometimes referred to as 'cases of first impression'.

4. Cases where a rule is narrowed, so that it no longer governs situations which it was previously held to govern.² Within this type also fall some cases of first impression.

There is one other type of hard case to be discussed, but it shall not be dealt with in this chapter. Cases which involve situations governed by two rules (or other legal material) which apparently yield conflicting results will most profitably be left until the problems associated with

¹See below.

²The belief might have been encouraged by law-review articles or text-book writers, or even by an obiter dictum.

determining the purpose or purposes of the law have been clarified. It should be noted, however, that from one point of view several of the types already mentioned can be seen as problems of contradictions in the law (i.e., contradictory guidance supplied by different legal materials). For example: a principle justifying the expansion of a rule might conflict with the principle that 'Whatever is not prohibited is permitted'.

This is just one indication of the general problem involved in setting up a taxonomy of this sort. To what extent can or need it be claimed that these categories do not overlap? There does not seem to be a hard-and-fast distinction between these categories, e.g., between the abrogation (or abolition) of law and the narrowing of a law.¹ It is, however, important for my purposes that some distinction between these types be retained. Poor though the taxonomy may be, it is nevertheless useful to have it in reconstructing judicial opinions. The reason for this is that pragmatic consistency is used differently in these different sorts of cases (as shall be shown).

B. Cases Where Preconditions for Applying Rules Are Lost²

Any rule, or other legal material, presupposes a

¹This comment will only succeed, it should be noted, upon a theory of law which does not 'individuate' laws in a single, rigid fashion.

²For additional examples of hard cases, see Appendix.

certain context, i.e., some background facts are assumed. The law 'presupposes' this background in the sense that we cannot believe that any rational person would have enacted such a rule if he had not believed that these background facts obtained or might, in the future, obtain. Bruce Miller makes this point in the following way: "[T]here is a kind of factual statement which is very important in justifying judicial decisions. These are the statements of fact that are needed to argue from a principle to a rule and from a principle to a decision; they are not specific to the case at hand . . . but [are] general statements of fact which provide a connection between principles and decisions."¹ These facts, or preconditions, are the links between a given goal and the rule adopted to fulfill that goal; given their truth, the adoption of a rule becomes rationally intelligible.

1. Broad Background Facts

These background facts can be very broad in nature. The broadest of preconditions (or necessary background facts) which any legal rule with prescriptive intent must satisfy if it is to give efficient direction to human effort is that it must be possible to obey that rule. Lacking this, the rule cannot achieve any goal at all. I am referring to what Lon Fuller calls the 'eight principles of the internal

¹Miller, Principles, Rules and Cases, p. 141.

morality of law'¹ (although his list might not be complete: see the additions suggested by Summers in his review of Fuller's work).² Fuller's characterization of law as "'the enterprise of subjecting human conduct to the governance of rules'"³ is provisionally acceptable here, if it is remembered that our discussion is only restricted to one class (though rules guiding conduct are a very large class) of legal rules.

The eight principles which Fuller lists include the principles that laws must not be too unclear,⁴ that the bulk of the rules of a legal system must be prospective rather than retroactive in effect,⁵ and that laws must be sufficiently promulgated.⁶ Unless these and other principles are followed, Fuller claims, we have "something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."⁷

We need not concern ourselves with the vexing problem of whether these are principles of 'morality' or

¹Lon L. Fuller, The Morality of Law (New Haven: Yale Univ. Press, Rev. Ed., 1969).

²"Professor Fuller on Morality and Law" in Summers, ed., More Essays in Legal Philosophy (Univ. of Calif. Press, 1971), p. 123, n. 2.

³Lon L. Fuller, The Morality of Law, p. 74.

⁴*Ibid.*, pp. 63-65. ⁵*Ibid.*, pp. 51-62.

⁶*Ibid.*, pp. 49-51. ⁶*Ibid.*, p. 39.

principles of 'efficiency' of law.¹ Nor is it important, for our purposes, to question whether Fuller has properly defined the term 'law'; acceptance of his definition (if it was intended to constitute a definition) need not be assumed. All that need be granted is that, with regard to legal rules of the direction-granting sort, these principles are necessary to success. One's conduct cannot be guided by a rule of whose existence one is unaware, of whose existence one could not have been aware, whether because the law has not been promulgated or because the law has retroactive provisions. One's conduct cannot be guided by an unintelligible rule. It may be that a legislature may, properly, enact some rules which contravene these principles; but the function which such rules are to serve cannot be such as to depend upon human obedience to the rules. More often, however, it is the case that the legislature unknowingly violates one of these principles, and thereby makes it impossible for the rule to achieve its goal; unknowingly, a rule which, to be successful, must be obeyed, was formulated in such a fashion that it cannot. Because these rules cannot achieve their goals, they are, in the method of pragmatic consistency, subject to abolition by the judge. If these principles are ignored, the most broad of background conditions for a rule to have rational dimension--that it can be followed--has been lost.

¹See Ibid., "A Reply to My Critics," and references cited there.

Fuller recognizes that these 'principles of the internal morality of law' may all (with, perhaps, one exception)¹ be reduced to, or deduced from, the one principle: laws must not be impossible to obey. His only reason, it seems, for not presenting them in this way is that his didactic purpose would not be well served by this device; Fuller

¹The possible exception is Fuller's last principle, viz., that there must be congruence between official action and declared rule (see The Morality of Law, pp. 81 ff.). This principle requires that the government act in that fashion in which it has said that it shall act; its avowed rules of decision must be put into practice. It would seem that this principle cannot be subsumed under the stricture that laws must be such as can be obeyed; it derives from another consideration. "It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience will become futile--as futile, in fact, as casting a vote that will never be counted." (Morality, p. 39) It would seem that the decisive reason for including this principle is that we cannot expect that laws which it is unreasonable to obey will probably not be obeyed. Yet, if this is to be accepted as a criterion for the unacceptability of laws, it would seem that laws which violate the deep moral convictions of a significant segment of society. From Fuller's silence on this matter it may be inferred that this latter is not an acceptable principle.

One class of examples wherein the principle of 'congruence' has been accepted by the courts is worth noting. Defendants have at times successfully argued that a violation of a law which the legal system has consistently failed to enforce is excusable or justifiable. This plea is similar, although not identical, to the plea of desuetude which is formally recognized in courts on the Continent; it is called by Sanford and Mortimer Kadish the 'norm of justifiable nonenforcement' (see their Discretion to Disobey, pp. 127-140). In *Redmund v. U.S.* (384 U.S. 264, 1966) defendant was charged with a violation of the Postal Obscenity Law, in that Redmund and his wife had taken nude photographs of each other and had them processed by mail. The Supreme Court vacated the conviction of Redmund, since this sort of violation had never previously been prosecuted (although the law, by its terms, supported the conviction). The Soliciter General, incidentally, supported Redmund's plea.

says, on this point:¹

The question may be raised at this point whether most of the other desiderata [other than that which says that laws must not require the impossible] that make up the internal morality of law are not ultimately concerned with the possibility of obedience. There is no question that the matter may be viewed in this light. Just as it is impossible to obey a law that requires one to become ten feet tall, so it is also impossible to obey a law that cannot be known, that is unintelligible, that has not yet been enacted, etc.

If, therefore, pragmatic consistency requires that laws be applied when, and only when, their reason requires application; and if these eight Fullerian principles represent necessary preconditions for many legal rules to achieve their goals in the only way possible, by obedience to them on the part of the citizenry, then these principles may be said to define part of the necessary context for these rules. With this bridge between Fuller's theory and that of pragmatic consistency, the numerous cases where courts have refused to apply statutory rules, or have abolished or substantially modified common-law rules, on grounds, e.g., of their extreme vagueness, or of insufficient promulgation, may be included as examples to be found in our system where this first requirement of pragmatic consistency (viz., that the context in which rules will operate be such as to permit them to achieve their purposes) has achieved recognition.

The subsumption of Fuller's theory has a considerable importance for the logic of argument by the method of

¹Ibid., p. 70, n. 29.

pragmatic consistency. Information about what I term the particular background facts (see following subsection) needed to preserve the rationality of a rule may yield evidence for the claim that the rule's posited purpose could no longer be achieved by adherence to the rule. Still, the rule may achieve other purposes or functions, which are not necessarily vitiated by the background change alleged.¹ On the other hand, a demonstration that one of the Fullerian principles has been violated by a rule constitutes in itself sufficient reason for pragmatic consistency requiring that that rule be changed or abolished (except in the rare instance when a rule serves other than a guidance-function). Allegations of the violation of a Fullerian principle serve as a very strong warrant for 'controlling' a rule by pragmatic consistency; for this allegation amounts to the claim that whatever (among a broad range of possible goals) the goals of a rule are, none of them may be achieved by the rule as it currently stands. This form of argument is largely independent (in a way that other argument-forms of pragmatic consistency are not) of the determination of the particular goals of a rule.

2. Specific Background Facts

There may be other background facts which are assumed by a rule and which are specific in nature. An example of

¹See further on this Section C, Subsection 3 ('Difference Between Expanding and Narrowing Law').

this may be found in the case of Kennedy v. Parrott.¹ Chief Justice Barnhill wrote the court's opinion. Prior to Kennedy, the established common-law rule had been that any extension of an agreed-upon operation by a physician constituted a battery on the part of the physician, unless the patient or his authorized representative consented to the operation being extended.² Some of the mischiefs contemplated by this rule were relatively clear and reasonable: the fact that a person is a physician, even the patient's own physician, ought not to be taken as free license to intervene surgically in ways which the patient might not consider to be in his own best interest. The possibilities for abuse of trust by physicians, in the absence of such a precautionary rule, are evident.³

But Chief Justice Barnhill was of the opinion that this particular common-law rule was only appropriate given

¹Kennedy v. Parrott, 243 N.C. 355, 90 S.E. 2d 754.

²This rule constitutes part of the origin of the doctrine of 'informed and voluntary consent' in the law of medicine. See Katz, Capron and Glass, ed., Experimentation with Human Beings (Russell Sage, 1972).

³Compare with the problem of surgery for breast cancer. A woman will often consent to an exploratory operation, to discover whether a lump of the breast is malignant; when the surgeon operates, and discovers an active cancer, he may want to begin immediately a radical mastectomy, instead of reviving her, obtaining her consent, and then having to subject her to general anesthesia a second time. Yet, since women sometimes object to the possibly incapacitating and disfiguring mastectomy, the physician cannot proceed as he might otherwise desire; the law requires him to obtain the woman's consent. See Corn v. French, 71 Nev. 280, 289 P. 2d 173 (1955).

the background facts concerning surgery which had obtained at the time when this rule was announced, and which had since passed away. At the time when the rule was developed, the surgeon who found a medical need to extend an operation could often ask the patient himself whether the extension should be done. As the Justice notes, the rule in question was developed before the introduction of anesthesia, and was appropriate to a time when patients were often conscious throughout the course of surgical procedures. When the patient was not conscious, another condition which used to obtain might help: since surgical procedures usually took place in the patient's own home, members of his family were at hand to grant consent to the extension.

By the time Kennedy was litigated these background facts had changed. Anesthesia was widely employed, so that the patient could not give consent during the operation in the course of which the necessity for the extension is made evident. In addition, operations are done today in hospitals under strict aseptic conditions, so that even if the family is waiting in the hospital, for the surgeon to attempt to obtain a proxy consent from them might entail an unacceptably long and dangerous delay.

The judge concludes this review of changed conditions in a fashion indicating the present use of the method of pragmatic consistency: he says, "Ratio est legis anima: mutata legis ratione mutatur et lex. Reason is the soul of

the law; the reason being changed, the law is also changed."¹
 In two ways, then--through greater knowledge of the context in which the law operates, whether this context be very broad and abstract or very narrow and concrete--a system of reasoning which focuses upon the purposive character of law will change the law, or 'control' its operation.

B. Hard Cases Due to Ambiguity in the Law

1. Types of Ambiguity

By 'ambiguity' is typically meant 'capable of being understood in two or more ways'. But the legal context has characteristics which are not reflected in common usage. Since, in law, we are concerned with understanding, not abstract propositions, but warrants for action--laws--I will use 'ambiguity' in an unaccustomedly broad sense, to mean any use of language which, due to defect in expression, fails to supply those who seek to be guided by the law with a clear direction for action (excluded from this, however, are conflicts in or between laws).

Consider the following two cases:

a. A maid is told to "Get the family something to eat." She is unsure as to what sort of a meal, specifically, is desired: fish, or fowl, or meat, etc.

b. A maid is told to "Get something to eat." The

¹Kennedy v. Parrott, quoted in Seavey, Keeton and Keeton, Law of Torts (West pub., St. Louis, 1964), p. 38. Hereinafter cited as 'Torts'.

difficulties which she would have encountered in carrying out the first command are now present as well. In addition, however, she is unsure as to whether she is being told to get herself something to eat, or to get the mistress or family she serves something to eat.

These examples illustrate two different types of ambiguity which arise in the law. In the first case, the maid knows who is to receive the food, but does not know which food is desired. She chooses to make hamburger for supper. Does the mistress have, ordinarily, the option to complain at this point, and say that she wanted fish? Could she say, "You have misinterpreted the command. I asked for something to eat; and one edible thing is fish; and I meant for you to understand that I wanted fish."? This complaint is not open to her; our maid, if philosophically inclined, would be justified in responding that the resolution of the ambiguity found in the command had been delegated to the maid in a discretionary fashion. There are, indeed, constraints (which go beyond considerations of language and meaning) upon the interpretation which may be given to the command. Not only is the maid constrained to only bring back edibles (she may not bring back rocks); she is constrained as well to a restricted class of edibles. She is subject to criticism should she bring back a squirrel which she has just brained. Still, within the wide class of possible instantiations of 'edibles' she has, by delegation, broad discretionary power. In fact, the command was most

likely purposely ambiguous (what is sometimes called 'equivocality')--although, as indeed often happens, the ambiguity was likely not desired so much as was the avoidance of tedious explication.

In the second example, in which the maid is unsure as to who is to be fed (the maid herself or the employers of the maid) the situation is quite different. Here it is reasonable, as it is not in the first example, to say that the maid is unsure of what is meant. More precise direction ought to be forthcoming, for there is one 'uniquely correct interpretation' which was intended. Here is unintentional ambiguity, or ambiguity proper. In this case, should the mistress be asked to clarify the command, the reasonableness of this request for clarification would be apparent to the mistress. In the first case, on the contrary, a request for clarification would not have been in order: a proper response would have been, "I want you to decide what to get me to eat on your own."

There is, therefore, as between these two forms of ambiguity (the intentional and the unintentional) a difference in the sorts of criticisms which might reasonably be made; there is also a difference between the kinds of problems which each engender.

The application of this (rather tendentious) parable to the problem of ambiguity in the law is obvious. There are, on the one hand, laws which are designedly ambiguous, and which, it would seem grant a warrant to the judge to

use his discretion in applying; these are the laws which intentionally delegate discretion. Many laws of this sort will, in fact, state that the judge is to employ discretion in applying them: an example would be a law granting the judge the right to impose a sentence of from five to fifteen years imprisonment for armed robbery (at his discretion). At the other extreme, there are laws which, on all accounts, possess one 'uniquely correct interpretation' (although opinions as to which interpretation is to be supplied differ). Between these extremes, there are laws in regard to which opinions might differ as to whether discretion has been delegated or not. The due process provision of the Fourteenth Amendment constitutes one such law. Justice Frankfurter felt that this clause gave the judicial branch discretion to determine whether the law whose constitutionality is put into question was so in conflict with the conscience of civilized man as to violate due process; Justice Black felt that this clause imported a duty upon the states to abide by the Bill of Rights, which in turn represents absolute limitations upon the governmental exercise of power.¹

The problems which intentional ambiguity raises for a theory of legal reasoning which has as a goal the limitation of judicial discretion are, contrary to what might be expected, not great. It would be expected, that is, that,

¹See on this "Mr. Justice Black and the Judicial Function," in Paul Freund, On Law and Justice (Cambridge: Belknap Press, 1968), pp. 214-223.

if judicial discretion is to be eliminated, there must be a single, uniquely correct decision in every case adjudicated by the courts; and the fact that no such decision is forthcoming, e.g., in sentencing procedures, shows that the limitation of judicial discretion cannot be effected. Yet this is far from being a decisive point.

For, if any criticism is in order here, it is a criticism of the legislative, not the judicial branch; and it poses a problem for the science of legislation, not for a theory of legal reasoning. A theory of legal reasoning cannot extract from a designedly ambiguous instrument unambiguous guidance, and if unambiguous guidance is really necessary (as I do not agree it is) then this must be solved by better legislation. Indeed, it might be said that in writing this designedly ambiguous instrument the legislature has removed the discretion of the judge to act in a non-discretionary, 'patterned' fashion--the judge is not free to reject this legislatively-granted freedom! (It must be recalled that this argument only holds for a circumscribed class of laws, those which grant the judge discretion in an explicit or near-explicit fashion.)

This is not to say that no guidelines may be supplied for the exercise of this discretion.¹ The maid, too, had constraints, even upon her choice of edible substances. It

¹See, for example, Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (Chicago: Illini Press pb., 1971).

is possible to abuse the discretion which is granted; by, for example, interpreting the intentionally ambiguous clause in such a way as to defeat its apparent purpose. Pragmatic consistency is relevant to the application of these laws as well. It is nevertheless not the case that pragmatic consistency will, when applied to this sort of legal material, supply a uniquely correct result in all possible cases.

On the other extreme there are laws which are unintentionally ambiguous, where discretion has not been delegated, but, rather, it is expected that there exists a correct resolution of the case under law with which the judge is confronted. The suggestion made here is that when there is a claim made (by the litigants or the court) that the language of the law is ambiguous, it is often the case that the problem is less one of language than it is one of purpose. It has already been argued that ambiguity of language could not, in and of itself, lead to a hard case; for if it did, any case arising under written law could be a hard case. (There is an omnipresent capacity for ambiguity in all language.) Two examples of cases which would, ordinarily, be said to be 'hard' due to ambiguity will now be supplied. They demonstrate that hard cases purportedly involving ambiguity may have another explanation; incidentally, the logic of solving this sort of problem will be explained.

2. Cases Involving 'Ambiguity'

The first case is Mitchell v. Cohen, which came before

the Supreme Court in 1948.¹ The Veteran's Preference Act of 1944² had provided that preferential consideration for governmental jobs would be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war . . . and have been separated therefrom under honorable conditions." Cohen had enlisted as a member of the Volunteer Port Security Force, a branch of the Coast Guard Reserve. Members of this force served for about twelve hours a week; most members continued their civilian employment throughout the course of their service; they could not be transferred from the city in which they lived without their consent; and many were disenrolled when they complained that their duties were interfering with their civilian employment. Cohen now claimed that by virtue of this service he was entitled, as was any other veteran, to the benefits of the Veteran's Preference Act.

The meaning of the term 'serviceman' was not specified in the statute, and so it is likely that his case will be considered by some to represent a 'core and penumbra' situation (with respect to 'serviceman'). Yet Cohen pointed out that Webster's had defined 'serviceman'--without a trace of ambiguity--as 'one who has performed military service'--and it was undisputed that Cohen did indeed perform military

¹Mitchell v. Cohen, 333 U.S. 411 (1948).

²58 Stat. 387, 15, U.S.C. (Supp. V, 1946), sec. 851.

service.¹ It might still be maintained that the statute was ambiguous (due to its language); but surely the more difficult and important problem which the statute posed was the need to determine its purpose. Whatever ambiguous language is involved may be resolved once the purpose of the law is known.

For example: if the practice of preferential hiring of veterans was intended to compensate the serviceman in consideration of his help to his country in its time of need, Cohen might well be entitled to the law's benefits. His service was meritorious; not only did he volunteer to serve, but in addition he, as the other members of the Volunteer Port Security Service, received no salary, in contrast to regular servicemen. If the purpose of the law, on the other hand, was to compensate servicemen for hardships incurred, then Cohen would not be entitled to the Act's benefits. It may be argued that the ambiguity in language was consequent upon this ambiguity in purpose; it must at the very least be granted that the difficulty of the former was compounded by the latter.

The clarification of purpose which the Court finally arrived at was that the purpose of the Act was to allow servicemen who had been "completely divorced from their civilian employment" to be reemployed and rehabilitated, and therefore Cohen was not entitled to these veteran's

¹See the opinion quoted in Hart and Sacks, op. cit. p. 1195.

benefits.

The standard approach used to solve ambiguities of purpose (and those ambiguities of language which, as in the preceding case, are attributable to or compounded by ambiguity of purpose) may be conceived as a three-level process. First, the court is confronted with a case falling under a law which, literally construed, requires decision D; second, a preliminary consideration of that law's purpose makes D appear dubious;¹ third, a detailed consideration of purpose is made, which will finally determine what is the correct decision.

This three-level process may conveniently be illustrated by Doherty v. Ayer² (referred to in Hart and Sacks' The Legal Process).³ By statute, cities and towns were required to keep the highways "reasonably safe and convenient for travellers, with their horses, teams and carriages at all seasons."⁴ In 1908, the case of Doherty raised the question of whether this statute required that highways be maintained in the state of repair which automobile traffic required.

¹The preliminary consideration of purpose is so natural as to often take place unconsciously. We begin to see an 'ambiguity' because the apparent purpose demands this; this is just one instance where our expectations influence our perceptions.

²Doherty v. Ayer, 197 Mass. 241 (1908).

³Hart and Sacks, op. cit., pp. 1214-1215.

⁴Quoted *ibid*.

On the first level, which involves decision reached through a literal reading of the statute, the answer is no, automobiles are not included in the law's scope: 'travelers' was immediately qualified to include only equine traffic. Hart and Sacks reconstruct the second and third levels as follows:¹

The statutory purpose would appear to have been to insure safety of travel. Why should that not be extended to automobiles, if the words permit of such an extension? [But is it not the case that the 'words permit' this only when the purpose of the statute is considered?] But the court found qualification of such purpose: The legislature has declared for safety of travel in the face of costs of highway maintenance for horse-drawn vehicles. It should not be held to have so declared as to much higher costs for auto travel, not foreseen because not foreseeable.

(Recall that here and elsewhere in this chapter the problems inherent in the crucial step of determining the true purpose of a law are not dealt with.)

The second level, the discovery of what we might call pragmatic ambiguity, is reached when we read the statute in the light of a purpose to insure 'safety of travel'; the third level resolves the case by better determining and delimiting the purpose of the law.

To sum up: some ambiguities are not properly resolved by a theory of legal reasoning, even one which has as its task the limitation of judicial discretion: these are the intentional ambiguities to be found in the law. Unintentional ambiguity may be eliminated by adopting that decision which, more than any other, furthers the purpose

¹Ibid.

of the law in question.

C. Expansion and Narrowing of the Law

1. Expanding and Narrowing Law vs. Resolving Ambiguities in the Law

To what extent may a distinction be drawn between the 'controlling' of law through the method of resolution of ambiguities, on the one hand, and, on the other, through the expansion or narrowing of the law? At first glance, there appears to be a major difference between these two classes: when the courts expand or narrow the law they change the law, whereas when they resolve an ambiguity they merely discover the 'true meaning' and sense of the law. One class involves 'judicial legislation', the other, 'judicial interpretation'.

Is this clear-cut distinction defensible? While it can be maintained (and, in fact, often constitutes a major tenet) for other theories of legal reasoning, the distinction is, of necessity, obscured or lost in the theory of pragmatic consistency. For in pragmatic consistency the law is 'changed'--given a broader or narrower effect, or made to apply to a greater or lesser class of cases--through a consideration of the purpose of the law; and that purpose is held to be immanent in the law itself, in such a way that those marks on paper or pronouncements from the bench which we call 'law' are only understandable given at least some understanding of the purpose of that law. This purpose is taken as though it were an implicit preamble to the law. In

one sense, then, the expansion or narrowing of the law, when properly justified on grounds of pragmatic consistency, does not constitute a change in the law at all (even though when this occurs our predictions of judicial action may be falsified, and our textbooks and journal articles outdated).

The distinction between resolving ambiguities in the law and changing the law is only possible given a theory of language which supposes that words which are used in a purposive context possess meaning which may be determined independently of that context. If this is granted, a judicial resolution of ambiguity can be accomplished without referring to the purpose of the law, while still remaining true to the 'law itself'; this procedure does not presuppose that the purpose of the law is, whether written or not, part of the law itself.

This theory of language is denied by pragmatic consistency, which views the proper application as well as the adoption of law as an ongoing purposive endeavor. While the claim need not be valid outside of the law, within the legal context pragmatic consistency requires that two propositions be rejected:

a. The distinction between the 'true law' (the 'black-letter rules') and the law which the true law purposively entails (i.e., those expansions, narrowings, and resolutions of ambiguity which are justified by pragmatic consistency).

b. The distinction between 'strict' and 'purposive'

interpretations of law and legal language.

It is not claimed that these distinctions cannot be made (by some other theorist); but rather, that from the perspective of this theory the distinctions should not be made.

Yet if this is so, what basis does pragmatic consistency have remaining for distinguishing between resolving ambiguity and 'changing' the law? First, they are distinguished in that resolution of ambiguity of language can only be done for a document with an authoritative legal form. We cannot speak of resolving the ambiguity of a common-law rule when no statement of that rule is thought to possess force of law qua statement. While a judge may be required to abide by a rule of common law, there is no judicial opinion in which that rule is expressed or stated which possesses legal force in and of itself--its strength derives from the fact that it is an adequate expression of a rule of law, which latter is independent of the opinion. The actual language of a statute possesses a force which the language used to state a common-law rule lacks.¹ So allegations of ambiguity of language are only applicable to written instruments; expansion or narrowing of the law ('change' of the law) might apply to either common-law rules or statutes and other legal written instruments.

While there is no further distinction between 'changing'

¹Cf. Max Radin, "Statutory Interpretation" 43 Harv. L.Rev. 863 (1930).

the law and resolving its ambiguities for the theory of pragmatic consistency, nevertheless a comment on the distinction which others see is in order. For when a judge reaches his decision by what he perceives as a resolution of ambiguity, he feels that he is not making the law; and he feels that he is making the law when he expands or narrows the law. If it is wished to accommodate the law to the law's purpose, therefore, this may be done to statutes without 'changing' the law; in contrast, the preservation of pragmatic consistency in common-law rules cannot be done through an appeal to ambiguity, it necessarily involves 'change'.

This may serve as a partial explanation of the fact that judges (in England and America) are often perceived as using the method of equity (i.e., the method of pragmatic consistency) when applying the common law, and foregoing equity when applying statutes. A commonly quoted claim of Sir Frederick Pollock's runs, "Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances. Unfortunately, they have for reasons which it is perhaps not very easy to define, been far less successful in their interpretation of the written law, or, in other words, of statutes."¹ My own reading, such as it is, suggests to

¹Note 9 L.Q. Rev. 106 (1893). Quoted in Davies, *op. cit.* 20, p. 519.

me that the courts often do use pragmatic consistency in applying statutes, but they do this by resolving ambiguities (and, at times, by finding ambiguities in unambiguous statutes, which they then proceed to resolve): this is not perceived as 'development' or 'judicial legislation' so much as 'interpretation'--a more comforting ascription. In the common law case, the judge is forced to work openly; in the statute case, the judge may work behind a veil or ambiguity; yet, from the perspective of pragmatic consistency, he does the same sort of thing in each case.

2. Cases of Expansion of the Law

First to be examined is a case involving a judge-made rule which was expanded in a pragmatically consistent fashion; to understand the case, some background needs to be supplied. It is often theorized that juries tend to decide cases in such a way that the party to litigation who can best bear the monetary loss which a decision adverse to him involves will be made to bear that loss. (This is sometimes referred to as the 'deep pocket theory'.) As a result, the common law in New York State forbade the mention in court of the fact that an insurance company will reimburse the defendant should the plaintiff's suit be sustained; for if the jury knew that the defendant's insurance company will have to pay (i.e., that the insurance company is the 'real party in interest') they would reason that, the law notwithstanding, it is best that the insurance company should

bear the loss and reimburse the plaintiff. It should be noted that this common-law rule was developed in the face of New York legislation which required that suits always be brought against the real party in interest; but I am interested in the expansion of this rule, rather than its original justification. The rule will be taken here as well-established.

In the case of Butera v. Donner¹ the court was called upon to extend this protection for insurance companies. The previous rule had required that defendant insurance companies not be named as the real party in interest; in Butera, the insurance company was the real plaintiff. (Any money awarded would go to the plaintiff's insurance company, rather than to the plaintiff.) Yet clearly the same prejudice which would operate against the insurance-company-qua-defendant would obtain against the insurance-company-qua-plaintiff. In each case the jury would take the side of the stereotypically destitute individual against the proposed depredations of the stereotypically omnivorous and wealthy insurance company.

The court therefore extended this common law rule, saying,²

The same frailties of human nature that impel a jury to return a large verdict against an insured defendant are still present and quite as much at work when a jury discerns that a corporate insurer of the plaintiff is

¹Butera v. Donner, 177 Misc. 966, 32 N.Y.S. 2d 633 (1942).

²Ibid., quoted in Torts, op. cit., p. 646.

to recoup a claim it has made. . . . This judge-made doctrine [that defendant insurance companies not be mentioned in court] is founded on necessity and justice and the same necessity and justice require that this motion [to name in court the insurance company as the real plaintiff] be denied.

The reference to the intention of the law, to the 'necessity and justice' which caused the adoption of the original rule, was unavoidable. There was neither real nor imagined ambiguity in this rule, for the rule had no authoritative expression to be ambiguous. But this does not work both ways: the fact that a statute does not, by any stretch of its language, cover a situation will not necessarily mean that the statute cannot be extended or 'changed' to cover it. If an appeal to an ambiguity in a statute fails, 'change' can yet occur.

Consider the case of People v. Price.¹ The Price Compound Company of Minneapolis sold, in Chicago, "Mrs. Price's Canning Compound," which, declared the label, was to be used in "canning all kinds of fruit, and is especially suitable for corn, beans, peas, asparagus, tomatoes, etc." The District Attorney did not share this optimistic view of the product, which contained, inter alia, boric acid. Price was charged with violating the Pure Food Act.

This Act was restricted, by its terms, to "unhealthful, adulterated or misbranded food, liquors, or dairy products."² Section Eight of the Act provided that food

¹People v. Price, 257 Ill. 587 (1913).

²Ibid., 589 (quoting).

shall be deemed to be adulterated "if it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health . . . and formaldehyde, hydrochloric acid, boric acid . . . are hereby declared unwholesome and injurious."¹ Yet, while boric acid was clearly not in the best of company, the statute was restricted by its terms to food, in other words, to products ready for ingestion by the consumer. The Price Compound was not itself a food, and was not added to food by manufacturers; rather, it was to be added to food by the housewife-consumer. Price therefore claimed that it had not violated the law.

The court did not agree. The statute must be extended with due regard to its purpose, and its "main purpose is to protect health by preventing adulteration of food. . . . [The use by the housewife of this product] would be as injurious to the health as if . . . added by a dealer."² The "prohibition against the sale of unwholesome and injurious preservatives is . . . necessary to make effective the manifest purpose of the enactment,"³ and the effect of the statute must extend to these cases.⁴

¹Quoted *ibid.*, pp. 591-592.

²*Ibid.*

³*Ibid.*, p. 595.

⁴The judge claims that "it requires no unwarranted stretch to hold that the title is broad enough to include

3. The Difference Between Methods of Expanding and Narrowing Law

I have argued that from the perspective of pragmatic consistency there is little essential difference between the resolution of ambiguities and the changing of a law through expansion or narrowing of it. There is, however, considerable difference in the logic of this theory's application between extending a law, on the one hand, and, on the other, narrowing it or abrogating it. This difference is a result of what I have called the phenomenon of 'proliferation of purposes'. A rule may serve a number of goals or purposes, each of which is valid, and each of which would, perhaps, have been individually sufficient to justify the establishment of the rule in the first place. To expand a rule, therefore, all that is necessary is to show that one of the rule's goals is furthered by expansion. To narrow or abrogate a rule, on the other hand, it must be shown that none of the reasons for, or purposes of the rule will thereby be hindered. To expand a rule, an exhaustive investigation of purpose is not necessary: all that need be shown is that one purpose of the rule is thereby furthered. To narrow a

the sale of unwholesome preservatives." With respect, I do not agree: this is clearly a case, not of ambiguity, but of expanding the law, and the judge's argument is in the main that his expansion is 'so necessary to make effective the manifest purpose of the enactment' that despite the language the statute needed to be held applicable. The judge was apparently influenced to couch his argument in the form of an appeal to ambiguity because of the Illinois Constitution; section 13, article 4 prohibits statutes which embrace subjects not in their titles.

rule or abrogate a rule it is necessary to show that each and every goal of the law will be served as well after the change as before it.

The point is illustrated well by the case of Leonard v. George,¹ decided by the United States Court of Appeals, Fourth Circuit, in 1949. The case involved an appeal for damages awarded as a result of an action in tort for malicious prosecution. The plaintiff had been arrested and jailed, and then was released on bail. When released, the plaintiff paid Boykin, the superintendent of defendants in that territory, \$415 to have the prosecution dismissed. Evidence was introduced in court that at the time of payment the plaintiff had protested his innocence, and "stated that he was being held up and was making payment under protest because he had to get away."²

To sustain a charge for malicious prosecution, it was required that the plaintiff must have been prosecuted and acquitted.³ When these conditions do not obtain, the plaintiff is estopped (prevented as a matter of law) from claiming his innocence of the charge; if, for example, a valid compromise solution is reached, the question of the defendant's guilt or innocence must remain open.⁴ The

¹178 F. 2d 312, quoted in Torts, op. cit.

²Ibid. in Torts.

³See Glinski v. McIver, 1962 App. Case 726, opinion by Viscount Simonds.

⁴Restatement of Torts, Vol. 3, p. 400.

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problem is that although in the Leonard case a compromise was reached, the compromise was in fact invalid, so that the relevance of the rule of estoppel is questionable. Should the rule be extended, to prevent litigation for malicious prosecution to those who have accepted an invalid compromise, or should it be narrowed (or constructed narrowly) so that the acceptance of an invalid compromise does not support the estoppel? The answer to this question is dependent upon the reason or purpose behind the original rule.

The majority opinion of Chief Judge Barker found two reasons for the rule:

a. Termination of the prosecution by compromise does not show that the defendant was innocent or guilty, despite the state of the evidence against the erstwhile defendant which could now be produced in court. The defendant might be inclined, in certain circumstances, to accept a compromise rather than have himself vindicated by means of a lengthy and possibly expensive law-suit. However, it would be unfair to the prosecutor to then allow the defendant to bring a charge of malicious prosecution: for without the consent to terminate the prosecution, it may be assumed, the prosecutor would have proceeded with his investigation and turned up evidence of guilt--evidence which, at this late date, is no longer available. The guilt or innocence of the defendant is therefore an entirely open question, which

cannot now, in fairness, be resolved.¹

b. "The reason for the rule seems to be that where the termination of the case is brought about by a compromise or settlement between the parties, understandingly entered into, it is such an admission [on the part of the defendant accepting the compromise] that there was probably cause [for the arrest] that the plaintiff [currently bringing the charge of malicious prosecution, i.e., the erstwhile defendant] cannot afterwards retract it and try the question which by settlement he waived."² In short, the second reason for allowing a compromise to stand in the way of a charge of malicious prosecution is that the acceptance of the compromise yield a considerable evidence that the arrest was properly made.

If the first of these reasons is accepted, it is clear that the rule of estoppel should be extended to cover invalid compromises. While it cannot, upon this reason, be assumed that the defendant (who is now the plaintiff) was guilty, neither can it be shown that he was innocent, his protestations notwithstanding. True, the defendant was pressed for time, and felt that he was being 'held up' (in both senses of the phrase); but it would be unfair to require the prosecutor to, at this late date, resume an interrupted and stale investigation. If, on the other hand, the second reason is accepted, invalid compromises should not be

¹Per Lord Tenterden in Wilkinson v. Howell, Moody & M., p. 495.

²White v. International Textbook Co., 156 Iowa 210, 136 N.W. 121.

covered by the rule, for at least one of the rule's purposes (the first) justifies the extension. Judge Barksdale in dissent, however, fell into the trap of assuming that there was only one reason for the rule (the second); and given that reason, he says that "It would seem that when the reason for the rule does not exist, the rule should not be applied."¹ It should be clear why I think that Barksdale's view cannot be sustained. He was required to show that none of the purposes of the rule would be served by applying it to those who accepted an invalid compromise, not merely that one of the purposes would not be so served.

By the logic of pragmatic consistency, then, it is more difficult to justify the narrowing or abrogation of a rule than its extension. This applies, by the way, to narrowings which are affected by resolving ambiguities as well.²

To conclude this section I will provide one example where the law was, despite the above strictures, successfully narrowed on grounds of pragmatic consistency. The

¹Quoted in Torts, op. cit.

²This is to some extent balanced by some high-order principles of the legal system, such as 'whatever is not prohibited is permitted' or 'nulla poena sine lege'. These principles tend, that is, to limit the court's power or extending rules along the lines suggested by pragmatic consistency. The status of these sorts of principles under a legal system which, unlike ours, is purely governed by the method of pragmatic consistency is not here investigated.

case is described by Jerome Frank.¹

Sometimes a literal interpretation of a piece of legislation is indubitably correct. Often, however, so to construe a statute will yield a grotesque caricature of the legislature's purpose. A famous case in point was decided in 1892. Congress in 1885 had passed a statute which expressly prohibited "the importation . . . of foreigners . . . under contract . . . to perform labor in the United States. Trinity Church, in New York City, made a contract with an English minister, who having agreed to become its pastor, came to this country. The government sued the church for violation of the statute. The Supreme Court admitted that the act of the church was "within the letter" of the statute. But it held that it was not within the purpose Congress intended. The Court said it was not substituting the judges' will for that of the legislature, for "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving a broad meaning to the words, makes it unreasonable to believe that the legislation intended to include the particular act. . ."

I want to particularly note one point in connection with the Trinity Church case: it serves as an example of the fact that some cases may arise where no exhaustive investigation of purpose is necessary in order to know with certainty that this case should not be included under the law. Sometimes we feel that whatever the purpose was, it could not possibly be furthered by applying the law to this case. (It will be noted that nowhere does Frank say--nor did he apparently feel it necessary to say--what the purpose of the statute was.) It goes without saying that this impression of ours might on occasion turn out to be mistaken.

¹Jerome N. Frank, Courts on Trial (NY: Atheneum pb. ed., 1971), pp. 297-298.

D. Conclusion of the Chapter

This chapter, and the one preceding, was intended to introduce the notion of pragmatic consistency as a method of legal reasoning, and to demonstrate, by means of examples, the plausibility and attractiveness of the theory. The discussion of the way in which the method of pragmatic consistency would resolve hard cases in the law also demonstrated some of the logic involved in the use of reasoning about law by means of the law's purposes. Due to the idea of proliferation of purposes, for example (to be more fully discussed in the following chapter), it was shown that it is easier to expand the law than it is to narrow it. The idea that the fulfillment of goals by law presupposes a certain factual context was developed to show how pragmatic consistency could solve some of the problems presented by outmoded law, and how the theory of pragmatic consistency includes much of what is valuable in Fuller's theory of the internal morality of law.

Throughout, positive aspects of the theory have been stressed, and the more problematical aspects of the theory (e.g., the notion of 'purpose' employed; the method of discovering purpose in law) have to a large degree been ignored. An intuitive solution to these difficulties, rather than one in which is critically developed and acceptable, has been employed. These problems shall be dealt with in the following chapter; until then, my aim has been to argue that, if these problems can be solved, and if the theory can be

defended against criticism, it is an attractive theory. In the last two chapters, the motivation for embarking on the difficult task of critically examining the theory has been supplied.

CHAPTER V

A CRITICAL EXAMINATION OF THE THEORY OF
PRAGMATIC CONSISTENCY

In the exposition of the theory of pragmatic consistency which was presented in the last two chapters it was taken for granted that the notions behind the theory may be given an intelligible description. The elements of the theory were there presented, and the theory was explained in such a way as to put it in the most favorable light. Inconvenient qualifications and queries were ignored; in particular, an intuitive notion of the 'goal' or 'purpose' of laws was utilized.

A beginning at filling these gaps will now be attempted. The notion of 'purpose' that has been assumed will be explained, together with some related notions. Subsequently, the problems which this theory faces will be taken up: these include the problems associated with the proliferation of purposes in the law, with the level of generality at which purpose is to be sought, and with conflicting purposes and conflicting laws. This in turn will lead to a consideration of what I have termed 'high-level pragmatic consistency',¹ with special attention to

¹Including the highest level of pragmatic consistency, the purpose of the legal system as a whole.

constitutional adjudication, and to the limitations which pragmatic consistency is bound to abide by. The chapter will conclude with a schematic presentation of the claims which have been made, and of problems which remain, for the theory of pragmatic consistency.

A. Two Meanings of 'Intention'

In this thesis, the words 'goal', 'intention' (and, at times, 'purpose') are used interchangeably (or nearly so). In the considerable literature which has grown up surrounding the method of interpretation of legislation by the intention of the legislature,¹ this has not always been the case.² Because a lot of the criticism of this method has been predicated upon a view of 'intention' which I do not share, some points about the meaning of this word need to be established as preliminaries to the ensuing discussion.

¹Cf. Horack, "In the Name of Legislative Intention" 38 W.VA. L.Q. 119 (1932); Max Radin, "Statutory Interpretation" 43 Harv. L.R. 863 (1930); Landis, "A Note on Statutory Interpretation" 43 Harv. L.R. 886 (1930); Charles Curtis, "A Better Theory of Legal Interpretation" 3 Vand. L.R. 407 (1950); W. H. Loyd, "The Equity of a Statute," 58 U.Pa. L.R. 76 (1909); Hart and Sacks, The Legal Process (Cambridge: Tentative Mimeographed edition, 1958), pp. 1410-1417; F. J. de Sloovere, "Extrinsic Aids in the Interpretation of Statutes" 88 U.Pa.L.R. 527 (1940); Harry W. Jones, "Statutory Doubts and Legislative Intention" 40 C.L.R. 957; Frank, "Words and Music" in Courts on Trial (New York: Atheneum, 1971); and excerpts from Frankfurter, "Some Reflections on the Reading of Statutes" and Llewellyn, "Remarks on the Theory of Appellate Decision" in Auerbach et al. The Legal Process (San Francisco: Chandler Publishing Co., 1961).

²Cf. Landis, op. cit.

The critics of the method of interpretation by the intention of the legislature--which I take to be one facet of the method of pragmatic consistency--have seen 'intention' to be, I think, some sort of mental act; generally, the intention of the legislature has been seen by them as identical with the motive (or, sometimes, the thoughts passing through) the legislature. In the sense of the word which they have used, an 'intention' must be possessed by a subject, a mind, and it is privately possessed by that subject. The search for this sort of intention leads us to the actor's consciousness. It is this sense of the word which is used when we say, with exasperation, "We cannot ever know another's intentions."

While this might be one way in which we use the term, the constraints upon its use which are naturally suggested by this view are not justified, for there are other, relevantly different meanings attached to the term 'intention'. If it is accepted that in seeking a person's intention we are looking for his motive (or some other mental entity), we must first know something about the person. To put this in a stronger way: if the 'mental sense' of 'intention' were the only permissible sense of the word, to have certain knowledge of someone's intentions, we would need to have privileged access to that subject's consciousness. And yet these limitations upon 'intention' are not always observed.

We speak, for example, of what Orwell intended in writing 1984. We say that he intended to show a certain tendency which is shared by all totalitarian regimes, be they fascist or communist. In saying this, however, it is obvious that we do not, first, have to examine Orwell's biography, in order to determine what Orwell in fact was thinking of or motivated by when writing 1984. What evidence does one have for thinking that such-and-such is the intention of the author? (When using the sense of 'intention' which I am supporting, it is not entirely wrong or even, perhaps, metaphorical to speak of the intention of the book.) The evidence is, of course, the book itself. Rereading the book will make you more firm in your belief that such is the intention, although it will tell you nothing further about Orwell's motives, or the thoughts which he had in writing the book, or, in fact, about any other mental entity at all.

In order, that is, to know the 'subjective intentions' (a term I use to include motives, thought, or other mentalistic senses of 'intention') of 1984 one would need to know Orwell; but in another ('objective') sense of 'intention' this is not necessary; and this is a perfectly ordinary way in which the word is used. Perhaps the example is weakened by what we all know about Orwell; perhaps it is felt that we are allowing our knowledge of his 'subjective intention' to influence our judgment. Take a

different case, then, where one can speak of the intention of the author without knowing who the author was. One can speak of the intention of the author of Hamlet without being sure whether the author was Marlowe, or Bacon, or Shakespeare; without, that is, knowing whom the subject of these intentions--their possessor, so to speak--is. It may even be the case that we can speak of someone's intention being X, when we know that X was not his motive, and when we are quite doubtful that X ever passed into consciousness. For example: we might say that Dickens' motive was to make money, his intention to expose social evils of the English industrial revolution.

All that need be granted at this point, however, is that we need not be telepathic in order to speak with confidence of the intention underlying a statute, nor need we (as in the Hamlet case) have a clear idea as to whom we wish to ascribe the intention of a statute to; for the evidence for intention may be found in the text itself, and not in the results of some psychological investigation.

It is not only the case that this 'objective' sense of 'intention' is one of its acceptable meanings, or possible meanings. It is, in addition, the sense in which the 'intention of the legislature' must be understood; for the reasons which have caused jurists to interpret law by the intention of the legislature necessitate our saying that the objective sense of the word is in question.

B. A Derivation of the Objective Sense of
Legislative Intention

To show that this is the meaning which follows from the underlying reason for adopting the method of interpretation by intention, a brief excursus is necessary. We begin with one critic of this method of interpretation, Max Radin. Radin claimed that even should it prove possible to discover the intention of the legislature, we need not make the effort, for all that binds the judge is the statute itself, and not the intention of the statute-maker.¹

In a technical sense his claim is true. The job of the legislature is to produce statutes, not to produce intentions; its job is that of formulation and validation of laws, not that of creating purposes for judges to obey, and not that of producing legislative history to evince that purpose.

The matter cannot, however, be permitted to rest at the technical level. As Radin himself recognizes, it is simplistic for a judge to claim that he is only bound by 'the statute itself', if by that is meant that written document which the legislature publishes. If the judge is to be bound by 'the law itself' he must first know what that law means, or what that law requires. Rules of interpretation are necessary. But the set of rules to

¹ See Radin, op. cit., p. 871.

which we would most naturally turn in our effort to understand the law, viz., the 'maxims of statutory construction', themselves fail to furnish a single interpretation of the statutes. As has been argued strongly by Karl Llewellyn,¹ to every 'thrust' which one maxim of construction will make, there is a 'parry' forthcoming from another maxim of equal validity. One maxim, e.g., says that the titles of statutes do not control the meaning of the statute; another maxim has it that the titles may be consulted when there appears doubt or obscurity in the body of the statute. Cases cannot be decided by reference to contradictory maxims. This is not to say that there is no role at all which these maxims of interpretation might play--Hart and Sacks find their use to be that of informing us as to permissible readings of the law--but their role is necessarily circumscribed.

Some still believe that the judge ought to apply the law, which involves, as a necessary corollary, that he can apply the law; this, despite the lack of guidance given the judge by these maxims of construction of statutes, and despite the fact that hard cases show us that the plain meaning of the law is not always a sufficient guide to decision. The belief can, of course, be abandoned; but must it be abandoned? It is in this context that the search

¹Llewellyn in Auerbach, op. cit., pp. 499-500.

for the intention of the legislature must be viewed. The justification of this method entails a certain belief about the import to be given to the phrase, 'the supremacy of the legislature'.¹ This phrase cannot be taken to mean that the courts are bound by statutes, simpliciter, if it is to afford us an alternative to free judicial discretion. The doctrine must go beyond this, to hold that there is, aside from the words of the statute, some binding quality to the policy as declared by the legislature, in the only way available to them to declare policy: by the adoption of a statute designed to further that policy. Justice Frankfurter expresses this added element of the doctrine by saying that "where policy is expressed by the primary lawmaking agency in a democracy, that is by a legislature, judges must respect such expressions."² Upon this view, one element of the distinction between the judicial and the legislative processes, between judicial and legislative reasoning, is that the legislature may adopt policies in any area (subject, of course, to constitutional limitations); and that once this is done the judiciary should give effect to that policy. Within this theory of checks-and-balances democracy--which is here being assumed--the legislature is seen as the appropriate forum for policy-formulation, for determining what the public interest requires, and what

¹Cf. Landis, op. cit.

²Frankfurter in Auerbach, op. cit., p. 446.

policy will best serve that; in contrast, judges are not ordinarily free to make laws de novo because (and only because) those laws are in the public interest.^{1,2} When the legislature has acted to form policy in their 'molar' fashion, the judge has procedural restraints upon the exercise of his power. And finally, in this account, the judge must give effect to the spirit as well as to the letter of the law; this too is seen as one of the procedural restraints placed upon the judge.

¹Cf. Rolf Sartorius, "The Justification of the Judicial Decision" 78 Ethics 171 (1968).

²It is important to notice the differences between legislatures and courts under the theory of pragmatic consistency. Legislatures make law, and, in making law, they form the law's policy and purposes; courts only apply law (though they apply it in a way which would be called 'judicial lawmaking' by someone who did not accept the theory of pragmatic consistency. Courts are handed these purposes, so to speak; the purposes and policies of the law are data, 'givens' for the courts. Legislatures, on the other hand, in creating policy, can abrogate past policy as well.

Exactly how, on what basis, legislatures determine policy is a question beyond the scope of the theory of pragmatic consistency. It is tempting to make an analogy, from the relationship which courts have to legislatures, to the relationship which legislatures have to electorates: electorates dictate to legislatures policy, as do legislatures to courts. But this analogy is faulty, and must be resisted: for the problems which arise in trying to determine the purposes (or the public interest) of an electorate are of a different magnitude than the problems in doing this for laws or legislatures and, apart from this, it is far from clear that this hypothesized relationship between the legislature and the electorate is required or even allowed by the theory of democracy. All these questions are, at any rate, too involved to discuss here.

Viewed in this light, it is not the case that the 'intention of the legislature' may sustain either a subjective or an objective interpretation of 'intention'. The reasons for adopting 'legislative intention' do not neutrally apply to either possible meaning; 'subjective intention' (as motivation or other mental entity) is not sustained by the justification which I developed above. First, because the 'intention' is ascribed, by this justification, to the legislation; only through the medium of the law do we get to the intention of the legislature itself. Secondly, not every (possible) intention is to be given effect by the judge, under this justification; it is clear that some subjective intentions of members of the legislature are irrelevant to the judge's task, upon any account. If Legislator A intended, in voting for this bill, to secure his reelection, this intention is not to be given effect to by the judge (if indeed it could be). The motives of the draftsman of the bill--who in all probability is not a legislator himself--may be disregarded; they are no part of the 'intention of the legislature' which is justifiably enforced by the judge. The fact that the motive for putting some clause into the bill was to appease others--that in one sense of 'intention' the intention was just to secure acceptance of the bill--is also no part of that intention which we are here concerned with.

This is, I think, the theory which Frankfurter

advocated:¹

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy, is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek to effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members.

It is, therefore, only reasonable to assume that, lacking strong evidence to the contrary, those who advocate interpretation by legislative intention mean by 'intention' some non-mentalistic entity. This has not prevented much of the criticism of this method of interpretation from revolving around the absurdities of the subjective account of intention. And the critics of this straw man, who believes in giving effect to the motives or thoughts of the legislators, are so enamored of this criticism that the subjective view is attributed to writers who clearly did not hold it. Morris R. Cohen does this, for example, with Austin. Cohen writes,

Austin, Lieber, and most eminent writers after them define interpretation as the discovery of the true meaning of a statute or law. In harmony with the phonograph theory of the judicial function, this true meaning is lodged in the mind of the legislature. . . . In actual judicial interpretation, however, this is certainly not always true. If I have any difficulty in interpreting a passage in a book, I consider myself

¹Frankfurter op. cit., p. 449.

fortunate if I can interrogate the author himself. But for the courts to ask those who actually drew up the statute what it means would be absurd.¹

But this view of intention as a mental fact, tied to the 'subject' legislatures--as opposed to intention as the purpose of a statute--is not to be found in Austin. Austin does not think that the statutes' 'true meaning is to be found in the mind of the legislators.' Austin rather defines ratio legis, the method which he advocates, as "the scope or determining cause of a statute law; that is to say, the end or purpose which determines the lawmaker to make it, as distinguished from the intent or purpose with which he actually makes it."² (by which latter Austin is, I think, referring to intention as mental entity). Austin has also defined the 'intention of the legislature' in a manner more fitting to its objective than to its subjective signification:

It is true that if the literal meaning is indeterminate or ambiguous, the interpreter may seek in other indicia the intention of the legislature:--for example, in the reason of the statute, as indicated in the statute itself . . .³

Indeed, some have criticized the concept of the 'intention of the legislature', while accepting the notion

¹Morris R. Cohen, Law and the Social Order (Archon, 1967), pp. 129-130.

²Quoted in C. K. Allen, Law in the Making (Oxford, 7th ed. 1964), p. 492, from Austin, Lectures on Jurisprudence, Lec. XXXVII. Emphasis added.

³Austin, Lectures on Jurisprudence, pt. II, sec. 903.

that the objective, purposive intention must be given effect by the judge. Radin, for example, distinguishes between what he terms the method of intention and the method of purpose, and reserves most of his criticism for the former.¹

We find Justice Holmes writing in a letter,

Only a day or two ago--when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean.²

Clearly, then, the search for intention is an illegitimate endeavor; all we need to know is what the words mean. But what do the words mean? This same Justice Holmes writes that "the general purpose is a more important aid to the meaning than any role which grammar or formal logic may lay down."³

What sorts of criticisms are obviated by rejecting the subjective account of purpose? There are, first of all, those criticisms which are predicated upon the belief that, there being no 'subject' to possess legislative intention, the concept is a fiction; for as we have seen in respect to Hamlet, one sense of 'intention' does not require that there be a subject. This criticism is one which Radin has made:

¹Radin, op. cit.

²Quoted in Frankfurter, op. cit., p. 449.

³Ibid.

The least reflection makes clear that the lawmaker, der Gesetzgeber, la legislature, does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with words which some two or threemen drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.¹

In the sense in which intention is employed by its advocates, it may be responded, to discover legislative intention is not to compile a series of reports of the stream of consciousness of involved parties.

As noted above, in addition, the objections that the intention of the legislature may be such as should not on any rational account be effected--e.g., the intention that the bill should pass, 'intention' in respect to compromise legislation--are predicated upon a view of intention as mental entity which is not adopted here. A more general claim that the judge should not inquire after the motives of the legislature² is also not inconsistent with the method as here stated.

C. Purposes, Intentions, and Effects of Laws

The last section was mainly intended to reject one account, that which holds that the intention of the legislature is a purely mental entity, which must be

¹Radin, op. cit., p. 870.

²See Herbert Wechsler, "Towards Neutral Principles of Constitutional Law" 73 Harv. L.R. 1, p. 33 (1959).

predicated of some subject, and which is privately possessed by that subject. A positive account of intention and its cognates must now be given.

We begin with two quotations from John Dewey:^{1,2}

Ends are foreseen consequences which arise in the course of activity and which are employed to give activity added meaning and to direct its further course. They are in no sense ends of action. In being ends of deliberation they are redirecting pivots in action.

Roughly speaking, the course of forming aims is as follows. The beginning is with a wish. . . . Action fails to connect satisfactorily with surrounding conditions. Thrown back upon itself, it projects itself in an imagination of a scene which if it were present would afford satisfaction. This picture is often called an aim, more often an ideal. But in itself it is a fancy which may be only a phantasy, a dream, a castle in the air. . . . It becomes an aim or end only when it is worked out in terms of concrete conditions available for its realization, that is in terms of "means."

Since purposeful (or, in one sense, intentional) behavior is behavior that is directed by some aim, end, or goal,³ the investigation of either of these two sets of concepts (goal concepts/purpose concepts) entails an investigation of the other.

Our particular problem, however, is much greater than that of defining goals and purposes. As I see it, our discussion must be bound by two conditions:

¹John Dewey, Human Nature and Conduct (Modern Library), p. 209.

²*Ibid.*, pp. 216-217.

³Richard Taylor, Action and Purpose (Prentice Hall, 1966), p. 233.

First, we cannot identify the purpose of a given law with the reason which caused all the legislators to adopt that law; nor can we identify one particular subset of legislators whose own purposes are identical with the purposes of the law. This cannot be done because the judge is not telepathic, he cannot know the subjective motivation of the legislature, but only that which it produces: the law itself, and its legislative history (documents produced in committee hearings, etc.). There may be a preamble concerning the law's purpose attached to the law, but the judge does not know that this was the operative consideration in the minds of the legislators. In addition, the legislators may have had reasons for adopting the legislation which the judge need not give effect to: e.g., all of the legislators may have adopted a proposal for school busing to curry favor with their constituents.

Secondly, we cannot identify the purpose of a law simply with the effects which it has upon society. There are a number of reasons why this is so. Preeminent among these is our desire to distinguish between the intended and the unintended consequences of legislation. The effect of certain tax laws may be to inhibit or enhance population growth, but this is not, in any straightforward sense, their intended effect.¹

¹John T. Noonan and Cynthia Dunlap, "Unintended Consequences: Laws Indirectly Affecting Population Growth

And this definition of the purpose of a law would certainly be useless for the theory of pragmatic consistency, which seeks to guide the effects of laws through a consideration of the law's purpose. On the broadest level, there is a strong presumption against identifying the purpose of something with its final state; else, the purpose of human beings is to die.¹ We cannot, therefore, simply discern the purpose of a law from its effects; which is not the same as saying that we cannot discern a purpose immanently present or embodied in the law, in, e.g., the law's text.

What, then, may we say is the purpose of a law? I suggest the following: The purpose of a law is that goal which the design of the law reveals, and which may be given effect to by the judicial branch in the interpretation and application of that law. (Please note that this is the definition to be employed henceforward.)

Since, as Dewey says, the possession of an end must involve some action towards the achievement of that end (if we are to say that it is an operative purpose, and not a mere fantasy), then there must be some clue in the design of the law which will reveal the aim sought by the law. In the light of that purpose, we may answer the question, 'why was that statute adopted, and why were its provisions

in the United States" in Parke and Westoff, eds., Aspects of Population Growth Policy (U.S. Government Printing Office, 1972).

¹Taylor, op. cit. p. 235.

described as they were'? But more than that, this must be the sort of purpose which can be attributed to the law which the judge confronts, which can guide judicial action. To revert to the busing example: a purpose of achieving a racial balance in schools is a purpose which the judge may further, may make himself a participant to, in his own actions; a purpose of pleasing constituents by adopting the law cannot guide the judge's own actions. The purpose of pleasing constituents may be the purpose of adoption of the law; it cannot be the purpose of the law itself, which persists past adoption. A similar point can be made, of course, with reference to other proposed motivations for the adoption of the law or a part of it, e.g., a clause which is inserted because it is a compromise measure does not have, as its continuing purpose, the gathering of votes needed for the law's passage.

What may serve as the goal which a law is designed to achieve? What can count as an aim or purpose? I am using the notions of purpose or goal in an inclusive sense, so as to admit any state of affairs as a possible goal. This includes such states as those in which due process in judicial action is satisfied, or those in which defendants are treated fairly, or those in which a just state is created or preserved. In my usage all of these states-of-affairs when given determinate content are possible goals of rules. This usage is not, I think, philosophically

improper, although it is admittedly anomalous; Hare, for example, uses the terms in a similar fashion:¹

It sometimes seems to be implied by writers on ethics that it is immoral, on certain sorts of occasion, to consider the effects of doing something. We ought, it is said, to do our duty no matter what the effects of doing it. As I am using the word 'effects', this cannot be maintained. I am not making a claim for 'expediency' (in the bad sense) as against 'duty'. Even to do our duty--in so far as it is doing something --is effecting certain changes in the total situation.

This point is made in conscious opposition to the way the terms 'teleology' and 'deontology', as applied to systems of morality, are ordinarily understood. In the ordinary understanding, a theory of morality is teleological if it judges actions by their consequences, and is deontological if it judges actions by their characteristics (e.g., the characteristic that this action is a lie, or an act of heroism).

But the distinction, when understood in this way, is a difficult one to maintain, largely because of the difficulty encountered in trying to specify what may count as the consequences of an action. It must be admitted, I imagine, that the immediate consequences or effects of an action are to be included as part of that action's consequences. The consequences of seeing a motion picture must include (in addition to any feelings which this experience has created in me, the diminution in my funds

¹R. M. Hare, The Language of Morals (Oxford Univ., 1964), 4.1, p. 57.

which it engendered, and so on) the fact that I have seen a motion picture. The fact of having completed an action is always one consequence (the immediate consequence) of having done that action. Similarly, the consequences of having broken a promise include, in addition to a loss of confidence in the institution of promise-keeping, or the pain to the promisee, the fact that I have broken a promise. Again, this is only to say that the state of affairs which is immanent in having completed an action 'successfully' must be included as among the consequences of performing an action. These immanent consequences are all that a 'deontological' moralist is concerned to prevent.

Despite the strange flavor this point may have, I think we must admit that the major distinction between 'teleological' and 'deontological' moralists consists in the kind of state-of-affairs which they admit have moral relevance,¹ and not in any divergent responses which they give to the question of whether or not the consequences of actions are morally relevant to the appraisal of action. If one is to continue to distinguish between teleological and deontological morality, I suggest, one must begin by

¹For some teleological moralists it is not only the case that only certain states-of-affairs count morally; in addition, only some states-of-affairs serve as directing goals (or purposes) in their psychology of human action. Hedonists, e.g., often seem to believe that the only motivating force for people is pleasure; Bentham would be an example.

distinguishing between teleological goals and deontological states-of-affairs.

In general, a deontological state-of-affairs, in contrast to a teleological goal, is exhausted by the correct description of the state of affairs which is both immediately and necessarily (logically) the consequence of the action to be judged. The minimum necessary consequence of 'keeping a promise' is that a promise has been kept; no pain, pleasure, utility, confidence, or anything else must have resulted from the bare keeping of a promise. No doubt, the action of 'keeping a promise' might entail the existence of a complex state of affairs: it may be that the promisor and the promisee must be, or have been, aware of certain things, that they must have communicated, etc. All and only these conditions, however, have to be satisfied if we are to speak of the deontological state-of-affairs being satisfied. By way of contrast, teleological goals seem to include only ongoing consequences (and sometimes only certain ongoing consequences), like the amount of pleasure, beauty, or security which will result from an action, as the moral determinants of value. Actions which produce, or which tend to produce, those states-of-affairs are therefore good or valuable.

While I, in common with Narveson and Oldenquist,¹

¹See Jan Narveson, "Utilitarianism and Formalism," in 43 Australasian Journal of Philosophy 59 (1965); and Andrew Oldenquist, "Rules and Consequences," in 75 Mind 180 (1966).

find these considerations decisive with regard to the teleological/deontological distinction as it has been traditionally maintained (although there remains, on my account, a distinction, in the types of consequences which these moralists see as relevant), still, only a lesser claim needs to be maintained for me to establish my point. It need not be maintained that the traditional teleological/deontological distinction cannot be upheld in regard to morality: reconstructions of that distinction can be attempted, whose usefulness need not be questioned here.¹ For our discussion is not of systems of morality, but of a system of law; and the relevant difference between these types of systems in this context is that it is nearly universally admitted that legal requirements are, by and large, far more determinate (have far more determinate content) than are moral requirements. (Recall that for Golding constitutional adjudication, which is the closest the legal system gets to moral adjudication, only 'approaches' without reaching moral reasoning.)

Because this is so, while we may ordinarily specify the necessary components which go into a deontological goal of the law (see *infra*) it may seem to be far more difficult to specify the necessary components of a deontological rule of morality, e.g., the state-of-affairs

¹Cf. Dan Brock, "Recent Work in Utilitarianism," 10 Am. Phil. Q. 241 (1973), esp. pp. 252-3.

which must exist before we can say that a promise has been made, or a lie has been told (compare promise and lie, moral terms, with their far more determinate legal counterparts, contract and misrepresentation). So the translation of deontological rules into deontological goals, which may seem to be an insurmountable task in the field of ethics, need not seem so in the field of law.

(To avoid confusion, let me note that I am not going to distinguish in all of what follows between 'goal' and 'state-of-affairs' simpliciter; if necessary, the distinction will be marked by qualifying these terms as 'teleological' or 'deontological'. 'Goal' and 'state-of-affairs' are therefore to be understood as being neutrally applicable to any consequences or effects which are the desired outcome of action.)

It may be objected that the notion of the goal of a rule is, if applied to deontological states-of-affairs, entirely vacuous. The intended goal of any rule (or other legal material) could be, in this account, "The creation of the state-of-affairs wherein the rule is obeyed"; the weak account of 'goal' which I have given would have to include this as a goal. In the development of this theory, to be sure, this account needs to be strengthened with respect to most rules in the legal system, so as to furnish a criterion whereby we may justify prima-facie disobedience to a rule in terms of the goal of that rule; if the goal

is simply to obey the rule, this cannot, of course, be accomplished. The strengthening of the notion of deontological goals can ordinarily, however, be done fairly simply, by specifying obvious characteristics which a particular deontological state must have. For example, a state in which due process of law (a legal standard) is achieved must include, I take it, the fact that the defendant or his legal representative is informed about the defendant's rights, whatever those rights may be, as well as other characteristics forthcoming from a determinate characterization of the concept.

Other criticisms are perhaps mooted by a reminder that for my purposes it is enough to make the purely logical and, if you like, trivial point that deontological rules or other legal materials may be translated into teleological rules with a deontological goal. For this, no particular account of how the translation is accomplished needs to be assumed.¹

What else may we say about the goal of a rule? We are tempted to say that a goal must be some imagined state-of-affairs which is deemed desirable; but this will not do. There need not be one single state-of-affairs towards whose achievement the law was designed. There may be an indefinite number of such states-of-affairs. The purpose

¹For another account see William Frankena, Ethics (Englewood Cliffs, New Jersey: Prentice Hall, 2d ed. 1973).

of an enactment like the equal protection clause of the Fourteenth Amendment is not the achievement of some single state-of-affairs in which everyone is equal, or equal in certain respects. It is much more plausible to say that its purpose is the prevention of certain states-of-affairs where the desired equality is not achieved; and therefore its goal is served equally well by the existence of any one of several states-of-affairs in which certain sorts of inequality are not present. These states-of-affairs are very various; that which they all possess in common is the avoidance of some forbidden inequalities. The goal of a law need not be a change in the current state-of-affairs either; a rule might be designed to preserve the status quo so the fulfillment of a goal need not require the production of some quality or characteristic deemed desirable.

Finally, how are we to discover the goal which the law was designed to achieve? The investigation of aims is, again, not a question of psychology in this context. The aims which we are interested in must have come to fruition at the level of action, they must have made some practical difference in the formulation of the statute. We would want to know, therefore, the state of the law before this law which we are examining was enacted; the problem which the previous state of the law presented; and why this law, rather than other, similar measures, was enacted. For this

reason, it is useful to have information about proposed amendments to the law which the legislature rejected, as well as about legislation in the same area (dealing with similar problems). The cumulative effect of the many choices which were considered in the adoption of a statute is to delineate a purpose, or a circumscribed class of purposes, which the law, taken as a whole and in its historical context, could be said to have been designed to achieve.

This does not mean that the existence of legislative history is a necessary condition for the discovery of purpose in law (for we may find purpose in laws which have no available legislative history). Legislative history would, however, when available, serve as a sufficient condition for this. The reasons for the adoption of a law which find their way into the public record will generally give clear indication of the purpose which the judge can and should participate in.

Some laws or other legal materials may have a confused legislative history, or may have no extant legislative history. Many of these seem to have 'passed into the public domain'. Think, for example, of well-established laws of long standing, like provisions of the Constitution, or some early anti-trust legislation, or of certain common-law rules. Even if we knew what their original intention was, we do not any longer think it necessary to advert to

this original understanding. For these laws, today, are different from the laws as originally passed; today, the laws come before the judge with a patina of earlier judicial interpretations, with a well-established (by the judiciary) field of application, none of which has been contested in authoritative fashion. The 'lawmaker' has in effect acquiesced to a new ascription of purpose on the part of the judiciary; so that it may be found that a law starts out with some purpose, and yet may begin to serve another function; and when the furtherance of that function becomes an operative consideration for the judge the function has begun to be a new purpose of the (current) law.

Can it be proven, now, that every law has a purpose or purposes which the judge may use through employing the method of pragmatic consistency? No exhaustive examination of any legal system has been made here, after all; rather, I have been explaining a method which I claim may be used in the interpretation of laws. What assurance have we that this method shall be uniformly successful in discovering purpose? For, after all, it does not in general¹ do any good to say that every law has a purpose: that it be obeyed.

There can be no such proof; but what may be done is to show why it is reasonable to accept the theory in the

¹Compare with Appendix.

absence of proof. I have tried to show, for example, the concept of purpose as employed here is very broad, and includes as goals those deontological desiderata which have specifiable components (e.g., information about rights to ensure due process of law). 'Goal' has been employed in such a manner that whenever one thing is done for the sake of something a 'goal' is being sought. Perhaps it will be claimed, then, that lawmakers (which may include judges, administrative agencies, etc., as well as legislatures) do not intend to do anything by making law; they make law for its own sake, and have nothing further in mind. This is possible; but extremely unlikely; and it is just this sort of claim which must be made if we are to say that laws do not have any goals towards which they are directed.

Certainly, many problems remain to be faced: the possibility of conflicting goals or purposes in the laws; the problem that, typically, laws serve a variety of purposes. Responses to these and other criticisms on behalf of the theory will be given, although they may not entirely lay the criticisms to rest. In addition, metacriticisms (or, as I have called them earlier, 'mis-criticisms') are available, which, instead of arguing against the theory, accept presuppositions. Such is the claim that the judge need have no concern with the policy expressed in the law. But these criticisms are at best premature (and at worse ipse dixits): before criticizing

the theory on this basis, would it not be best to see if less radical criticism is available--that the theory is unworkable, or self-contradictory, or that the theory is my main concern.

D. An Example of the Discovery of
Legislative Intention

One thing which should be done in defense of the theory is to show how it has been used, as a propaedeutic to how it may be used. Let me present, therefore, an example of how Justice Brandeis discovered purpose in one statute whose interpretation raised serious difficulty. As with all these examples, my purpose is not to show that pragmatic consistency is the one true method of legal reasoning actually employed in the United States, but rather to show the practicability of the theory.

The opinion to be discussed was written for the case of Strathearn Steamship Co. v. Dillon et al., and it appears in a collection of Justice Brandeis' unpublished opinions.¹ The case involved both the validity and construction of the LaFollette Act, which provided that, contracts to the contrary notwithstanding, seamen shall be paid upon demand one-half of their earned wages when reaching a safe United States port. In general, private international law requires that a contract's legality and effect be judged by the law

¹Alexander M. Bickel, ed., The Unpublished Opinions of Mr. Justice Brandeis (Harvard, 1957), pp. 34-60.

of the country in which the contract is made. In Strathearn, the contract in question was made abroad,¹ and it provided, as did most foreign seamen's contracts, that payment of wages shall be deferred until the end of the seaman's term of employment.

The question of whether Congress had the power to control foreign contracts in this way was not difficult.² In order to enter our ports, foreign vessels were constrained to comply with the LaFollette Act; so if Congress had intended the LaFollette Act to apply to foreign contracts, the issue was settled. However, one principle of statutory interpretation has it that statutes shall not be construed in such a fashion as to make them constitute a major departure from past law (if no alternative construction is available). It needed to be shown that the LaFollette Act was clearly intended to produce such a departure from previous private international law.

The issue, then, revolved mainly around the question of construction, and the construction of the Act was controverted: in a similar case, Sandberg v. McDonald,³ the Court split in a 5-4 decision, and ruled that one provision of the Act (at least) did not control a financial transaction--advance partial payment of wages, which the

¹Apparently in England.

²See Bickel's comments, op. cit., pp. 52-53.

³Sandberg v. MacDonald, 248 U.S. 185 (1918).

LaFollette Act made illegal--unless it had been made in United States waters (regardless of the country of registry or the seaman's vessel). The arguments in Sandberg were textual; and again in Strathearn Justice Day, writing for the Court, had, in Alexander Bickel's words, held the legislative history "up at a distance, gingerly and uncertainly, his face partially averted, as if they were something he had picked up out of a bundle of laundry."¹ Brandeis, apparently, did not wish to swim against the textualist tide, and did not circulate his private opinion; perhaps for this very reason it illustrates well his method of statutory construction.

Brandeis begins with a brief review of earlier legislation in the same area (seaman's welfare).

Efforts to ameliorate the condition of seamen were continually engaging the attention of Congress. In the twenty years preceding 1915 ten acts were passed to that end. . . . The grosser incidents of servitude had been . . . largely overcome.²

The review serves both to indicate general legislative policy towards seamen, and to serve as an historical explanation for what was to follow.

All of this legislation--which of course added to shipowners' costs--had helped cause a decline of American mercantile commerce. It was losing its competitive stance relative to foreign merchant marines, which were unencumbered

¹Bickel, op. cit. , p. 58.

²Ibid., p. 36.

by this sort of legislation. This too concerned Congress:¹

Congress investigated from time to time the cause of this decline of the American mercantile marine. . . . Committees of Congress concluded that the decline . . . was the result of lower costs in building, equipping, and operating foreign vessels; and that the lower cost of operations was due mainly to their lower wage scale and the inferior living conditions of their crews; and that equalization of operating costs in this respect would be an indispensable factor in reestablishing our mercantile marine.

An earlier solution to this, which involved reducing American standards, had failed.

In this fashion, Brandeis had analyzed the earlier state of the law on this matter, its general policy, and the 'mischief' which Congress was attempting to solve²--the resolution of the conflict between the needs for a strong merchant marine and for decent conditions for seamen.

Finally, Brandeis comes back to the particular case and its resolution:³

It had been the common practice of such foreign vessels to engage their seamen abroad for long periods of service. . . . It was also the common practice . . . to provide . . . for deferring payment of substantially the balance of the wages earned until the termination of the shipping contract. Prior to the passage of the [LaFollette] Act . . . seamen on foreign merchant vessels who deserted while in American ports were liable to arrest; and by many treaties American magistrates and courts were bound to lend aid in arresting and returning them to their ships. . . . The committees of Congress concluded that if seamen on foreign vessels

¹Ibid., pp. 38-39.

²Note how closely my proposal for the discovery of purpose in laws follows that of Heydon's Case; see above, Chap. II.

³Bickel, op. cit., pp. 39-40.

were freed from liability to arrest in our ports for desertion, and their exemption from arrest were coupled with a provision enabling the seamen to obtain here payment of a substantial part of all wages theretofore earned and remaining unpaid, foreign vessels engaged in the American trade would be compelled to raise wages and working conditions to practically the standard prevailing in our coast-wide trade. . . . America would be able to compete for the foreign carrying trade. . . . Such is the nature of the measure in question; such the evils against which it was aimed and the means by which it was proposed to overcome them.

It is clear what Brandeis' conclusion must be. It is vital to note that the statute itself was in fact worded very poorly; if just the text were to be regarded, several interpretations of the law were possible; and in the similar Sandberg case, in fact, both majority and dissenting opinions had reached their conflicting conclusions by each relying upon the text, upon what Justice McKenna optimistically called "the simple service of interpretation."¹ No salvation was, then, to be found in the text; and Justice Brandeis' method enabled him to go beyond the text to consider policy and purpose, which together indicated that the interpretation of the text urged by Strathearn--that the statute did not apply to contracts made in foreign countries--"would so narrow its scope as to make it inefficacious."²

¹Quoted in Bickel, p. 54, from 248 U.S. at 201, 202.

²Ibid.

Altogether this opinion stands as a superb example of the use of pragmatic consistency in the law's construction. History is set out, general policy explained and demonstrated, the mischief is identified, the cure which Congress has adopted is placed in its proper context; and, this done, the decision to be made is clear and, in this case, clearly 'uniquely correct'.¹ Even if buttressing by legislative materials has been impossible in this case, the policy would still have been obvious from the other elements which Brandeis notes, e.g., the history of seamen's legislation. Opinions like this one go a long way towards disproving the claim that the purpose of the legislature is an undiscoverable fiction.

E. Vertical Proliferation of Purposes

Human action, and particularly well-thought-out human action, is often characterized by proliferation of purpose: we try to 'kill two birds with one stone', we try to order our actions so that each will serve as many purposes (or goals, aims, intentions; these are being used here interchangeably) of ours as possible.

There are two essentially different ways or directions in which this proliferation might proceed: there can be vertical and horizontal proliferation of purposes. By a vertical proliferation of purpose I mean to suggest that

¹The Court, by the way, reached the same conclusion as Brandeis, through different reasoning.

many of the aims which we seek in doing something can be arranged in a hierarchical order, such that aim A justifies aim B which justifies C and so on: alternatively, such that C may, in some sense, be deduced (given numerous facts about the world, including our preferred methods of achieving goals) from B, and B from A. By a horizontal proliferation of purpose I mean that one act may serve two or more distinct purposes, which do not bear this hierarchical relationship to one another.

Let me give a simple example of each kind of proliferation.

- (a) I turn on a light. My primary purpose--the immediate goal that I seek--is, simply, to turn the light on. My secondary purpose is, perhaps, to light up the room. My tertiary purpose is to read an article in philosophy. My ultimate purpose is to equip myself to teach philosophy. Given that I want to teach, and given numerous facts about the world relevant to the attainment of this aim (which might include the fact that other purposes of mine forbid, e.g., obtaining a teaching position through blackmailing the dean) it follows, in a weak sense, that I need to or ought to read that article; given this need, it follows that I need a lighted room; given that need, it follows that I need to turn the light on; A justifies B which justifies C, and C is done for the sake of B, which

is done for the sake of A. This constitutes one hierarchical chain of purposes; and the chain is intelligible given the correctness of my beliefs as to background facts about the world. The hierarchical nature of the chain is insured if and only if it is the case that, if I knew C (the lowest-level, or primary, purpose) would not help in achieving B, then I would not choose C; it is intelligibly hierarchical if and only if there is some credibility to the argument that C is needed for the sake of B. Hierarchical chains of purposes involve the phenomenon called vertical proliferation of purpose.

- (b) A pregnant woman has a hysterectomy. She aims at insuring both permanent sterility for herself, and death for the fetus. If she could only achieve one of these goals, she would nevertheless proceed. Each of these goals is individually sufficient as a motive for action; neither is done for the sake of the other. In this case, we have purposes which do not stand in a hierarchical order, i.e., we have horizontal proliferation of purpose.

When seeking to determine the purpose of a law we are nearly always faced with the phenomenon of vertical proliferation of purpose; hence we are faced with the need to determine which purpose-level (primary purposes, secondary purposes, . . .) should be employed in the

adjudication process. Radin illustrates this with reference to a law making gambling contracts void.¹ Its primary purpose, i.e., what the law is immediately trying to do, is simply to make gambling contracts void.² But just as a sane man does not make a law without a goal in mind, he does not, in general, make a law without a secondary goal in mind as well.³ The secondary and tertiary purposes--what Radin terms the "ulterior purposes"--are, we may assume, the discouragement of people gambling beyond their means (gambling contracts being voided, people will not be able to obtain credit for gambling), and the discouragement (although not the abolition) of all sorts of gambling. The hierarchy (or 'tree') of purposes may of course extend still further, to include the reasons why gambling is held undesirable.

What is to be done when a judge is faced with vertical proliferation of purposes? Which level should he employ? As I have described this, it is impossible that a lower-level purpose should conflict with a higher-level purpose; for the former is deduced (given those facts about the world) from the latter. This is rarely the case, however; and it is perhaps never the case when we are confronted with vertical proliferation in a hard case. For, as we

¹Cf. Curtis, op. cit., pp. 415 ff.

²See chap. V for discussion on deontological purposes.

³Hart and Sacks, op. cit., p. 166.

have said, while lower-level purposes--which are (merely) means to ends--they are, typically, imperfect tools for achieving those ends. The secondary purpose, again, only implies the primary purpose, given the truth of background beliefs about the world; and a hard case will often bring to light an erroneous belief of this nature. The more erroneous 'facts' infect an argument in a purposive chain, the less justified the lower-level purposes will be.

In the run-of-the-mill, ordinary case which comes before judge, the fact of vertical proliferation, in and of itself, is not distressing; it presents no impediment to decision. Ordinarily, that is, these several purposes are necessarily compatible, since they exist in a deductive relationship with one another, and therefore the purposes must, of necessity, all reach the same result. In theory, it makes no difference which level is chosen in a justified, intelligible chain of purposes; which is not to say that there is no practical reason for choosing one level over another.

F. Choosing a Level of Purpose; Overly-Broad Purpose

If the vertical proliferation of purpose does not yield conflicting results--if the lower-level purposes are such as may be properly deduced from the higher-level--and if, therefore, there is, from the viewpoint of theory, no reason for choosing one level rather than the other, it

would still seem that for practical purposes only the lower level of purposes should be chosen.¹

One argument for taking low-level purposes where possible is that the higher a purpose, the more factors need to be taken into account before that purpose will yield a decision. Imagine, for example, a court confronted with a defendant accused of committing murder, who has killed his infant son who suffered from some painful, and ultimately fatal, degenerative condition. At the lowest level of principle or purpose, the immediate purpose for the mandatory rule against murder, it could be clear that the required judgment is that the defendant is guilty of some degree of felonious homicide. (That this result is almost never reached in cases of this sort is due to the 'interposition' by the jury of their own moral standards; these cases are nearly always forbidden under the 'letter of the law'.) The primary purpose level, then, yields unambiguous guidance. At a somewhat higher level, the situation becomes less clear: some of the purposes which

¹One consideration whose thrust runs contrary to this need to use low-level purposes is the obligation which the courts have to clarify the law. For this clarification is not, in general, achieved when a case which could have been resolved upon broad grounds, grounds which would control a large number of cases (i.e., by a high-level purpose) is instead resolved in a limited fashion, with low-level purpose. Perhaps, though, this concession to the need to clarify laws should only be made for courts of appeal, in certain specified conditions; investigation of this question would lead far afield.

are commonly cited as justifications for the punishment (rather than conviction) of murderers are, arguably, not present; punishment of the defendant in this case will most likely not serve the function of Spezialpravektion, the prevention of the felon himself from committing crimes in the future. At this somewhat higher level, then, the situation is more clouded; and were we to go to a yet higher level of purpose and invoke, e.g., the need of the legal system to achieve results which will conform with the dictates of morality (positive or critical), the result is still more difficult to discern.¹ Even in a better-justified hierarchical chain than this, i.e., one where the elements of the chain obviously stand in a deductive relationship, the lower level of purposes should still be more important for decision: a primary purpose yields an immediate rule and hence a decision; more nearly ultimate purposes must be 'reasoned down' to the level of action and decision. The next reason for avoiding high-level purposes shows the difficulty involved in this 'reasoning-down' process.

This difficulty arises through the problem of the possible 'invertibility' of the high-level purpose proposed. Singer describes the problem:

¹Cf. the discussion of Learned Hand, J.'s position in Edmond Cahn, The Moral Decision (Indiana Univ. Press, 1956), pp. 300-312.

In a case in which the consequences of everyone's acting in a certain way would be undesirable, while the consequences of no one's acting in that way would also be undesirable, I shall say that the argument is inverted. . . . Now in order for the generalization argument to have a valid application with respect to some action it is necessary that it not be invertible with respect to that action.¹

The defeat of a principle or purpose through a demonstration of its invertibility is most usefully considered as a special case of the rejection of principle by means of the modus tollens argument. Consider the argument that one ought not to farm, because if everyone were to farm the consequences (nobody producing shelter, nor clothing, etc.) would be undesirable. If we can invert this argument--if we can show that the consequences of nobody's farming would be just as bad as if everyone farmed--we have defeated his argument (our inversion of his argument) reads: 'By your own logic, the production of food is never morally licit, and this result is itself absurd'.

Singer's explanation of why it is that some principles are invertible is of particular relevance to the problem of choosing a level of generality within a vertical proliferation of purpose. For principles, he says, are invertible because they are described in too general (or broad) a way to be determinate for moral purposes. In our example, "The question, 'Is it right or wrong to produce

¹Singer, Generalization in Ethics (New York: Atheneum, new ed. 1971), p. 72.

food?' has no clear sense. . . . It is too general to be answered. The most we can say is that it depends on the circumstances . . ."^{1,2} Similarly, as we go up the 'tree' of purposes, we find that the higher levels of purpose are subject to invertibility (if we are not very careful). This is, of course, the same claim as was made by the neutral principles advocates in the first chapter, translated into different jargon. Some of the cases (e.g., Shelley v. Kraemer) referred to there would serve as illustrative of this problem; at this point, though, a new case (Buck v. Bell)³ will be brought in, because of the particularly

¹This all applies, *mutatis mutandis*, for 'reiterability' as well as 'invertibility'; in fact, the former is a form of the latter, that form which fails because a situation (or in our case goal) which is asserted to have some moral significance is described in too specific a way to have relevance. An argument is reiterable if it chooses to make a moral distinction on the basis of some arbitrary feature of a situation--e.g., 'I should be tax exempt because I live at 1032-46th St.' The principle under which an argument like this is valid--that any similarly arbitrary fact may be taken as supplying an acceptable moral distinction--is an invertible principle, whose consequences are unacceptable. Reiterability is ordinarily avoided in the law, even when a low-level, specific purpose is adopted, because these low-level purposes are typically justified through serving higher-level purposes, rather than through a principle like the one above, justifying any arbitrary low-level purpose.

²*Ibid.*, p. 76.

³Buck v. Bell, 274 U.S. 200, quoted in Simpson and Stone, eds., Law and Society (West, 1949), bk. II: Law in Modern Democratic Society, pp. 1129-1132.

vivid way in which it illustrates the oft-encountered problem of invertibility when high-level purposes are used.

Justice Holmes, of course, delivered the opinion for the Supreme Court. The case involved dispute over the constitutionality of statutes allowing for compulsory sterilization of mental defectives. The defendant, who was the superintendent of the State Colony for Epileptics and Feeble Minded in Virginia, acting pursuant to a state law, had ordered that a salpingectomy be performed upon the plaintiff, Carrie Buck, for the purpose of rendering her sterile. Plaintiff contended that the statute in question was void under the Fourteenth Amendment. This statute authorized the superintendent of colonies for the mentally defective created by the State to have sterilizations performed upon the inmates under his care if, in his judgment, the operation would be in the best interests of the patient and society. This, the plaintiff claimed, denied the patients due process of law and the equal protection of laws. (The substance of the law and not its procedural aspects was in question.)

An unsympathetic reader of J. Holmes' opinion might conclude from it that Holmes' commitment to social Darwinism had overwhelmed his good judgment. It has been written of the opinion that "He was amused at some of the rhetorical changes in his opinion suggested by his associates, and purposely used 'short and rather brutal

words for an antithesis' that made them mad."¹ My concern is not with the dictum which, no doubt, brought forth that comment--"Three generations of imbeciles are enough--but with the sufficiency of reasoning in the opinion which withheld the constitutionality of the Virginia statute."

The substance of the law was justified by Holmes because it is demanded by "the general welfare." He says,

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . .²

That this principle, in and of itself, is far too broad to avoid invertibility, is perhaps too obvious a point to require explanation; suffice it to say that if it would be undesirable that the State never be allowed to demand anything of its citizens, it is equally undesirable (and, often, unconstitutional) that the State be allowed to demand any kind of sacrifice by its citizens which may be supported by claims of 'the general welfare'.

But Holmes does not stop with this principle. He goes on to offer what might be a more narrow principle, and says, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."³

¹Francis Biddle, Justice Holmes, Natural Law, and the Supreme Court (New York: Macmillan, 1961), p. 8.

²Simpson and Stone, op. cit. , pp. 1131.

³Ibid.

He then cites Jacobson v. Massachusetts¹ to which he appends the 'short and brutal' dictum quoted above.

Yet what is the principle of Jacobson? As nearly as I can tell, it is no less broad than Holmes' original justification; the principle in Jacobson supplied by Justice Harlan to support compulsory vaccination was that

the liberty secured by the Constitution of the United States . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which each person is necessarily subject for the common good.²

By appealing to Jacobson Holmes has not succeeded in narrowing the principle. In fact, this Jacobson principle is so broad that it was used by Holmes again in his famous dissenting opinion in Lochner v. New York.³ In that case, in his defense of the constitutionality of a New York law which regulated the maximum hours which a baker may work, Holmes wrote, "It is settled by various decisions of this Court that state constitutions and state laws may regulate life in many ways which we as legislators might think as unwise . . . as this" and he goes on to cite in support of this, Jacobson (inter alia).

This is all the reasoning to be found in Buck v. Bell.

¹Jacobson v. Massachusetts, 197 U.S. 11.

²From Jacobson; quoted in Jay Katz et al., eds., Experimentation with Human Beings (Russell Sage Foundation, 1972), p. 722.

³Lochner v. New York, 198 U.S. 45 (1905).

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A principle is advanced in support of a statute; the principle contains no restricting clauses. The principle, it is true, could be said to support many laws which are desirable; but in the unqualified form in which it is advanced in Buck, Jacobson, and the Lochner dissent, it could be used to justify summary execution of undesirables, unlimited interference in rights to property--in short, any conceivable totalitarian abuse whose blow can be 'softened' by an appeal to the 'general welfare'. Whether Buck represents a principled position or not--whether, that is, an opinion could be written to justify the same result by use of a different, non-invertible principle--I could not say (although I should think that the principles which come to mind would all be based upon a faulty interpretation of background facts about the world--they would seem to all depend upon the erroneous belief that we are in danger of being swamped by genetic defectives if we do not act to prevent their procreation). Nevertheless, the opinion which was given does not, certainly, represent principled decision-making. Nor does it, therefore, represent pragmatically consistent decision-making: for the purpose apparently used (to secure, by whatever means seem most efficient, the general welfare) cannot be attributed to the Constitution, laws or lawmakers of this country.

Before leaving the question of what level of generality of purpose may be properly used in judicial opinions, one

qualification needs to be made explicit. At times an opinion may, in the course of its argument, call attention to some very high-level purpose which is invertible in the unqualified fashion in which it is expressed. For example, in the Strathearn case above, J. Brandeis calls attention to a general policy of the legislature to ameliorate the condition of seamen. In the unqualified fashion in which this policy, exempt seamen from paying income taxes. But while this use of policy may be misleading, it is not illegitimate in the way that the principle in Buck was. When deriving a broad purpose as an incidental to the main body of reasoning, the court does not rest its decision solely upon the overly-broad principle (as was the case in Buck, for example); the principle is only used to buttress an independently-justified decision; it is only an inclining consideration. The argument by modus tollens, and hence by invertibility, only works against decisive considerations (see the discussion in chap. I on the logical dimensions of the tollens argument).

G. High-Level Pragmatic Consistency and Constitutional Provisions

The ordinary means which pragmatic consistency affords for reaching a decision in a hard case is that of adjudication by purposes of individual laws. At times, however, recourse must be had to higher-order purposes than this, purposes which are not embodied in any rule. Recourse is

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had to some purpose of the law, rather than a law; this purpose is not attached in any necessary fashion to a particular rule. In contrast to lower-level purposes, these purposes are not derivable from a legal rule; yet, we are warranted in asserting that these purposes have legal quality.

In this class are two types of purposes. The first of these are those purposes or goals which must be fulfilled if the legal system is to achieve its other goals, i.e., those goals which are derivable from legal rules. Satisfaction of these purposes serves as a necessary precondition for the operation of the legal system; given nearly any goal of the legal system, these conditions too must be satisfied. The eight principles of the 'internal morality of law' are included in this type of higher-order purpose; nearly all laws must satisfy the requirements of clarity, non-contradiction, etc., but no laws are specifically adopted merely in order to serve these needs. These are minimal characteristics which nearly any law must abide by.

The second type are those open-ended provisions of the Constitution--especially including, but not limited to, the Bill of Rights--which have been encountered in chap. I. A judgment of this nature, if it required justification would lead us far afield; fortunately, a justification is not required.

For there are two possible ways of reading these open-ended Constitutional provisions. The first way restricts their meaning, or gives them a fixed, definite meaning. This is the path adopted by those who maintain that the Constitution may only be construed in accordance with the original intention of its Framers (or the bodies who have since amended the Constitution), or in accordance with previous judicial pronouncements. An example of this point of view would be the doctrine that the protection of freedom of speech only covers that freedom necessary to preserve the political life of the country.¹ There are problems with this view,² but if it should be accepted, these provisions may be viewed as though they are rules, not as high-level purposes. The provisions in this view have a definite content, which the judge applies; indeed, this would appear to be the chief attraction of this view. If it is accepted, the Constitution does not present any special problems of analysis.

The second view, which we have seen has been accepted by Wechsler and Golding, sees these provisions as

¹Compare Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 Indiana L.J. 1, who adopts this view on the basis of the 'original understanding', with Harry Wellington, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication," 83 Yale L.J. 222, 267-8, who adopts this view on the basis of prior judicial pronouncements.

²See Learned Hand, The Bill of Rights (New York: Atheneum, 1965), pp. 34-5.

"a compendious affirmation of the basic values of a free society," as "an affirmation of the special values they embody rather than as statements of a finite rule of law."¹ In this view the judges have had delegated to them (by the Constitution) the power to determine the content of these clauses, so that the clauses shall be interpreted in such a way as to ensure a certain connection between the nation's morality and its laws.

This is the view which would place these Constitutional provisions within the category of 'high-level purposes', and which will therefore, arguendo, be accepted. It is only upon this view that the Constitution poses the problem of restricting judicial discretion. It was because he adopted this view that Wechsler needed to find a way in which Constitutional adjudication could be said to have any legal quality whatever (rather than being mere expressions of the judge's own private value structure); his solution, which was seen to be in some respects unsatisfactory, was the positing of the need for neutral principled decision-making.

Within the perspective of the theory of pragmatic consistency, the problem which both these types raises arises from their abstract nature. These might be

¹Herbert Wechsler, quoted in Martin Golding, "Principled Decision-Making and the Supreme Court" in Summers, ed., Essays in Legal Philosophy (Univ. of Calif. Press, 1968), p. 218.

characterized as purposes without accompanying rules to indicate the path which needs to be followed in fulfilling these goals; the limitation of purpose which needs to be followed in fulfilling these goals; the limitation of purpose which we have seen in the standard 'rule of law' is not present in these cases. And this abstract nature, as was shown in discussing vertical proliferation of purposes, may yield two damaging consequences:

- (a) The line of reasoning which is required to bring these high-order purposes 'down to cases' is long and complex. These purposes themselves, it would seem, would need to justify rules, upon which decision might be reached. But rules are, again, paths to achieving goals, and with high-order purposes you are not given a preferred path. How shall it be determined that rule R, rather than R₁, ought to be adopted? For example, how do we determine that the test for determining the scope of the protection of freedom of speech is that it must not be speech which poses a "clear and present danger," rather than a "probable danger" or some other formulation?
- (b) The abstract character of these purposes often makes it impossible to 'follow them to the limits of their logic' once they are given a determinate meaning. It may be that we all agree that the legal system must always do justice, in the absence of a definition of

justice; given any such definition, the proposition becomes a matter for dispute. On the other hand, no one would argue that justice need not be sought by the legal system. As Singer would have it, these purposes are too abstract to be used simpliciter; both the determinate principle and its negation are undesirable, and the principle is therefore invertible.¹ This again points up, in a more rigorous fashion, the need to adopt some rules, criteria, or standards (as they are most often called) for adjudication with these principles.

It may be helpful here to advert to the neutral principles controversy (chap. I). The theory of neutral principles was, after all, our starting-point (and is in addition subsumed under the theory of pragmatic consistency.² The problems which were found in the response which the theory of neutral principles gives to the problem of determining standards for constitutional adjudication were

¹See Marcus G. Singer, Generalization in Ethics (New York: Atheneum, 1971), pp. 71-80, 112-115.

²A reminder may be helpful here. The theory of neutral principles derives from the requirement that the law govern by means of rules. This is identical with Fuller's first principle of the internal morality of law (the 'generality of law'). Fuller's principles have themselves been adopted as part of the theory of pragmatic consistency, as representing preconditions for laws which need to guide human behavior. By substitution, then, neutral principles is adopted by pragmatic consistency.

that there is no requirement spelled out that the standards must be general, i.e., that 'particularized standards' may not be used, and that it appears that the standard by which a principle is judged acceptable (the modus tollens) is subjective in nature. Given these problems, the theory of neutral principles was viewed as representing necessary, but not sufficient, conditions for assuring the judicial quality of constitutional adjudication. Can a solution to these problems be found?

The problem of generality was simply that, under my reconstruction of the elements of Wechsler's theory, there was no reason to require that standards be general. I argued that there is no way of getting from the requirement that there be rules, to a requirement that there be rules of a certain level of generality. But pragmatic consistency does not rest on as minimal a base as that. In pragmatic consistency, rules cannot be 'particularized', for this would defeat the purpose of adopting rules of law: human conduct cannot be given meaningful direction by rules unless those rules are (to some degree) general. In order that any law may guide the behavior of human beings (potential litigants as well as courts), the rule must not be so specific that it is not understandable or not capable of application. In light of this it would not be acceptable, e.g., to eliminate the theoretical entity 'state action' by an expansion, through some legal-realist analogue of

Craig's Theorem, into an indefinitely-long conjunction of observation-statements explaining the reaction of the legal system to any hypothesized litigation.¹ This is unacceptable not merely because it would be unresponsive to the judge's needs,² but because it would not help the law-abiding citizen either. There is, therefore, a need within the theory of pragmatic consistency that constitutional standards be general--general enough so that they may guide human conduct.

The second problem--that of reducing the subjective element in this type of decision--is far more difficult. By way of partial response to the problem Golding says³

. . . constitutional interpretation does not occur within a vacuum of values. By this I do not simply mean that judges bring with them a personal set of values or that the determination of constitutional or other questions frequently reflects a 'choice of values'; my meaning is, rather, that affirmations of various values are written into the Constitution, 'values that must be given weight in legislation and administration at the risk of courting trouble in the courts'. The Court, then, cannot avoid taking those values into account in constitutional adjudication. To do otherwise would be to fail to adhere to the requirements of principled decision-making. These values supply substantive criteria of principled judgment. We are entitled to reject any principle of

¹On Craig's Theorem see Carl G. Hempel, Aspects of Scientific Explanation (New York: Free Press, 1965), pp. 212ff.

²Martin Golding, "Principled Judicial Decision-Making" in Kent, ed., Law and Philosophy (Appleton Century Crofts, 1970), p. 444.

³Golding, "Principled Decision-Making and the Supreme Court," *supra*, p. 444.

decision that, if acted upon, would lead to the frustrating of accepted values. But this is workable only when values are not in competition.

Golding is saying that the principles must not be unacceptable (that is, must pass the test by tollens) to the values to be found in the Constitution, not to the judge's own, idiosyncratic values. Further, we may say, as long as two or more legal values do not conflict--as long as only one is involved in litigation--that value must be given effect; and in this situation we need not enunciate standards by which this is to be done; our standard is the Constitution itself. If, in these circumstances, a standard is required, then we are faced with only the empirical difficulties involved in determining which rule would best effectuate the posited value or purpose.¹

H. The Minimalist Approach to the Application of High-Order Purposes

There is one further possible response to the problem of ensuring that there be an objective check upon the judge's choice of a standard of constitutional interpretation, or some other high-order standard. The response involves a requirement that whatever principle is chosen, it must be minimally acceptable to jurists at a given time.

I will begin with an example of a problematical high-order principle of the first type, those preconditions

¹This raises, however, the problem of empirical determination of the best rule for a goal.

for keeping the legal system going. The example is the following: It is sometimes said by courts, by way of dismissing a complaint, that de minimis non curat lex--the law takes no account of trifling matters.¹ This principle has behind it yet a broader principle, that the law will take steps which would not otherwise be legitimate if those steps are necessary to prevent the 'opening of the floodgates of litigation'. But for now, just consider the de minimis principle. There is no question in my mind that most plausible definitions of what a 'trivial' complaint or hurt is would include as 'trivial' some cases which are arguably not 'trivial', and even some where the law in fact would provide a remedy. But the judge who is confronted with the complaint of some fragile being who has stubbed his toes on account of another's negligence, may well feel himself justified in using de minimis for dismissing the case, because any definition conceivably acceptable by any court would include this harm as trivial in nature.

On the other hand, if pressed to give his justifying definition of 'trivial harm' the judge would likely falter. How then is his claim (that any plausible definition would cause dismissal of the case) to be judged? What criterion can be employed? The test would have to be whether this

¹Cf. Wallace v. Shoreham Hotel Corporation, 49 A. 2d 81 (1946).

type of case would be included by other judges under a minimum, non-idiosyncratic definition of 'minimis'. Insofar as the judge is not obliged to give a full definition, all he need ask himself is whether his criterion represents minimum content to the principle.

This may be further illustrated, by reference to the principle behind de minimis, that the courts may take action to keep litigation at manageable levels. The need for such a principle is obvious; as Jerome Frank writes:¹

That men do not dispute, in court, most asserted rights is indeed fortunate. For one of the principle factors in maintaining social order is that, happily, most people do not fight with their fists or with weapons--or in court. Most people do not litigate, most of the time. If every potential law-suit became an actual law-suit, society would go to smash. If everyone litigated whenever he could, no one ever could. Anyone who has encountered a litigious paranoiac in action can envision what would happen if all men were incessantly litigious.

This principle has been used, inter alia, to justify the practice of prosecutors to select some laws for non-enforcement (despite legal requirements that the prosecutor enforce all laws).² There are some laws which are never enforced;³ some laws which are sometimes enforced, but are

¹Jerome Frank, Court on Trial (New York: Atheneum, 1971), p. 11. Italics added.

²See Sanford and Mortimer Kadish, Discretion to Disobey (Stanford, 1971), pp. 180ff. and notes there; Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry (Chicago: Illinois Books ed., 1971), pp. 12-15 (section entitled "Illegal Discretionary Action").

³For example, Kadish and Kadish note laws which make it criminal, in various jurisdictions in the United States,

never enforced in certain clearly-defined situation;¹ laws which are usually not enforced but which will sometimes be taken out of the closet and used, generally against persons whom police and prosecuting officials deem undesirable, for reasons which the law may or may not recognize;² and other laws which have a varying interplay between enforcement and nonenforcement. Related to this idea, of course, is the use of plea-bargaining.

Here we face the problem of high-order pragmatic consistency straight on. Clearly, some laws should not be enforced, in order that court dockets may remain reasonably clear. Equally clearly, however, if this alone may serve as a justification for not enforcing a law, then no law need ever be enforced, or, at least, the prosecutor should never be liable to answer for his nonenforcement of any law at all; and this consequence the legal system does

to "swear, to eavesdrop on conversations . . . to sell candy cigarettes, to show movies depicting felonies." What would it be like, I wonder, to see a movie without a felony? See Kadish and Kadish, Discretion to Disobey, notes on p. 123.

¹For example, laws against gambling which are never invoked against the Saturday night poker game.

²For example, laws making it criminal to loiter on a city street for longer than ten minutes, which, if enforced at all, are enforced only against suspected prostitutes, or other individuals whose presence is 'bad for business'.

not accept.¹ On what basis are the distinctions to be drawn?

Some of the standard points made in connection with this are available to a theory which stresses purposes in law. With respect to some laws (e.g., laws against swearing) it may be said that the legislature did not intend to create a new crime, but rather to express, in the strongest way open to a legislature, 'organized community denunciation' of a practice. This purpose is achieved by the passage and promulgation of the law; it is not necessarily furthered by prosecutions which might, indeed, call forth increased disrespect for the law (and hence defeat the law's purpose).

Sometimes, however, this kind of justification is not available. Can a response to the problem of how to apply high-order principles of law, such as the one that the dockets of courts be kept clear, still be found? It would be most difficult to supply a determinative criterion, or some dynamic definition, which will serve to distinguish those actions or laws which should and those which should not be barred from the courts in the name of limiting the judicial docket. The best which perhaps could be done is

¹Compare Wilbur v. Howard, 70 F. Supp. 930 (1947). The case involved a prosecutor who, it was alleged, frequently and flagrantly failed to prosecute gambling offenders. The action, brought by "ministers and others," successfully terminated (for them) in the removal of the prosecutor's name from the rolls of those who may practice before the U.S. District Court for the District of Kentucky.

to require that whatever criterion a jurist might adopt, it would be such as to include the instant case. This sort of determination would not be utterly impressionistic; e.g., claims that a law is so surrounded by procedural restraints, or places such a burden of proof on the prosecutor (like criminal prosecutions for slander)¹ are colorable arguments in favor of the nonenforcement of a law.

The response which this method of analysis would afford to the problem of formulating constitutional standards is then as follows: It is certain that the Constitution allows the judge a certain amount of discretion in his power to interpret and apply the Constitution. (Remember that the liberal construction view has been accepted arguendo.) Thus, to give hard-and-fast rules which are derivable from the Constitution might, itself, be said to be an act which contradicts the intent of the law (to remain flexible)--just as a judge would be contradicting the intent of a law allowing for individualization in sentencing were he to establish his own rules of sentencing. In one sense, then, the problem cannot be resolved in a fully-satisfactory fashion. The dual goals, of following the intention of the law and of eliminating or severely limiting discretion cannot be accomplished

¹Cf. Attorney General Jackson's claim, discussed in Kadish and Kadish, *supra*, pp. 134-35.

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with regard to a law or legal material whose intent is to secure some degree of discretion. (This cannot be done, at least, until a fully satisfactory resolution of Russell's Paradox is achieved.)

Yet some response to the problem is still possible, for we need not say that discretion was granted to the individual judge. Instead, it could be said that the intent was to leave room for courts (and Courts) to give a changing content to the Constitution over time. If that is so, objectively acceptable standards of the Constitution which are (so to speak) intertemporally valid are not required, but rather only standards which are intra-temporally, yet, among competent jurists, interpersonally valid. What this boils down to is that the standards which are chosen should be based upon that minimal conception of what an open-ended clause of the Constitution requires of us which is shared by the competent jurists of any given time. Because these are minimal standards which are time-bound, the standards which would be set would be developed by a process of accretion (from the absolute minimum to the less absolutely minimum). The claim must be made and must be colorable, that, e.g., whatever 'due process' of law requires, it requires representation by counsel in felony cases.

This method seems to emerge from those characteristics which all high-order purposes share: their need for

standards to make them usable, their difficulty in definition (due to the problem of invertibility) and the fact that they are only used in the defeat, rather than in the formulation, of laws. But the method would not be acceptable to those who feel that questions of constitutionality require of the courts searching analysis, to those who feel that in doubtful as well as certain cases the Constitution may be invoked. Yet this latter view would likely also maintain that there are determinate standards which are somehow implicit in the open-ended provisions with which we are dealing. If this is so then whatever the content which is given to these provisions (whether they are given a 'liberal' or 'conservative' content), the fact that a determinate content has been supplied makes this view relevantly similar to the 'strict constructionist' view mentioned earlier. Adoption of the strict construction view, it was asserted, does not raise the special problems of high-order purposes; for in that view the constitutional provisions, having a determinate content, are similar to finite rules of law. Justice Black's absolutist view of the First Amendment is an example of the fact that a 'liberal' content may be given to a constitutional clause, while yet a 'strict constructionist' method of applying that content may be present; because Black has given the Amendment a fixed (though broad) content, he has avoided the special problems of

discretion which high-level purposes, without attached rules, raise.

I. Contradiction in Laws

Although the problem of contradictory laws as a hard case for judicial reasoning is well-established, I have chosen not to include together with my earlier remarks on other hard cases. The questions which this knotty problem raises for a purposive theory of law are quite complex, and the partial solution which I offer both depends upon the analysis of high-order purposes carried out in the last section, and leads naturally into the question of the purpose of the legal system as a whole, dealt with in the following section.

I should first like to remark on the nature of the problem which is posed here. It is very rarely that we find two statutes, or two provisions of a statute (or other form of legal rule) which contradict one another in an immediate way: so that one is saying, in effect, Do x, and the other is saying, Don't do x. More frequently we may find one provision of the law saying that we ought to do x, and another punishing us for doing x; but this is not, after all, a formal contradiction (in any ordinary understanding of logical contradiction), of the form, $p \ \& \ -p$. If the latter type of situation is nevertheless felt to represent a contradiction, some theoretical bridge must be

found between the two schemata. Following Fuller's lead, and analogously to the remarks made about ambiguity in laws, I would maintain that the contradictions which we ordinarily encounter and which other theories treat as formal contradictions are in fact pragmatic contradictions, i.e., inconsistencies in apparent purpose. This sharpens, rather than solves, the problem that this type of hard case presents for the method of pragmatic consistency; since the contradiction, it is maintained, is most often found at the level of the purposes of rules, we cannot appeal to that level in any obvious way in order to resolve that contradiction.

To illustrate this, let me borrow an example furnished by Fuller.¹ Consider a statute which contains a provision requiring automobile owners to install new license plates on January First, and another provision of another statute making it a crime to perform any labor on New Year's Day. Let us grant, further, that the meaning of 'labor' is understood in the legal system to include the installation of license plates. There would seem to be a contradiction here between these laws. But, as Fuller says, "[is] there any violation of logic in making a man do something and then punishing him for it?"² The answer to the rhetorical

¹Cf. Fuller, The Morality of Law (Yale Univ. Press, rev. ed. 1969), p. 65.

²Ibid., p. 66.

question is clearly 'No'. Any contradiction which is nevertheless present is not to be found at the level of sentential analysis, but at the level of analysis of purposes. "We may certainly say of this procedure that it makes no sense, but in passing this judgment we are tacitly assuming the objective of giving a meaningful direction to human effort."^{1,2} (There may, of course, be logically contradictory laws also; but usually, even laws called logically contradictory will be found upon examination to be only purposively contradictory.)

¹Ibid., italics added.

²As fuller notes in another connection, there might even be a symbolic purpose which is achieved in this type of situation, provided that the action to be punished is not commanded but merely permitted. An example where this sort of procedure actually does take place is found in traditional Jewish civil law. I quote from the late Rabbi Dr. Isaac Herzog, a former Chief Rabbi of the Ashkenazic community of the State of Israel (The Main Institutions of Jewish Law, Soncino Press, 1965, vol. I, p. 384): "In the case of movables (metaltelin), the payment of the price does not, generally speaking, in the absence of certain formal modes, operate a legal transfer. But once the price had been paid and accepted, the transaction was deemed binding in the forum of conscience upon both vendor and vendee, and the party taking advantage of the rule of law had to submit to an imprecation pronounced by the court invoking divine retribution against the man who 'does not stand by his word!'"

The point of the example is that the 'contradictions' of the law which we ordinarily speak about are contradictions of purpose; and even a schema (P is permitted & P is punished) which seems to be as close to a formal contradiction as we might find in the law and, in suitable circumstances, be understandable--'suitable' circumstances being those where we may find an intelligible purpose in the law.

An actual example from American law which Fuller refers to will also help in showing us both how it is that contradictions are usually present at the level of purpose, and how they might be handled, at times, by means of the method already provided. United States v. Cardiff¹ presented the Supreme Court with the question of whether the president of a company manufacturing food, who had refused entry to a federal inspector, had thereby violated the Federal Food, Drug, and Cosmetic Act. Section 704 of the Act states that the permission of the plant's owner to enter must be obtained before the inspector may enter, while Section 331 made it a crime for the owner to refuse "to permit entry or inspection as authorized by Section 704. If we are to maintain that only formal contradictions constitute the hard cases of 'contradiction in the law',² the statute would not raise any problem. It could have been interpreted as meaning that the owner violates the statute if, but only if, after giving the federal inspector permission to enter on some future date, he refuses him entry when the date arrives. Fuller remarks,

The Supreme Court considered this interpretation but refused to accept it. The trouble with it is not that it is lacking in logic, but that it does not correspond

¹U.S. v. Cardiff, 344 U.S. 174 (1952).

²As does Kelsen, for example. See General Theory of Law and State (New York: Russell and Russell, 1961), pp. 374-5: "Just as it is logically impossible to assert both 'A is' and 'A is not', so it is logically impossible to assert both 'A ought to be' and 'A ought not to be.'"

to any sensible legislative purpose. . . . It is not understandable that it [Congress] should limit the inspector's right to entry to the improbable case of an eccentric factory owner who might first grant permission and then shut the door.¹

The provisions are contradictory, that is, but they are not formally contradictory; the contradiction lies at the level of purposive analysis.

One way to deal with this contradiction, and with any contradiction involving mandatory, and especially criminal, law, is to say that it results in such unclear direction to the citizen as to fail to give him adequate warning of criminality. That is to say, the law is so unclear that it must be voided, in order to observe the precondition for any law that it must not offer hopelessly ambiguous direction (one of the high-order purposes adverted to in the preceding section). This is what the Supreme Court did in fact do in this case. So, one way of taking care of contradictions in laws is by voiding the laws insofar as they contradict, on the grounds that the preconditions for fulfillment of the law's purpose are not present. Sometimes, however, this is not, intuitively, a proper response to the problem. Pragmatic consistency offers two other means of resolving contradictions without resorting to this extreme course.

The second method is summed up in the maxim, lex posterior derogat priori, the later law (implicitly)

¹Fuller, The Morality of Law, supra, p. 68.

repeals any provisions in previous laws which are inconsistent with the new law. Since the purposes of law are purposes in law, and our evidence of the 'intention of the legislature' is gathered from the actions of the legislature (specifically, the action of adopting statutes), the fact that the new law is inconsistent with the previous one shows that the purposes of the legislature have changed. This method is also not intuitively complete (in the sense of offering an adequate response to all of the hard cases arising due to contradiction). Some contradictions, like Cardiff, arise in the same piece of legislation, that is, two inconsistent provisions are sometimes adopted simultaneously. Other cases may arise in which there is some indication that the later law should not be taken as representing a change in the goals of the law.

There is a third method of resolving these contradictions, which is theoretically the most important method, although it is the most difficult to adopt in practice. The method involves resolving contradictions between two laws--that is, as we have seen, between two goals--by means of a third goal which both of these (lower-level) goals were designed to achieve. As is the case with so many ideas in this thesis, I take my point of origin from some remarks made by Martin Golding in reference to the theory of neutral principled decision-making. It is put forward in the form of a suggestion tentatively embraced, tentatively

rejected and then re-embraced. He says,¹

I fail to grasp Professor Wechsler's position if it consists in the statement that one ought to, or even can, supply 'neutral principles' for 'choosing' between competing values. I can, of course, choose between two competing values by reference to a third value which is more comprehensive or supreme, that is, when there is already an ordering of values. . . . But it is difficult to see how the ordering itself is to be made on 'neutral principles'.

The proffered solution of the problem is given immediately afterwards:²

Thus, when, in deciding a case, a tribunal is faced with two competing values and there is no good reason to be advanced for preferring one value over another, so that the preference given to one value is entirely arbitrary, if you please, we may still require that the tribunal formulate a standard or criterion that shall function as a principle of decision in this and other cases of its type.

Here we are offered a means for constructing a hierarchy of values when these values have not, previously been arranged in hierarchical fashion. Given this hierarchy of values, we may adjudicate the contradictions between values. Mutatis mutandis, we may construct a hierarchy or 'tree' of goals or purposes, and adjudicate conflicts between lower-level purposes by referring to the higher-order purpose which both of the rules (which are attached to the lower-level purposes) are designed to achieve. To construct the tree, we see how far the court involved would

¹See Oppenheim v. Kridel, 236 N.Y. 156 (1923), quoted in Hart and Sacks, The Legal Process (Cambridge: tentative mimeographed ed., 1958), 480-481.

²Golding, "Principled Decision-Making and the Supreme Court," *supra*, p. 225.

be willing to let one principle hold sway over another principle, these two being pragmatically inconsistent in some of their applications; then we may construct a principle to account for this preference, which shall adjudicate between the two. Once we have this next-highest branch on the tree, this next-highest principle, it may be appealed to in deciding the instant case.

While I shall reserve a full discussion of the case for the next chapter, let me advert to Henningsen v. Bloomfield Motors Corporation¹ as an example of this method. The case involved a warranty on an automobile, given 'in lieu of all other warranties, expressed or implied', which provided the minimal protection of replacing defective automobile parts, if the part is returned to the manufacturer for verification of the complaint. If, that is, the automobile was sold without engine oil, and as a result the buyer ruined the engine by driving around without oil, the liability of the manufacturer and dealer was limited to shipping the customer a quart of oil (after, of course, the crankcase was returned for inspection!). One contradiction which arose in this case was the conflict between the principle that warranties of contracts should be given effect, and the principle that they should not be given an effect which would make them too hard upon the buyer. The court found that both of these principles are derivable

¹Henningsen v. Bloomfield Motors Co., 32 N.J. 358, 161 A. 2d 69 (1960).

from the policy of the law to reduce the scope of caveat emptor: and what this higher principle required, in the instant case, could not, of course, be more obvious.

Another such inconsistency arose because the principle of giving effect to contracts was here being employed to cause the courts to enforce the terms of a contract of adhesion (a contract where all of the bargaining power is on one side, and where, therefore, that side can write up any sort of contract which he likes, whereupon the buyer must either accept these terms or do without an essential product or service). Since the basis for the principle of giving effect to contracts was the concept of 'freedom of contract', and since contracts of adhesion served to defeat this purpose (upon which its own validity was ultimately dependant), the principle was found not to apply to contracts of adhesion. The documentation of this reasoning will be found in the full discussion of the case, in chap. IV.

This method of resolving purposive contradictions is similar to Ralph Barton Perry's use of 'comprehensiveness' in the adjudication of values.¹ The method does, however, lead to a fundamental difficulty for the theory of pragmatic consistency. The use of this method involves, in effect, a demonstration that ultimately the proliferation of purpose which occurs in the legal system is vertical in nature;

¹See generally Ralph Barton Perry, Realms of Value (Cambridge: Harvard Univ. Press, 1954).

it cannot be used when there is ultimately horizontal proliferation of purposes in the law. A little reflection will show that if we follow the tree of purposes or goals of the law to its top, this method may only be used if we should find that there is some sort of ultimate purpose which the legal system as a whole serves. It has been asserted that this is not the case.¹ I am not certain what the implications for the theory of pragmatic consistency would be if this assertion is true, if, that is, there is not, ultimately, some single purpose to the legal system. One of the methods by which pragmatic consistency resolves contradictions would be lost; but I am not convinced that this is a very serious consequence, or that there would ensue some other serious consequences through admitting that there is no single purpose to the legal system. The problem is nevertheless interesting enough to be a worthwhile one to pursue.

J. The Purpose of the Legal System

Among the most popular, and most thoughtful, discussions of the idea that there is an overriding purpose which the legal system as a whole is designed to achieve, and which judges must effectuate, is Ronald Dworkin's review of The Judicial Decision by Richard Wasserstrom.

¹Cf. Dworkin, "Wasserstrom: The Judicial Decision" 75 Ethics 47 (1964), also published as "Does Law Have a Function?" 74 Y.L.J. 640 (1965).

Dworkin's position is, of course, that there is no such purpose; but this is only his rough conclusion. It will be rewarding to examine the article in fine, to see exactly what Dworkin is saying here.

Let me first obviate two possible sources of misunderstanding:

- A. Only Dworkin's argument about the claim that there is a single purpose to the legal system will be examined here; an extended discussion of his theory will be provided in chap. VI, and no inferences about his theory (which was largely developed subsequent to this article) should be drawn from this discussion.
- B. Sometimes, it seems, when we speak about something being the 'purpose of the legal system' what is meant is that there is a certain tendency in the legal system towards that 'something'. In this sense it could be said, for example, that the purpose (or, perhaps, function) of some ancient legal systems with which we have some acquaintance was to keep the peace within society,¹ that many of the laws in the system--perhaps the vast preponderance of laws--were designed with that ultimate state-of-affairs in mind. It is perfectly natural and understandable that this kind of tendency could be called a purpose towards which the legal system as a

¹See, generally, the works of Roscoe Pound, e.g., An Introduction to the Philosophy of Law (Yale Publ., 1971).

whole strives. But this is not the sense which I require. For a legal system in toto cannot be said to have a purpose (in my sense of the term) unless an analysis of the vertical proliferation of purpose of each and every law yields, finally, the same purpose. If all that would be shown is that a legal system has a certain tendency, it would not have been proven that each law shares that tendency. We could not, therefore, be sure that two laws with different primary, of low-level purposes, could in fact be adjudicated between by reference to a purpose which both of these rules share.

Wasserstrom maintains that "some goal or function of the legal system must be presupposed if evaluation is not to take place in a contextual vacuum."¹ This goal or function must be, according to Dworkin's interpretation of Wasserstrom, of a certain kind as well: it must be of the "forward-looking, state-of-affairs-to-be advanced kind."² This is not the only sort of standard imaginable: the judge could, conceivably, feel that the purpose of the legal system is to ensure that fair play, as that concept is commonly understood, is maintained; or he may feel that the purpose of the legal system is to ensure that those with morally superior claims against their fellow-man should

¹Quoted in Dworkin supra, p. 49.

²Ibid.

be vindicated.¹ But, says Dworkin, these are not forward-looking standards, and Wasserstrom's theory cannot accommodate them. Although this seems to me to be disputable, this may be passed over. Dworkin has not discussed, however, the possibility that the purpose of the legal system could be what I have called a 'deontological' purpose, e.g., that the goal which a legal system is seeking is the achievement of a state-of-affairs which has specifiable characteristics that jointly, ensure that, e.g., 'fair play' is done. There are, after all, reasons why we say, in a given situation, that fair play has or has not been heeded; there are characteristics which may be said to be necessary to the achievement of fair play, characteristics which prove that fair play is not present, and characteristics which incline one to one position or the other. It is not the case--and, certainly, Dworkin would not admit it to be the case--that absolutely anything may be said to exemplify 'fair play', just as it is not the case that anything may be called 'awesome' (e.g., a cup of tea served in Melmac dishes). Words and terms, even terms like "fair play," have certain meanings and content, with reference to which they are applied; and these meanings or content may be used to judge whether the deontological purpose has been fulfilled (whether, immanent

¹Ibid., pp. 49, 51.

in situation x, 'fair play' is present). This point, however, need not vitiate the value of Dworkin's argument.

There are (at least, although I have not seen more) two reasons which Dworkin has for rejecting the view which Wasserstrom advances. One of these reasons is that it is not the case that the judge occupies in the institution of the law a position which allows him to give effect to this purpose, whatever it may be. The function of framing the law so that it will be well-designed to achieve that goal is one which the legislator must fulfill; it is not part of the judge's task. In Dworkin's example, a judge who is confronted with a case involving a mortgage is not free to decide on the basis that the institution of mortgages, viewed in the light of the purpose of the legal system, is bad. This sort of judgment, to abolish the institution of mortgaging on those grounds, ought properly be left up to the legislators.

Dworkin is not, by the way, only maintaining that the judge has in this case and similar cases an obligation to decide in accordance with a well-established legal rule. For even when the judge is not confronted with this stricture--when he is faced with a lacuna in the law, or an ambiguous law, or a set of contradictory laws--he still may not make his judgment turn upon a belief as to which decision would best serve the purpose of the legal system. It is wrong to say that "if and to the extent that courts

and legislatures both 'make law' the same standards are or ought to be applicable to them in that capacity."¹

It is not clear to me whether this should be taken as a point against the thesis of pragmatic consistency. Pragmatic consistency itself strenuously affirms that there is an important difference between the legislatures and the courts, in that the former make policy, and give purposes legal status, in a way that the latter does not. It seems, also, that Dworkin would seem to side with pragmatic consistency on another possible point of divergence, for he appears to hold that the policy, and not merely the words, of the legislature should be given effect by the courts.² But if Dworkin's remarks do constitute a criticism of pragmatic consistency, the criticism only consists in saying that we do not currently practice this method consistently. All Dworkin is saying is that "present practice"³ does not countenance the judge making considerations of pragmatic consistency into account. Even if this claim were true--and the cases in the last chapter and in the appendix demonstrate that in large part it is not true--this constitutes no criticism of either pragmatic consistency or Wasserstrom's theory, for both

¹Ibid., p. 54.

²See *ibid.*, p. 52, where he mentions that the court may proceed by analogy from legislative pronouncements to contravene otherwise-valid law.

³*Ibid.*, p. 53.

are concerned with giving reasons why we should change our practice of judicial reasoning in favor of another method.

Dworkin's second criticism is more successful. It is said that the reason for maintaining that the judiciary should effectuate a certain policy is that it ought to serve the community which it governs. Each community has a goal which the judiciary ought to recognize and effect. But are there in fact any such goals of communities; does the United States, for example, share such a goal, towards which all of its efforts ought to be directed (and are, in fact, ordinarily directed)? Aside from vacuous goals like 'the achievement of a just state', which give no direction for the judge in his process of decision, Dworkin cannot find any such overriding shared goal. To be sure, many states-of-affairs are seen as desirable by the preponderance of our population; but there are, in fact, many ends which can conflict which we seek as ends-in-themselves; and we are not always prepared to choose the attainment of one end to the detriment of all others. While we value highly material social welfare, we would not feel it justified to enslave a segment of our population to achieve material well-being. Conversely, while we value freedom, it is not so overriding as to be allowed at all times to interfere with material well-being. It seems probable--though not certain--that any such

determinate goal which could be supplied would be subject to the envisioning of a situation in which our community would choose not to pursue that goal because such pursuit would drastically affect our pursuit of other goals. Each of these goals may be reduced to a reductio ad absurdum.

In the moral, rather than legal context, this idea has been developed by Sir Isaiah Berlin:¹

. . . the human condition is such that men cannot always avoid choices, . . . not merely for the obvious reasons which philosophers have seldom ignored, namely that there are many possible courses of action and forms of life worth living, and therefore to choose between them is part of being rational or capable of moral judgment; they cannot avoid choice for one central reason (which is, in the ordinary sense, conceptual, not empirical), namely that ends collide; that one cannot have everything. Whence it follows that the very concept of an ideal life, a life in which all rational (or virtuous, or otherwise legitimate) wishes must be capable of being truly satisfied--this classical vision is not merely utopian, but incoherent. The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament.

The result is that whether we adopt Berlin's critical morality, or Dworkin's view of positive morality, there is ultimately no reconciliation by means of a single purpose or value which all other purposes or values seek to further.

This is, I think, a very powerful argument, and it may well be conclusive. The problem with the argument is that it focusses upon the extreme case, where we have a conflict between purposes. A full account furnishing a

¹Isaiah Berlin, Four Essays on Liberty (Oxford: Oxford University Press, 1969), li. I am indebted to Professor Virginia Held for calling this parallel to my attention.

purpose to the legal system would have to deal with this problem, then, but a more modest one would not.

This more modest account would, first, say that the legal system need not be serving a simple purpose in order for one to say that it is serving a single purpose. It could be said, that is, that there are a plurality of purposes to the law (prevention of anarchy, achievement of a modicum of political and economic equality, redressing of harms, etc.), which jointly constitute the purpose of the legal system. In other words, the goals sought are G_1 , G_2 , . . . and the purpose of the legal system is the achievement of G_1 & G_2 & . . .

The problem is, what is to be done when these purposes conflict? It seems to be the case that purposes can only be said to conflict when they would, in some situation, give opposing guidance; unless this condition is satisfied, what sense is there to saying that purposes conflict? In our context, this means that in order for the purposes of the legal system to be said to be in conflict, it would have to be the case that there exists or could exist a legal controversy in which the two purposes yield conflicting decisions (one favors the defendant, the other his opponent). To avoid this, it must be required that, if a complex goal is attributed to the legal system, the several goals must not be such as to be applicable to the same act or controversy. Can this be done?

A natural suggestion¹ might be that the law be broken up into its categories--criminal law, property law, tort law, etc.--in such a way that there is no overlap between these categories. It would then be the case that we be required to find purposes for each of these categories, and, since we had set up these categories in such a way that they may never relate to the same question in law (although they could be raised in the same trial); they could not come into conflict with one another.

I do not hold out very much hope for such a method. It is subject to attack on three points:

- (a) It may be denied that the law can be compartmentalized in the hermetic fashion described here. At certain points, for example, criminal law shades into the law of torts: criminal punishment may sometimes serve the function of compensation, and tort damages may sometimes serve the functions of retribution and deterrence.
- (b) It may be denied that these categories of law could be broken up in such a way that each would have an identifiable function.
- (c) It may be denied that these categories of law could be broken up without leaving a remainder of some categories which themselves have conflicting purposes or functions.

It is hard to see, for example, how the category of

¹In private conversation and as-yet-unpublished papers, curiously enough, Professor Dworkin has indicated a similar proposal, although with principles of categories of law, rather than purposes.

tort law might be done justice to without attributing to it both the purposes of maximizing utility and of ensuring fairness.¹

There are very good reasons then for denying that there is a single, simple purpose to the law as a whole; and there is much reason to doubt whether this could be rectified by positing a complex purpose, made up of the several purposes which the categories of the law fulfill. There is no pre-established harmony of human purposes, nor of the shared purposes of a community, nor, even, of the shared purposes which a community feels should be expressed in the law. It must, however, be stressed that this does not, I think, affect the claim that legal rules have purposes,² or that a number of legal rules may have a shared purpose. This also does not show that 'not all of the legal system has a purpose', i.e., that there are some elements of the legal system without goals which these elements were designed to achieve. There is no necessary connection, for example, between the statements "Each legal rule has a purpose" and "All legal rules have a purpose" (the latter implying that they all share a single purpose). This conclusion does not, therefore, affect the basic contentions of the theory of pragmatic consistency.

¹See George P. Fletcher, "Fairness and Utility in Tort Theory" 85 Harv. L. R. 537 (1972).

²Dworkin himself realizes this; cf. Dworkin, *supra* p. 49.

K. The Non-Empirical Character of the Theory

The theory of pragmatic consistency states that rules have discoverable purposes which may be used in the adjudication of hard cases. Can this be taken as meaning that in every case, once a rule's purpose is known, a decision which is obviously correct in the light of that purpose will emerge?

The answer to this must be 'no'. There are many empirical elements, determinations of fact, which must go into the decision of the judge.

Jerome Frank constructs an extended analogy between the interpretation of a law and a critic's interpretation of a musical composition.¹ The analogy breaks down when it is realised that the judge has not only the task, which he shares with the critic, of discovering intention; in addition, he has the task of determining which of the decisions open to him will best effectuate that intention, which decision will best advance the law's purpose. He is faced with the task which Fuller terms 'eunomics', the problem of determining which of several possible means is most appropriate and efficacious for the achievement of a given end. In contrast, therefore, to statements like those made by Horack,² I would maintain that the problem of

¹See Jerome Frank, "Words and Music" in Courts on Trial.

²See Horack, "In the Name of Legislative Intention" 38 W. Va. L.Q. 119 (1932).

judicial interpretation and decision-making is not entirely caused by the fact that the law-making organ of government is not the same as the law-applying organ. If this were the case, the search for purpose would no doubt be greatly facilitated, or the need for such a search could be entirely obviated. Still, there would remain the problem of which decision is most efficacious for that purpose.

That a solution to this problem is not offered by the theory of pragmatic consistency does not constitute a defect in the theory, any more than the fact that logic fails to supply premisses for arguments does not constitute a defect in logic. The situations are perfectly analogous. A valid argument of logic will have a true conclusion once it is granted or known that the premisses of that argument are true. The conclusion of an argument of pragmatic consistency--"The decision is x"--is assured upon the truth of the premisses, "The purpose of the law in question is P," and "Decision x serves P as well as or better than any other available decision." I would not be far off the mark were I to say that a theory of judicial reasoning should only be required to supply the rules whereby premisses warrant certain conclusions. Of course, the theory would be useless were it never possible, or (even) frequently impossible, for the judge to find out the truth of the second premiss, that decision x is best suited for fulfilling

the law's purpose. I cannot see any reason for asserting this, however. There are, after all, a limited number of possibilities here: x might be clearly better than the other possible decisions, in which case decision is for x; x might be clearly worse than an alternative, in which case the alternative is chosen; or, there may be no currently available information showing x to have any different effects, relative to the purpose, than the other possibilities: and in this case, we have no reason for preferring one alternative over the other. In the last case, then, pragmatic consistency justifies, indifferently, any decision which is not clearly at a disadvantage relative to the alternatives to that decision.¹

One illuminating question which may be asked about any theory of legal reasoning is, granted that all judges have accepted the theory, what possible points of disagreement between the judges would remain?² It is clear that even if pragmatic consistency were accepted, there would be room for dispute between judges as to which decision would best effectuate the law's purpose. There is no assurance that judicial estimates of probability would coincide.

But what about the other premiss to the argument of pragmatic consistency, that "The purpose of the law is P"?

¹See further on this appendix B.

²I owe this to remarks made by Martin Golding.

Would there remain disagreement there? Again, pragmatic consistency cannot assure the truth of its premisses in individual arguments, but it must show that the premisses can be reached. One cannot, therefore, be certain that there would never be disagreement on the purposes of a law, even when the method is used rightly. I have asserted, though, that laws always do have purposes: I have tried to show a method by which these purposes may be discovered (and not invented), which follows from the description of 'purpose' which I have given; I can show how some disagreements about the purpose of a law arise through a failure to recognize the logic of this sort of claim about purpose; I can give and have given examples where purpose may be discovered, although it would seem that, in those cases, it is not likely that an 'objectively right' purpose could be discovered, I have said something about what is done when these purposes are discovered. I have not given, nor do I believe I could give, an argument showing that in every case the method which I have explained will yield an objectively right purpose, to the exclusion of other possible purposes which may explain the available information about the law in question equally well. If there are two such purposes, each fitting the facts equally well (the facts about legislative history, amendments, judicial changes which have not been overruled, etc.) and which, in a given case, yield conflicting results, there would be no

uniquely correct decision available from the method of pragmatic consistency; and it does seem that this could conceivably occur. A purpose is, in a sense, a hypothesis which explains the design of a certain phenomenon (in our case, a law); and, as we know from science, phenomena can be explained by several hypotheses. It would be self-seeking to extend the analogy further, and say that, at any given stage in science, it is usually the case that one of the available hypotheses looks more probable than its competitors; and that a method of discerning which, among the alternative hypotheses, are tenable, would be valuable.

L. Final Criticisms and Summary

With the last section, my exposition of the theory of pragmatic consistency was essentially completed. In this section I shall address myself, first, to these criticisms made by H. L. A. Hart of this type of theory (in his article, "Positivism and the Separation of Law and Morals"),¹ and then conclude by listing, with some explanation, what I see as the remaining difficulties for the theory as presented here, together with the claims in its favor which have been made.

By addressing myself to Hart's criticisms, I do not mean to imply that no other significant criticism of the

¹H. L. A. Hart, "Positivism and the Separation of Law and Morals," reprinted in Kent, ed. Law and Philosophy (Appleton Century, 1971), 564.

theory has appeared.¹ However, Hart's criticisms assume peculiar importance, not merely because they are so widely known, but also because they were attacking quite clearly the notion defended here, that the purpose of a law is to be found immanent in that law, and that, on those grounds, interpretation and application of laws must be done by means of purpose. Much other criticism was directed, indifferently, at the two notions found in the phrase, 'the intention of the legislature', viz., the subjective notion, and the purposive notion. This confusion as to what theory is being attacked is found, e.g., in McCallum's work on legislative intention.² To take but one example: McCallum criticizes the "mysterious assertion that the intention of the legislature is 'not a collection of subjective wishes, but rather the objective footprints left on the trail of legislative enactment.' Such a statement is mysterious because it appears to mistake what could at most be evidence of intent for intent itself."³ Yet the notion which he is here criticizing certainly appears to be the purposive view of intention, in which case it is inapposite to claim that the objectively-present

¹See e.g., McCallum, "Legislative Intent" in Summers, ed., Essays in Legal Philosophy; Roscoe Pound, "Spurious Interpretation" 7 Col. L.R. 379 (1907); Max Radin, *supra*

²McCallum, "Legislative Intent."

³*Ibid.*, p. 238.

elements of the law which serve to inform us as to the law's purpose are only 'evidences' of intent (as purpose). A great deal of the criticism ostensibly applicable to the theory of pragmatic consistency is of this nature, the sort of criticism whose answer consists in the reiteration of neglected or misunderstood parts of the theory. Answering these criticisms would be both a useless and boring task.

Hart's comments, in contrast, are both to the point and invigorating. His famed brevity of expression places upon me a moral obligation to extensively quote from his comments, rather than attempting to paraphrase:¹

[The theory to be criticized holds that] instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judge's choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule's application and the penumbral decisions.

Is it wise to express this important fact [that aims and purposes should be used in application of law] by saying that the firm utilitarian distinction between what the law is and what it ought to be should be dropped? Perhaps the claim that it is wise cannot be theoretically refuted for it is, in effect, an invitation to revise our conception of what a legal rule is. We are invited to include in the "rule" the various aims and policies in the light of which its penumbral cases are decided on the ground that these aims have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled. But though an

¹The quotes are from Hart, *supra*, pp. 578-80.

invitation cannot be refuted, it may be refused and I would proffer two reasons for refusing this invitation. First, everything we have learned about the judicial process can be expressed in other less mysterious ways. We can say that laws are incurably incomplete and we must decide the penumbral case rationally by reference to social aims. I think Holmes, who had such a vivid appreciation of the fact that "general propositions do not decide concrete cases," would have put it that way. Second, to insist on the utilitarian distinction is to emphasize that the hard core of settled meaning is law in some centrally important sense and that even if there are borderlines, there must first be lines.... By contrast, to soften the distinction, to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy.

The first question we may ask now is, Upon whom does the burden of proof devolve? It is clear that for Hart the burden of proof must be satisfied by the theorist who would wish to 'import' the concept of purpose into the concept of law. The 'firm utilitarian distinction' which refuses this importation is to be accepted as a given datum; the purposive view, not. But why should this be so? There seems to be a general feeling about that it is somehow harder to refute a distinction than to defend the presence of a distinction. It is not easy to see why this should be so. To be sure, there are some logical considerations (of, I think, doubtful validity) which suggest that any distinction which can be made, and which is made, in such a way that people understand it, proves that the distinction (in some sense) exists, its ontological status is thereby

assured. Quine discusses this same point when discussing his differences between McX, who "maintains that there is something which I maintain there is not."¹

When I try to formulate our difference of opinion, . . . I seem to be in a predicament. I cannot admit that there are some things which McX countenances and I do not, for in admitting that there are such things I should be contradicting by own rejection of them.

This, however, is not of decisive significance in the present context. First, because it would have to be shown that there is a distinction which may be understood and formulated in a consistent fashion, in order for us to say that there is a distinction, that the distinction possesses ontological status. Second, because even if this were shown, it would not be to the point. To establish the positivist (or 'utilitarian') distinction as a datum, it would further have to be shown that this distinction, as made by the utilitarians, had passed into ordinary usage. Only then would our acceptance of a purposive view of law entail 'dropping' a distinction. Only then would our acceptance of a purposive view of law entail 'revising' our definition or 'rule of law'. Finally, (and this point is of a logically different order than the earlier two points), it would have to be shown that the distinction, when made, is of some use; that it is not a distinction which is 'true' but uninteresting (or positively harmful).

¹Willard Van Orman Quine, "On What There Is" in From a Logical Point of View (Harper Publishing, 1961), p. 1.

Hart might be making a second, and corollary point: the purposive view is 'mysterious', and hence contrary to ordinary understanding, in a way in which the positivist line is not. I do not, myself, think that this is so. Perhaps Hart is here trading upon an ambiguity in the purposive account as given by Fuller, an ambiguity to be found in the claim that there is no way of making a hard-and-fast distinction between the law that is and the law that ought to be. The distinction between these two is, no doubt, commonly understood and accepted, but only under a certain interpretation of the phrase, 'the law that is and the law that ought to be', an interpretation under which the 'law that ought to be' is the law required by morality (the ordinary conception of morality). But this is not the type of morality talked about here. "When he speaks of morality he seems generally to have in mind all sorts of extralegal notions about "what ought to be"¹ and also notions whose legality or extralegality is a matter of dispute. Among these, of course, is the notion of purposes in law itself. It may be admitted that it is 'mysterious' to assert that law must conform to morality; this would not be enough to indicate that it is 'mysterious' to assert that there are purposes in law which constitute a vital part of that law. And while Fuller may be making both of these claims, I am only making the latter;

¹Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart," 71 Harvard L. R. 630, 635.

so the criticism could not be transposed to apply to the theory of pragmatic consistency as it is developed here.

Hart may not be trading upon this ambiguity. If he is not I would maintain that the positivist distinction between the law that is and that which ought to be (or, rather, the multiple positivist distinctions) are themselves 'mysterious'. Once given a content it becomes mysterious, and a distinction 'in the air' without a delineated content is not a distinction at all. In particular, the distinction which Hart makes between the 'core and the penumbra', which is, in fact, essential to his distinction between the law that is and the law that ought to be, is not at all commensensical in any obvious way. While it is presented as though it were a fact about language (and particularly legal language), it is in fact a theory about language, (what Fuller has termed the 'pointer theory of meaning').¹ This changes the 'ontological status' problem considerably. This makes it much less obvious that the burden of proof is upon the defenders of a purposive view, and thus denies Hart an important tactic.

Too much, however, should not be made of this; it is only the pons asinorum of Hart's criticisms. Still, it has ramifications for those criticisms which Hart then gives. For he says that the claim that purposes and aims are immanently present in laws is advanced on the ground

¹See Fuller, The Morality of Law, supra.

that these aims "have, because of their importance, as much right to be called law as the core of legal rules whose meaning is settled." This is simply not true. To be sure, it is maintained, by those against whom Hart argues, that good effects accrue once we admit purposes into rules, and therefore that it is important to adopt this sort of theory. What is not true is that this is the reason, the only reason, for adoption of a purposive theory, for it is also claimed that this theory need not be adopted, because it is the theory which our legal systems already conform to not always, perhaps--and certainly not always in England, where positivism and analytical jurisprudence is so prevalent¹--but often enough so that it has as much right to be called the theory of our law as any other theory has. I would not like to make too much of this point, either; perhaps the theory of purpose in law should be advanced as purely a prescription (or 'invitation').

What then are Hart's reasons for declining the invitation? The first appears to be that the insights to be afforded by this theory can be put in other ways, which do not involve saying that the purposes by which the judge is to interpret the law are to be found in the law, and have the same binding quality of law itself. "We can say that laws are incurably incomplete and we must decide the

¹See Fuller's comment on excessive English formalism in commercial law, in Fuller, "Positivism and Fidelity to Law", pp. 637-38.

penumbral cases rationally by reference to social aims."

This is not, however, all that we are saying on the positivist account of Hart. We are in addition saying that the judge, in deciding penumbral cases on the basis of purposes, is engaged in a 'creative' act, that he is 'legislating'. Someone might maintain that it does not matter what we call a thing, as long as we know what we are about--but Hart could not say this. It is important to be clear, and not to mislead. And Hart admits that

in interpreting legal rules there are some cases which we find after reflection to be so natural an elaboration or articulation of the rule that to think of and refer to this as 'legislation', 'making law', or a 'fiat' on our part would be misleading.¹

The reference there is to extension of a law on the basis of purposive views of law.

Now it may seem that Hart has not given away very much by this admission. He does maintain that there are 'very few' cases of the sort described above. In fact, though, he has given away a great deal. He has admitted that in some instances--however few--interpretation of a penumbral case by means of purpose does not constitute 'legislation'. He has admitted that in some cases the law itself--the legal rule itself--may be 'elaborated or articulated' by means of its aim, by way of interpretation, rather than by way of legislation. He has admitted that

¹Hart, "Positivism and the Separation . . ." p. 591.

an examination of meaning, without an examination of purpose, will not always supply us with the class of 'the core of legal rules with settled meaning'. He has, in fact, caused his entire case to rest upon his second point, viz., that purposive theories of the law overemphasize the penumbra of law and concomitantly underemphasize the hard core of law.

I would prefer to pursue this first argument of Hart's a little further. The argument is, once again, that we can gain the advantages of the purposive theory by using different language. The argument is in effect rejected by Hart himself on the grounds that it leads to us speaking infelicitously, to misdescriptions. It is fantastic that a jurist who is concerned day by day with the effects of the language we use should only be worried about misdescription. The whole point of much legal philosophy has been that it makes a great deal of difference, in many ways, how we talk about things: that words have implications and ramifications for conduct. Hart is saying that if the gains of the purposive view could have been achieved without infelicity and misdescription, we may abandon the purposive theory. Upon a view that holds that the only task for legal philosophy is to describe the legal system for philosophy graduate seminars, Hart is, or may be, right. Upon a theory which holds that legal philosophy is a vital part of the functioning of the judicial system itself, he

is wrong; consequences of speaking other than misdescription must be taken into account as well, when we choose how we are to speak. Let me give a brief example of what these other consequences might be like.

There is a recent article by Christopher Stone, "Should Trees Have Standing?"¹ which recognizes this point. Stone argues that, in order to maintain the integrity of our environment, it should be made possible to sue polluters who have injured the environment even if no interests of any assignable citizen or group of citizens may be shown to have been injured through the pollution. Stone would accomplish this by having the legal system recognize rights of natural objects, and by having 'natural objects advocates' (or guardians) to pursue those rights in litigation.

Stone recognizes that we could, perhaps, achieve the legal consequences which he envisions and desires without saying, in these terms, that 'trees have rights'. A legal-realist description of the new forms of procedure which would be entailed by saying 'trees have rights' could be codified. And yet Stone feels (as do I) that it is better to adopt the seemingly peculiar locution because of what he calls the 'socio-psychic' gains that the manner of speaking would involve. In ter alia, if we said that trees have rights, we would be alerting our judiciary to search for new ways of fulfillment or vindication of those rights.

¹Should Trees Have Standing? Toward Legal Rights for Natural Objects (Los Altos, Calif: William Kaufman Co., 1974).

The application of the concept of 'socio-psychic gains' in the present context is clear. There is a difference between a judge acting as a 'legislator' and acting as a judge; between applying the law itself, and supplying, on the basis of 'social aims' a decision to supplement an 'incurably incomplete' rule; between applying the law and making the law. There are differences in the way the judge will view his task, and in the way the populace will view the judge's task, which are largely contingent upon which description of the judge's task is adopted. A judge who knows that his task is always that of purposive interpretation--that this is not only found in his occasional foray into the penumbra--will be alert to the need to keep his decisions pragmatically consistent with the purpose of the law. This, then, leads us to Hart's second point. Disclaimers aside, Hart does, after all, believe that it does make a difference which manner of speaking we adopt. If we adopt the purposive fashion of speech, then we shall turn all cases into penumbral cases; if we adopt the positivist stance, we will not become overobsessed with the penumbra. In short, Hart's two points cannot stand together: if it makes no difference which theory we adopt, he cannot claim that purposive views lead to a 'penumbral obsession'; if they do lead to a penumbral obsession, it does make a difference. Hart would choose, I think, to rest his case on the danger of penumbral obsession.

What are these dangers?

It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy.

To this it must first be said that Fuller is right, that the penumbra becomes the penumbra by virtue of some purposive problem, typically, rather than some language problem. It may be useful here to advert to the discussion of ambiguity in the law (chap. IV, sec. A), where it was argued that the ambiguity to be found is ordinarily purposive ambiguity. Again, with Fuller, if it is clear that "No vehicles in the park" proscribes Cadillacs from entering the park, this is so because all of the reasons which immediately spring to mind for adopting this law would be defeated by the entry of Cadillacs. Noise pollution, air pollution, danger to pedestrians, a disturbance of the pastoral ambience which is valued--all these would be effected if we allowed automobiles in. Going purely by the definition of 'vehicle', it is clear that an electric golf cart is a vehicle, and yet it is a penumbral case because it does not pollute the air, nor makes much noise, nor travels so quickly or possesses such mass as to be dangerous, nor, perhaps, destroys the ambience. Similarly with regard to bicycles. Baby carriages are a different story: they certainly are vehicles, yet certainly do not defeat any purpose of the law if admitted, and they are

therefore certainly not penumbral cases. There is no prima facie case for forbidding baby carriages.

To this must be appended two points, since Hart's apparent concern is that purposive views of the law make everything unsettled, everything open to policy questions. The first point will be developed in appendix B. Briefly, the argument is that there are laws which, on the grounds of pragmatic consistency itself, are not open to further questioning in terms of purpose. There are some laws whose purpose is best fulfilled if one sort of purposive investigation is allowed, the sort which fails to take into account the overriding need that there be a determinate rule. One classic example of this is the class of traffic regulations. Perhaps better examples may be found from rule-utilitarian discussions of 'rules of reliance'. It is, e.g., better that we have a determinate rule allowing banks to foreclose on mortgages, than that we modify this rule to allow widows exemption from their mortgage obligations. The reason is that the latter rule would lead to banks refusing to grant mortgages to widows. If Hart is thinking that it would be silly to allow questions of policy to unsettle these rules, he is right. What is significant here is that we have policy grounds for forbidding (other) policy grounds to take effect.

The second point is that Hart may not have taken account of the fact, in this criticism, that rules are not

just purposes, but are ways of achieving purposes, in the theory of pragmatic consistency. The fact that a rule has purpose P, and that therefore purpose P is a 'legally cognizable' entity, does not entail that P may be pursued in any old way. The rule delimits our warrant for seeking legal goals; this delimitation is, in fact, what distinguishes legal rules from what some call legal principles and policies, which latter are 'pure purpose' with no attached rules to yield guidance on how the purposes should be achieved.

This is the way in which Fuller understands the second objection of Hart. He describes the problem as follows:¹

. . . I believe, though I cannot prove, that the basic reason why positivism fears a purposive interpretation is not that it may lead to anarchy, but that it may push us too far in the opposite direction. It sees in a purposive interpretation, carried too far, a threat to human freedom and dignity.

Let me illustrate what I mean by supposing that I am a man without religious beliefs living in a community of ardent Protestant Christian faith. A statute in this community makes it unlawful for me to play golf on Sunday. I find this statute an annoyance and accept its restraints reluctantly . . .

What a different complexion the whole matter assumes if a statute compels me to attend church, or, worse still, to kneel and recite recite prayers! Here I may feel a direct affront to my integrity as a human being. Yet the purpose of both statutes may well be to increase church attendance. . . . Now I believe that positivism

¹Fuller, "Positivism and Fidelity . . .", pp. 670-72.

fears that a too explicit and uninhibited interpretation in terms of purpose may well push the first statute in the direction of the second.

Even if this is not what positivism fears, it is a point which it is important to refute. A purposive view of law can maintain that legal rules show us a certain path (the Hebrew for this, derekh, conveys the notion best) which must be trod in pursuance of the rule's goal. It was said earlier, for example, that a statute which voided gambling debts may have had as its purpose the discouragement of gambling beyond one's means, since credit to the would-be 'deep player' would not be forthcoming; it may have had as its purpose the prevention of loansharking; or, finally, it may have had as its purpose the discouragement of gambling. (These are not, of course, mutually exclusive.) These are all delimited purposes; a more extensive purpose, like that of ending gambling, could not be adopted. Nor could it be said, in pursuance of this statute, that since our purpose is to discourage gambling, we shall penalize those caught gambling. This is not the path which the statute in question chose; it is foreign to the statute's path.

It does not, then, seem to me that Hart's strictures constitute a valid reason for refusing the invitation which the purposive theory of legal reasoning offers.

Before concluding this chapter, and going on to discuss, in chapter IV, the relations between the theory of pragmatic consistency and two other theories of legal

reasoning, it would be well to say something about what I feel are the weaknesses and remaining problems, as well as the strengths, of this theory. Some points, though not all, have been made earlier. I will list the remaining problems and difficulties first, and then the strengths of the theory; no significance should be attached to the order within these lists.

Problems:

1. No infallible method of discovering the purpose(s) of a law has been given here; and it has in fact been claimed that the very concept of purpose which has been employed, by analogy with scientific hypotheses, precludes the possibility that such a method may be devised in the future.

2. There could remain cases of conflicts in the law where it would be inappropriate to apply lex posterior derogat priori, and inappropriate to apply the idea that conflicting statutes negate one another, and yet where the method of adjudication by means of the more 'comprehensive' purpose or value is not possible.

3. There remains a problem of when to go to high-order purposes in the law, and how to do this: e.g., how to formulate standards for constitutional adjudication.

4. The thesis did not attempt to defend the presuppositions which have been made about the role of the

judge in relation to policy, about the need to avoid subjective adjudication (adjudication by the judge using his own personal standards), about the need for the judge to at all times apply the law, or about the relationship between the judge and legislative policies. It was assumed that the judge has the obligation, in applying the law, to give effect to legislative policy.

5. No attempt has been made to give an empirical content to the theory. No way of discovering which decision the given purpose requires was supplied (the second premiss in the purposive syllogism); the method of discovering purpose was supplied only insofar as that method follows from the conception of purpose which was here advanced.

6. A point which has not been raised earlier is the question of how pragmatic consistency is to deal with those elements of the common-law which appear to depend, in an essential way, upon custom and history. Robert Summers makes this point against Fuller:

. . . this picture leaves out of account the teachings of the so-called 'historical school' of legal philosophers. Montesquieu, Savigny, Maine, Vinogradoff and others taught that we should not, in formulating theories of law, neglect such factors as custom, 'the spirit of the people', and even climate and geography. . . . The terminology of purpose cannot represent many aspects of law stressed by historical jurists. Take custom, for example. Custom cannot be plausibly analyzed in terms of specific purposes of particular persons. Yet it is very much part of the law.¹

¹Robert Summers, "Professor Fuller on Morality and Law" in Summers, ed., More Essays on Legal Philosophy (Blackwell, 1971), p. 118.

I believe that a response to this problem could be made. It would involve distinguishing between purpose in the law and purposes of individuals--which were conflated by Summers in the last quoted sentence, and which are distinct for the theory of purposes in law. It would also involve allocating the responsibility for these 'natural' considerations to the legislature; and it would show that custom is only accepted into the law for certain purposes. But this answer was not given in this thesis; and supplying the answer would be a considerable challenge.

7. The question of purposes in the common law generally was not dealt with in the detail which it deserves. Which of the purposes which can be attributed to common-law rules should be so attributed? What is the relationship between the purpose for a decision, and the ratio decidendi which is to be binding as precedent? Most of the answers to these problems could be given, I think, by analogy with what has been said here; indeed, there appears to be in general a very strong resemblance between the positions taken with regard to discovery of the ratio decidendi of a common-law decision and/or rule, and the legislative intent of a statute.¹ To say this, however, is to indicate a

¹Three popular positions for the discovery of the ratio decidendi are: (1) Use the rule which the judge himself has stated. (2) Use a rule which may be found in the precedent-setting case which could account for the decision. (3) Use a rule of your own devising which will account for the decision which the judge reached in the

program for future investigation, not a solution.

8. No clear answer was supplied to the problem of attributing a purpose of the law as a whole.

Strengths of the Theory

1. The thesis describes a theory which is often in fact used, and so describes certain elements of judicial thought. It is a theory clearly distinguishable from other theories with which it has been often confounded, e.g., the view that the subjective intention of the legislature should be followed, or the view that legislative documents are necessary for the interpretation of law.

2. It was shown that there is an underlying logic to reasoning by purposes. The following points were developed in connection with the elucidation of this underlying logic:

- a. The preconditions which purposes assume (e.g., Fuller's principles).
- b. The distinction between teleological and deontological purposes, and the claim that purposes need not be (in one sense) 'forward-looking'.
- c. The concepts of vertical and horizontal proliferation of purposes.

precedent-setting case.

In the realm of statutes, the foregoing find their counterparts in respectively: (1) Use the stated legislative purpose. (2) Use that legislative purpose which may be fairly inferred from all that we know of the legislature, including legislative materials. (3) Use that purpose which would have been the purpose of a reasonable legislature enacting this legislation ('constructive' rather than 'actual' intent or purpose).

- d. The relationship between purposes and rules, and purposes and principles or policies.
- e. The difference, due to the logic of purposes, between extending a rule on the basis of purpose, and narrowing a rule on that basis.
- f. The relationship between the concept of purpose which the theory employed, and the method of discovering purposes in law.
- g. The claim that purposes may be attributed to rules, and that they need not be possessed by assignable individuals.

3. The theory offers a new way of viewing some traditional problems in legal philosophy (and not merely a new way of solving them). These problems include those associated with the concepts of ambiguity, hard cases, contradictions in law, the internal morality of law, and those principles and policies which Dworkin has popularized.

4. The theory avoids many of the problems urged against it; e.g., those proposed by Hart; those associated with Max Radin and which only are applicable against a view that the subjective intention of the legislature must be given effect.

5. The theory can supply a method for solving hard cases which seems both plausible and practicable.

6. The theory supplies content to the idea that the judge is at all times bound to apply the law, and never is

to judge by means of ideas of his own which do not have legal validity.

The most usual claim that a theory of legal reasoning (or, indeed, any theory in the philosophy of law) makes, is that it retains the good elements of earlier theories, while rejecting the mistakes, excesses, and distortions which had been made. This is a nice claim to be able to make; but I do not claim it. However, some points of some other theories which seem right to find their place in the theory of pragmatic consistency, and some arguments against those elements which are not subsumed by pragmatic consistency may be advanced. This is the task of the next chapter.

CHAPTER VI
PRAGMATIC CONSISTENCY IN CURRENT
JURISPRUDENTIAL THOUGHT

In the present chapter, the theory which has been developed will be compared with two recent theories of legal reasoning. These theories are of some importance in current jurisprudential thought; in addition, the theories are such that a useful comparison between them and the theory of pragmatic consistency could be accomplished. This second point required that the presuppositions of the theories not be very different from those made by the theory of pragmatic consistency itself; for example, theories of legal reasoning with a determinist orientation, such as those which seek to achieve a correlation, through quantitative methods, between those judicial decisions which judges make, and the socio-economic background of those judges, could not be considered here.¹ I do not pretend that the theories chosen here are the only ones developed which satisfy these criteria.

It should also be noted that I do not intend my remarks in this chapter to be taken as an exhaustive review and critique of the theories discussed. Entire books could,

¹This is the line adopted by many investigators from the fields of sociology and political science; see, e.g., the work of Glendon Schuebert.

and no doubt will, be written with that task in mind. My interest only extends to points of similarity and divergence from the theory of pragmatic consistency. There are many good things in each of these theories which will not receive their just due here.

A. The 'Rule-Departure' Model and Pragmatic
Consistency as Retroactive Explanation

In an extremely valuable and interesting book, Discretion to Disobey,¹ Mortimer and Sanford Kadish offer a view of the legal system and of legal reasoning which may be taken as an alternative to the theory of pragmatic consistency. In what I shall call the 'rule-departure' model, departures from legal rules are justified by arguments similar to those afforded by pragmatic consistency. There are, however, two major differences between the rule-departure model and the theory of pragmatic consistency. The first revolves around the question of whether the focus of analysis should be on rules or on roles. The second raises the question of whether actions of citizens and officials in apparent defiance of a legal rule (which actions are however justified by reference to some purpose of the law) ought to be described as departures from a rule, or, as pragmatic consistency would have it, as a form of obedience to that same rule intelligently construed. I shall first describe the rule-departure model, and then take up

¹Sanford and Mortimer Kadish, Discretion to Disobey (Stanford U. Press, 1973); hereinafter referred to as Kadish and Kadish.

these points of difference in order.

Everyone who acts in a social role--a judge, a policeman, a citizen--and who undertakes an action relevant to that role, experiences restraints upon the kinds of reasons which he might supply by way of justifying that action. To all actions, of course, 'propositions of merit' are appropriate and necessary, i.e., explanations of why it is good to take that action.

But it is not enough to merely give propositions of merit when an action undertaken by an actor in a social role is involved. In these cases, a justification of the appropriateness of this actor doing this action must be supplied.¹ A judge, unlike a President or Governor of a state, cannot simply acquit a defendant because he thinks that 'it is better that the defendant go free than that he be punished.'² The judge, that is, has to appeal to a proposition of appropriateness, or what may (loosely) be called a procedural justification. (The same point, of course, applies to other social agents--e.g., husbands, or business partners.)³

The constraints which the propositions of appropriateness represent are justified by the nature of the relevant role. Certain roles are, however, structured in such a way that the rules of appropriateness need not

¹Kadish and Kadish, pp. 19 ff.

²Kadish and Kadish, p. 20.

³Kadish and Kadish, p. 6.

always be obeyed. Roles are constantly changing, in an interstitial as well as a molar fashion, to meet new demands and conditions. This change may be reflected either in a change of the role's rules or appropriateness, or in a change in the 'binding-force' of those rules. A role which permits the actor to initiate these changes on his own is termed a 'recourse' role', for in justifying the undertaking of an action not ordinarily open to him the actor has recourse to the ends which he was supposed to achieve (and which, in fact, the old rules of appropriateness were designed to achieve). Three types of ends may be appealed to in making this kind of argument:¹

a. Task ends, or the specific job the actor is supposed to accomplish. For a judge, it might be said that his task end is the resolution of legally cognizable ('justifiable') disputes.

b. Institutional ends, or the function of a role within its institutional context. This would be, for the judge (inter alia), the application of the law and the sentencing of prisoners.

c. Background ends, or norms which transcend any particular task or institutional structure. These may include "ends that are recognized by his society but only incompletely realized by its structure, or even ends his society has completely ignored. He may even look farther afield and invoke ends that perhaps no system of roles has

¹Kadish and Kadish, pp. 22-23.

ever achieved in full measure: ends such as a finer justice, kindness, respect for other people. . . ."¹

It is the contention of Kadish and Kadish that these ends are in fact appealed to in the American legal system in justification of two sorts of disobedience to rules: the disobedience of a citizen to an ordinary mandatory rule of the legal system (such as theft, murder, etc.), and the disobedience of an official to a rule (ordinarily) constraining his power. These are called, respectively, legitimated disobedience and legitimated interposition.²

Let me take two examples where the theory of rule-departure is used to explain facets of our legal system. I take it that the claim is further being made that these instances represent justified, or near-justified, uses of the theory. The examples will be used both in order to illustrate the rule-departure theory, and as a point of reference or criticism of that theory; they represent instances of legitimated disobedience and legitimated interposition, respectively.

The first example is entitled by the authors 'the norm of the lesser evil'. It holds that in given cases violation of the criminal law may be justified, and not punished by courts, because "it is better in terms of the

¹Ibid.

²See Kadish and Kadish, Chapter IV, for their further contention that many societies, with specified characteristics, could use this model.

ultimate ends of the criminal law for a person to violate a given rule than to obey it."¹ Examples of this norm's use are quoted by the authors from the commentary to the Model Penal Code:²

Suppose, for example, that the actor has made a breach in the dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. . . . Property may be destroyed to prevent the spread of a fire. . . . An ambulance may pass a traffic light. . . . A cargo may be jettisoned or an embargo violated to preserve the vessel. . . . A developed legal system must have better ways of dealing with such problems than to refer only to the letter of particular prohibitions, framed without reference to cases of this kind.

This is summed up as a defense which is available if "the harm or evil sought to be avoided . . . is greater than that sought to be prevented by the law defining the offense charged."³

The example could be used to illustrate both points of divergence between the theory of rule-departures, and that of pragmatic consistency; but let us now only look at the first. Pragmatic consistency, I have said, focuses on the ends (or purposes) of rules, and rule-departure theory on the ends of roles. In pragmatic consistency, reference is made to low-level purposes of rules which are involved

¹Kadish and Kadish, p. 120.

²Quoted in Kadish and Kadish, p. 121.

³Kadish and Kadish, p. 121.

in the litigation; in rule-departure theory, to what I have called high-order pragmatic consistency: two of the justifications, in terms of institutional ends and of background ends, would certainly fall under this rubric. Now with reference to this norm, two points seem to me to be perfectly clear:

1. The justification for the exemption from criminal sanctions of actions justified by the norm of lesser evil may be phrased so as to correspond with a justification from pragmatic consistency. The rule against murder is to save lives: and a mechanical obedience to this rule will cause us to lose lives. The purpose of traffic lights is to prevent accidents which cause bodily harm (inter alia); and this proximate purpose would be defeated if ambulances were to obey traffic lights. Preservation of property is important to us, and so we make laws in furtherance of this desideratum, but the purpose of these laws is disserved when they cause us to allow a fire to spread, causing far more widespread destruction of property. In all of these cases, pragmatic consistency affords a description at least as adequate and revealing as that offered by Kadish and Kadish.

2. This justification by means of low-order purpose is much easier to make than that by high-order reference to the ends served by the citizen's role. Even defining how the 'citizen's role' is of relevance here seems to be a formidable task.

The second example is a case of legitimated interposition. It has to do with discretion exercised by police and prosecutors in enforcing laws, discretion which, as we have noted earlier, is often not granted, and sometimes forbidden by law (or statute, anyway). Here, in contrast to the first example, the relevance of role-ends to the decision to exercise discretion appears to be clear. As Judge Breitel has said, "If every policeman . . . performed his . . . responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable."¹ The ends of the police (task ends or institutional ends) are the apprehension of criminals and the preservation of order, as our law defines order, and these ends would be defeated if the police attempted to enforce every law.

In this example, though, the deficiency of the rule-disobedience model, due to its emphasis on high-order principles, is still more apparent. As was said earlier, this type of high-order principle may not be used simpliciter as a justification for non-enforcement; for if that were the case, it could serve as a justification for the non-enforcement of any law at all. The authors of the rule-disobedience model recognize, apparently, that this is unacceptable, and so they give guidelines on which type of law need not be enforced. Their criteria are familiar: laws which entail trivial violations serve as one excluded

¹Quoted in Kadish and Kadish, p. 75.

class. There are others: "Sometimes the basis for non-enforcement is the police perception that the legislative purpose in making certain conduct criminal would not be served by arresting all persons who engage in the prohibited conduct. Instances include the deliberate nonenforcement of gambling laws against social gamblers, even though the laws make no such exception, on the ground that the inclusiveness of the laws is only designed to prevent professional gamblers from escaping prosecution. . . ." ¹

Both of these criteria are derivable from the theory of pragmatic consistency; but it is unclear, to me at least, what relevance they possess to a model which focuses upon roles rather than purposes in rules. To some extent, that is, the authors are forced to borrow criteria foreign to their theory in order to keep that theory workable and plausible. It must be admitted that some other criteria which are used are not so obviously the result of low-level investigation of purpose, for example, cases where the police respond to a community preference that a law not be enforced. The justification of this would appear to be a judgment that the gains in general amenability to law on the part of the community--because the law has not made a personal enemy of the community--outweigh the loss in legality which this decision entails.

This does not, however, seem to me to be crucial.

¹Kadish and Kadish, p. 73.

For preservation of pragmatic consistency would entail that non-enforcement justifications be more readily available when the justification is consequent upon an examination of the particular law's low-level purpose than when it be consequent upon more high-order considerations; and this seems to be so. It would seem to me that the policeman makes a plausible argument in the case of non-enforcement of gambling laws to Saturdaynight poker players. His argument for nonenforcement against number-runners in Harlem is rather less plausible, and increasingly less plausible when made with reference to a law specifically and certainly having as its purpose the termination of the numbers racket. This rough correlation between the level of purpose which has to be appealed to, and the plausibility of the justification for nonenforcement, is understandable upon the theory of pragmatic consistency, which emphasizes that this 'disobedience' must, when possible, be justified by reference to purposes of rules. I do not see why it is justifiable or understandable on the basis of a theory which would emphasize the purposes of the police role in our society.

My first conclusion is that the emphasis placed on high-level role considerations by the theory of rule-departures is incomplete (it needs to be supplemented by pragmatic consistency) and misleading. Pragmatic consistency teaches that, when possible, high-level purposes should be avoided. The fact that the norm of the lesser evil

can be, and has, in the excerpt quoted above from the Model Penal Code, in fact been justified by reference to low-level purposes is a point in favor of pragmatic consistency. In the case of police discretion, the felt need, when possible, to restrict nonenforcement to those cases which are justified again by means of reference to low-level purposes, militates in the same direction. Wherever both pragmatic consistency and the theory of rule-departures afford a solution, it appears that that of pragmatic consistency is preferable (and preferred).

Another consequence of the rule-departure model results from its reliance upon high-order principles, and this too militates against that theory and in favor of pragmatic consistency. I have argued that high-order purposes are so abstract, and require such a very long and complex chain of reasoning before they are 'brought down to cases', that it is dangerous to use them; they often will yield, at best, vague, impressionistic guidance. This is in contrast to low-level pragmatic consistency, which is much more directly tied to rules and states-of-affairs (and, hence, more easily applied to cases).

Because, I think, of their reliance upon high-order principles, the rule-departure model would have the norms in justification of disobedience and interposition kept out of the law books. Such doctrines as 'the norm of the lesser evil' and the 'norm of justified nonenforcement' should not, so the authors appear to argue, be stated in authoritative

legal sources. If we were to explicitly justify these rule-departures, they would no longer be rule-departures. Kadish and Kadish are arguing for deviational discretion, not delegated discretion. And this seems to them to represent an advantage for their model:¹

Interposition, because it is less visible and not officially approved, tends to work interstitially and narrowly; there is a higher surcharge on acting outside the rules than on acting at one's own discretion with the rules as a guide. This is the point made by Kalven and Zeisel in a passage quoted earlier: 'Perhaps one reason why the jury exercises its very real power so sparingly is because it is officially told that it has none.' It is also the point made by Stephens nearly a century ago when he argued that an explicitly recognized defense of necessity [what we have called 'the norm of the lesser evil'] (which he conceded a judge would allow in any event) would run the risk of multiplying the occasions on which people would venture to depart from the rule: "There is no fear that people will be ready to obey the ordinary law. There is great fear that they would be too ready to avail themselves of exceptions which they might suppose to apply to their circumstances."

It is, in short, suggested that if these principles of law were to be openly proclaimed, they would be extended, in fact, beyond what is warranted. The edge of the wedge would work its way about; the consequences of the camel's poking his nose into the tent are to be avoided. Perhaps the difference between myself and Kadish and Kadish has to do with a basic conflict in views of humanity, which cannot be settled. But perhaps it has to do with the fact that they have a theory which would place much more of a burden upon men than mine would. So whereas the consequences of their theory would seem to require that it remain eso-

¹Kadish and Kadish, pp. 179-180.

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teric,¹ pragmatic consistency would not be subject to this stricture. And to my mind, the theory of democracy requires that we avoid esoteric theories of law, of law which affects all citizens. I would not want to make too much of this point; but it serves to remind us, and bring us back to, the second point of divergence between the two theories. This is, that in pragmatic consistency it is maintained that one who appears to break a rule of law does not do so in fact if his action is in furtherance of the rule's true purpose; in the theory of rule-departures, you are in fact breaking a rule. The norm justifying your action is not contained, as an exception, in the rule which you broke. Again, in terms of the rule-departure model the rule is broken, but this may be justified by a reference to purpose; in the model provided by pragmatic consistency, when this justification is available it is claimed that the rule has not been broken at all.

This difference between the two views boils down, therefore, to this: shall we describe the action as justified on account of some consideration drawn from outside the rule which has been broken, such outside consideration yielding a defense for the action; or shall we

It might be said that in writing their book, Kadish and Kadish have neglected the necessity for secrecy; and who knows what harmful consequences would follow? But we need not say that the authors have been inconsistent in publishing. I am reminded of the story of the philosopher who wrote a book called The Secret of Hegel's Metaphysics. It was not long before a friend wrote him, congratulating him on keeping the secret so well.

describe it as an action which, although violating a rule when read mechanically, should not be construed as having been subject to, within the scope of, that rule in the first place.

This kind of divergence has a close analogue in moral philosophy. Let us consider a case when I (to adopt a neutral term) speak an untruth to someone from benevolent motives, and we agree that I have acted properly in so doing. How ought this action to be described? Should we say that I have broken the (unqualified) rule, "Do not lie!" but am justified in this because it has allowed me to adhere to a more important rule, "Seek the benefit of your fellow man!"? Or should we say that I have not broken the rule against lying at all, since the proper rule on lying is better expressed as, "Do not lie unless by so lying you have achieved a benefit for your fellow man, or unless ///, or unless ###, . . . !" (the marks standing for other justifying conditions)?¹

The divergence in respect to moral theory is analogous to that in legal theory; but the questions in these disciplines are not identical. A legal rule is not the same thing--perhaps not the same sort of thing--as a moral

¹On this question compare: Singer, Generalization in Ethics (NY: Atheneum, new ed. 1971), Ch. IV; Singer, "Moral Rules and Principles" in A.I. Melden, ed., Essays in Moral Philosophy (U. of Washington Press, 1958); W.J. Rees, "Moral Rules and the Analysis of 'Ought'" 62 Philosophical Review 27 (January, 1953); and Leonard G. Miller, "Rules and Exceptions" 66 Ethics 262.

rule. Among other differences, I would argue that although there are no authoritative experts on what a 'moral rule' is, which fact leaves moral philosophers a relatively free hand in explicating the term, the same is not true in reference to legal rules. Judge's usage, and the usage of lawyers and jurists, ought to be given weight in defining the phrase 'legal rule', provided, of course, that we can find such a usage which has been consistently maintained. In addition, the question of whether the rule-departure model or the pragmatic consistency model is to be accepted has reference to all different sorts of legal materials, not merely to legal rules (as we have seen, in fact, the rule-departure model emphasizes the non-rule elements in the legal system.) This is not merely a distinction without a difference: in the debate among moral philosophers, we can find some who are willing to adopt a rule-departure model with respect to rules and a pragmatic consistency model for other moral materials, e.g., principles.¹

¹Marcus Singer makes the linkup between principles and the law in a fashion worth quoting: "The principle of a rule can be thought of as analogous to the intent of a piece of legislation, which is the purpose it was designed to achieve, and hence the reason for its existence. Situations are constantly arising in which the literal or strict interpretation of a rule would be contrary to its intent or purpose. This is, in fact, the basis for the distinction between the spirit and the letter of the law. In such situations the rule ought not to be applied. Thus, though one can have some understanding of a rule without understanding its intent, for an adequate understanding of the rule one should know the intent behind it. Only so can exceptions to it be made with justice, and revisions of it be made with intelligence. . . . [Similarly] for an adequate understanding of a [moral] rule one must know the principles

The debate in moral philosophy, therefore, while similar, is not entirely apposite to the question presented here. The present question does, however, constitute a dispute between two different theories concerning the proper 'individuation' of laws', a term I borrow from Joseph Raz, who has given more detailed and critical attention to this problem than any other modern legal philosopher.¹

The problem of the individuation of laws is the problem of determining criteria whereby something in the legal system is to be said to constitute a single law. For example, shall we say that "killing is forbidden in New York" is a law, standing by itself; or shall we say "Killing is forbidden in New York, provided that it was not done in self-defense, or in a state of unconsciousness, or ///, or ###. . . ." (the blanks to be filled in by other legally recognized defenses and justifications) is the true rule of the law?

The question of individuation of laws has often been raised to help in answering the question of whether legal rules can be said to conflict. If the second formulation

on which it is based--to put it another way, the reasons on which it is established. . . . [Moral] rules do not hold in all circumstances; they are not invariant; in a useful legal phrase, they are 'defeasible'. Moral principles, however, hold in all circumstances and allow of no exceptions; they are invariant with respect to every moral judgment and every moral situation. They are thus 'indefeasible'." (Singer, Generalization, supra n.

¹See Joseph Raz, The Concept of a Legal System (Clarendon, 1970); and Raz, "Legal Principles and the Limits of Law," 81 Y.L.J. 823 (1972).

of the rule against homicide is adopted, we may say that legal rules compendiously refer to their exceptions as being excluded from their scope, and, consequently, all exceptions having been subsumed in the rule, no exceptions to this compendious statement of the legal rule need be admitted. Adoption of the compendious form for legal rules assures that rules will not conflict; adoption of the other alternative, the 'short form', assures that they will.

But the conflict between the rule-departure model of law adopted by Kadish and Kadish and the pragmatic consistency model need not be seen as identical to this dispute, with the rule-departure model adopting the short-form and pragmatic consistency taking the compendious form. While the rule-departure model does, I believe, entail acceptance of the short form, pragmatic consistency does not involve the compendious form. To hold that pragmatic consistency requires the compendious form would be the result of a mistaken view of meaning of legal terms, which has already been referred to here as the 'pointer theory of meaning'. It is only on the basis of this theory that it would be necessary to list, as in the compendious form, all of the exceptions to a rule. In contrast to this passive method of excluding exceptions, there is the possibility of including within the rule a dynamic norm which will generate all of the required exceptions. Rather than the rules, on the pragmatic consistency account, listing all of their exceptions, the alternative would give the short-form rule,

together with a 'preamble' descriptive of the purpose of that rule, as representing the 'true' legal rule (or, that view of the legal rule which, on balancing the relevant considerations, is most attractive). Once this is done, the exceptions to the rule may be generated from our knowledge of the rule's purpose, and so will merely constitute 'prima facie' exceptions to the rule.¹

There will remain, under this pragmatic consistency method of individuation of laws, in contrast to the compendious form, real exceptions to rules as well as prima-facie 'exceptions', although this fact may not be obvious. The reason for this is that one purpose may conflict with another purpose--whether these be purposes of the same rule or of conflicting rules--and which ever purpose gives way will be admitting an exception to its attached rule which had not been generated by the purposive preamble. These problems of conflict of purposes may also be handled by pragmatic consistency, as explained in the preceding chapter, but the solution is not forthcoming from a simple reference to the individual rule.

The primary theoretical reason for accepting this principle for the individuation of laws is that, as has

¹We may now formulate a rigorous distinction between prima-facie 'exceptions' and real exceptions to a rule: prima-facie 'exceptions' are exceptions to the rule in its pure short form (which are sometimes termed exceptions to the rule upon its mechanical reading); real exceptions to a rule are those exceptions to the short-form rule which has been modified by reference to its purpose-explaining preamble.

been argued, rules simply cannot be understood without a knowledge of their purpose, however deficient that knowledge may be. A mechanical translation of a law, as would be, e.g., offered by a dictionary translation, will either give us no guidance as to what the law requires--as we would have no way of deciding between conflicting translations, since we lack reference to purpose and context--or it will give us some guidance which, however, no one, least of all a competent judge, would recognize as the binding rule in question.

Given this principle of individuation, which identifies the legal rule as the short-form rule cum its purpose, do any of the arguments which have been given against the compendious-form still apply to the 'purpose-form'? One argument which has been stated against the compendious form is that the rules which it generates will be "enormously complex" and "very repetitive."¹ This argument does not apply to the 'purpose-form': as long as high-order purposes are excluded from the 'preambles' there is no great amount of repetition nor is great complexity introduced.

It has further been said that the project which the compendious method would require of us, that of listing all of the exceptions to a (short-form) rule, could never be completed. We could never foresee all of the exceptions to a (short form) rule which we would, in the future, wish to

¹See Raz, "Legal Principles. . .", p. 831.

include. Again, the credence which this argument possesses is owing, I think, to (perhaps unwitting) adherence to the pointer theory. Once it is seen that our rule was adopted to accomplish some purpose, achieve some state-of-affairs--and that in fact, as Singer would have it, these are the very 'reason-for-being' of the rule--we may say, a priori, that any exceptions to the short-form rule which would be justified by the purposive preamble are acceptable as exceptions. Here, the very same reason which has caused us to adopt the rule is causing us to allow the exceptions. Therefore, while we cannot state all of the occasions in which we would not want the short form rule to be followed, we can say that all exceptions justified by the purpose ought to be allowed.

Sanford and Mortimer Kadish have said¹ that the only reason for adopting a principle of individuation like that of pragmatic consistency, which allows us to say that while the short-form rule was not followed, the 'true rule' was never broken, is owing to a felt need to 'maintain appearances'. The motivation is to maintain the possibility of maintaining that legal rules are binding in a greater than prima-facie fashion, and that the legal system is, in some sense, 'coherent', 'consistent' and 'complete'.²

It should be said that we should not be blamed for

¹Kadish and Kadish, pp. 69-70.

²Kadish and Kadish, pp. 198-199.

It should be said that we should not be blamed for trying to maintain appearances, if we may rightly maintain appearances, without falling into some absurdity or serious error. It is desirable that a theory of law 'maintain appearances', other things being equal (as long, that is, as the 'debunking' response is not clearly preferable to the 'cosmetic' response). Kadish and Kadish in fact recognize that this is so, and appeal to it as a consideration in their favor:¹

. . .there are times in the administration of a law when preserving appearances performs a socially useful function. . . . Consider the example of lawmaking by the courts. For a judicial system to be effective, it must be accepted by the parties who submit their disputes to it. To state boldly that cases are determined by what the judge deems desirable rather than by the strict application of the law could hinder the public's acceptance of the judicial resolution of controversy.

Still more could be said in favor of the purpose-form model as a principle of individuation. Raz has stated, as one condition of adequacy for a principle of individuation of laws, that it should yield laws which do not "deviate too much or without sound reasons from the ordinary conception of a law."² This does not seem to be a proper desideratum, although it should perhaps be amended so as to primarily seek correspondence with the ordinary conception of what a law is which legal practitioners accept. At least some correspondence of this nature may be found between pragmatic

¹Kadish and Kadish, p. 180.

²Raz, The Concept of a Legal System, p. 142.

consistency's principle of individuation and that which is to be found implicitly held in legal writings. Plowden had said, for example, that in giving a purposive (equitable) interpretation to statutes you "do not act contrary to the law, but in conformity with it."¹ One more such statement, quoted by Kadish and Kadish themselves, is also apposite here. In reference to a violation of a short-form rule which was justified by the norm of lesser evil, a sixteenth-century serjeant writes, ". . .such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so as the intent of the law is not broken."²

This manner of speaking has not yet, I suggest, vanished; and we need not abandon it, on the basis of poorly-founded 'realist' views.

Let me be permitted one final word on this problem of the individuation of laws. It would appear that there are many possible purposes for such an activity, and that the criteria of individuation ought to shift along with the purpose sought in engaging in the activity. One might want to individuate laws so that the law might be broken up into manageable units; this, it would appear, is important for, inter alia, pedagogical purposes. It is useful if one

¹From Plowden in his note on Eyston v. Studd (1574), Plow. 459, 465 ff.

²Serjeant Pollard in Reniger v. Fogassa, 75 E.R. 29-30 (1550), quoted in Kadish and Kadish, pp. 120-121.

wishes to convey information about the law to the ignorant man and the confused man, as well as to the bad man.¹ I believe this was in fact the end-in-view which Raz was seeking in his own suggested explication of criteria for the individuation of laws.² In this, he was only being true to his positivist inheritance. I find it mildly puzzling, however, that Raz does not seem to notice that there exist other possible reasons for wanting to individuate laws, and that these other purposes call for other criteria of individuation. There is no single, true way of individuating laws which will be omniadequate for all purposes and in all contexts of discourse.³

The purpose which the method of individuating laws suggested here, the purpose-form, seeks to accomplish is that of facilitating the task of the judge who wishes to reach a reasoned decision while respecting his obligation to judge according to the law, and while recognizing the importance of maintaining this view of the judge's task in

¹See H.L.A. Hart, The Concept of Law (Oxford, 1961), p. 39: "Why should not law be equally if not more concerned with the 'puzzled man' or 'ignorant man' who is willing to do what is required, if only he can be told what it is?" The modest fashion in which this is proposed, as an adjunct to other theories, and views, serves to conceal the fact that these questions have become of exclusive concern in much Oxford legal philosophy (American interlopers excepted).

²See Raz, The Concept of a Legal System, pp.140 ff.

³On a similar point, see Dworkin, "Social Rules and Legal Theory" 81 Y.L.J. 855 (1972), pp. 885-887; herein-after cited as 'Dworkin, SRLT'.

the minds of the general populace. The fact that this method seems at times to accord with the method implicit in legal adjudication of hard cases is, therefore, a point in its favor. It does not establish that this purpose-form is useful in hard cases of legal reasoning; but it does suggest (by means of an appeal to authority and experience) that it may be well-suited to serve such a purpose.

To sum up the results of this section: it was shown that the rule-departure model differs from the pragmatic consistency model in two respects: a greater reliance on high-order purposes and principles, and an acceptance of the principle of individuating laws which I have termed the 'short form'. There appeared to be reason for accepting the stance of pragmatic consistency on both of these issues. I would like to emphasize, however, that the points of resemblance of these theories are more numerous and more significant than their points of divergence.

B. Ronald Dworkin's Theory and Pragmatic Consistency

Certainly one of the most important recent attempts at developing a theory of legal reasoning has been that of Ronald Dworkin.¹ Both in view of the points made, and of

¹The following articles by Ronald Dworkin are of relevance: SRLT, cited supra "The Model of Rules," 35 U. Chi. L.R. 14; "Judicial Discretion," 60 J. Phil. 624; and "Philosophy and the Critique of Law" in Wolff, ed., The Rule of Law (New York: Simon and Schuster, 1971), p. 147. The articles have been reprinted in various places; citations will refer to the above appearances. Hereinafter citations will be as follows: The Model of Rules as 'MR',

the comments this theory has elicited,¹ this theory has established itself as a significant contribution to contemporary jurisprudence.

Some preliminary comments are in order before discussion of the theory, the problems with the theory, and its divergences from pragmatic consistency. The first point is that it appears as if Dworkin has, in his recent articles,² been modifying his theory in a way which makes it correspond more closely than previously with the theory of pragmatic consistency. In the close of this section I will attempt to

Judicial Discretion as 'JD'; Philosophy and the Critique of Law as 'PC'.

¹Among the extensive literature surrounding Dworkin's theory, I have worked with the following articles: Raz, "Legal Principles and the Limits of Law," *supra* n. MacCallum, "Dworkin on Judicial Discretion," 60 *J. Phil.* 638; Tapper, "A Note on Principles," 34 *Modern L.R.* 628; Sartorius, "Social Policy and Judicial Legislation," 8 *American Philosophical Q.* 151; Note, "Understanding the Model of Rules: Toward a Reconciliation of Dworkin and Positivism," 81 *Y.L.J.* 912; Gross, "Standards as Law" in 1968/69 *Annual Survey of American Law* 575; Christie, "The Model of Principles" *Vol. 1968 Duke L.J.*, 649. A similar theory is expressed in Graham Hughes, "Rules, Policy and Decision Making," 77 *Y.L.J.* 411. An article sometimes cited in reference to Dworkin's theory is Wellington, "Common Law Rules and Constitutional Double Standards: Some notes on Adjudication," 83 *Y.L.J.* 221. I confess that, despite Wellington's reference to Dworkin, he seems to express a style of thinking and theory far closer to Hart and Sacks' *The Legal Process*; had Dworkin never lived, Wellington's article would have been produced virtually unaltered.

I shall not get into the question of precursors to Dworkin's theory. Elements of what he says may be seen in Dickinson, Pound, and others, but Dworkin's statement of the theory is certainly more complete, and, in a philosophical (rather than historical) context, far more rewarding to discuss.

²The articles I am referring to are the two later Dworkin articles, SRLT and P.C.

document this claim. In view of this, it must be understood that what will be referred to here as 'Dworkin's theory' may not be a theory which Dworkin holds any longer. The standard philosophical move at this stage would be to speak of an 'early' and a 'later' Dworkin, my comments being addressed only to the early Dworkin; but since these two Dworkins are only four years apart, I will forego this tactic.

Which brings us to the second point by way of preface. One cannot be certain that interpretations of Dworkin's articles, and inferences drawn from these interpretations, are warranted. Dworkin's published writings are avowedly incomplete. In view of this, gaps (rather than errors) in Dworkin's theory must not be taken as seriously as would be the case if Dworkin presented us with a finished theory. Nevertheless, I find it difficult to make a clear distinction between gaps and errors in theories which purport to describe legal reasoning, and so I will leave it up to the reader to apply this caveat. Recent experience¹ has taught that these more extensive treatises can be long in coming, and that useful discussion can be had in the interim.

The final comment that I would like to make is that I am not proposing to discuss all the points which Dworkin has made, nor all of the criticisms to which his theory is liable, but, rather, only those points which are germane to

¹I mean, of course, Rawls and his long-awaited A Theory of Justice.

pragmatic consistency. Views regarding, for example, the meaning of discretion, and the possibility of realizing the positivist goal of describing a rule of recognition for the legal system, are, at most, of merely ancillary relevance to our main discourse.

With this out of the way, let me begin by describing Dworkin's theory. On Dworkin's account,¹ H.L.A. Hart had claimed that the materials of the legal system consist only of rules (albeit rules of different sorts). Most frequently, the judge will be able to rule on a controversy solely with reference to these rules. At times, however, the judge is confronted with a case involving an ambiguous rule, or two conflicting rules, or with a case of 'first impression' which is not yet governed by any rule at all. When this happens, the judge must exercise discretion in deciding the case. To be sure, this discretion will be guided ('informed') by reasons, e.g., by considerations of policy. But these reasons are extra-legal in nature, from whence follow two consequences: the judge must decide these cases without benefit of the law, and in deciding these cases the judge is not legally bound to apply these reasons. In some cases, that is, the judge runs out of law, and must seek outside of the law, and outside of his legal obligations, in deciding cases.

Dworkin denies that this is the case. There are, he

¹Dworkin's interpretation of Hart on this is a matter of some dispute. See G. Carrio, Legal Principles and Legal Positivism, p. 22, quoted in Dworkin, SRLT, 856.

says,¹ principles and policies which have legal dimension which are always available to the judge to aid in deciding cases. These principles and policies share two characteristics which are not possessed by rules. First, they do not have what Dworkin calls an 'all-or-nothing quality' about them. "If the facts a rule stipulates are given, then either the rule is valid, in which case the answer which it supplies must be accepted, or it is not, in which case it contributes nothing to the decision. . . . But this is not the way the . . . principles . . . operate. Even those which look most like rules do not set out legal consequences that follow automatically when the conditions provided are met. . . . We do not treat counter-instances [to principles] as exceptions. . . ." ² In addition, "The rule might have exceptions, but if it does then it is inaccurate and incomplete to state the rule so simply, without enumerating the exceptions. In theory, at least, the exceptions could all be listed, and the more of them that are, the more complete is the statement of the rule." ³ That rules have an 'all-or-nothing quality', then, means three things: they are applied whenever applicable (by their terms), they necessitate a result when applied, and they are exceptionless. When we say, in contrast, that principles do not have an 'all-or-nothing quality', we

¹Dworkin, MR, 22 ff. ²Dworkin, MR, pp. 25-26

³MR p. 25.

deny that any of these three conditions obtain.

The second characteristic differentiating rules from principles and policies is that the latter have weight.

"When principles intersect . . . one who must resolve the conflict has to take into account the relative weight of each. . . . Rules do not have this dimension. . . . If two rules conflict, one of them cannot be a valid rule."¹

Dworkin claims that this follows from the 'all-or-nothing' characteristic, without specifying why this is so. The reason is, apparently, that since rules (by the 'all-or-nothing' characteristic) necessitate a result when applicable, if two rules should conflict, that which is not necessitating the result must be inapplicable, i.e., invalid.

Before considering Dworkin's response to the other positivist challenges--the questions of whether these principles are legal, and whether they serve to eliminate discretion--it will be useful to look at what Dworkin claims are principles and policies in the law, and the two cases which he cites in which they were employed. He distinguishes between principles and policies in the following way: "I call a 'policy' that kind of standard that sets out a goal to be reached. . . . I call a 'principle' a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or

¹MR, p. 27.

some other dimension of morality."¹ Dworkin appears to recognize the possibility of characterizing principles and policies as, respectively, deontological and teleological goals: "The distinction can be collapsed by construing a principle as stating a social goal (i.e., the goal of a society in which no man profits by his own wrong), or by construing a policy as stating a principle (i.e., the principle that the goal the policy embraces is a worthy one), or by adopting the utilitarian thesis that principles of justice are disguised statements of goals (securing the greatest happiness of the greatest number)."² He claims that to do this would cause us to lose sight of a useful distinction.

What is Dworkin's evidence for these policies and principles? And why do they have the characteristics which he ascribes to them? It seems that Dworkin construes his task as descriptive in nature: he is describing a feature of the Anglo-American legal system;³ and the account of the positivists fails because it has failed to notice the existence, use, and significance of principles and policies. The examples which Dworkin gives, then, of cases which illustrate the existence and use of principles are of crucial importance. Not, to be sure, because they are unique:

¹MR, p. 23. ²Ibid.

³See Dworkin JD, note on p. 625: "I adopt what I believe is a central thesis of that book [The Concept of Law]. . . ." If this is inapposite, it nevertheless is very clear from Dworkin's work that he is adopting a descriptive theory.

"almost any case in a law school casebook would provide examples that would serve as well."¹ But rather precisely because they are not unique; they are cases which show that Dworkian principles are used, and there are many more such available.

The first example is Riggs v. Palmer.² It presented the court with the problem of whether or not Elmer Palmer who had murdered his grandfather for the apparent purpose of insuring that he receive the bequest of that grandfather, ought, by law, to inherit. Palmer contended that the will assigned to him the inheritance, that the will was properly executed, and that therefore the law requires that he receive the inheritance. The court admitted that it "is quite true that statutes regulating the . . . devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer."³

If this is so, why then was there any question-- indeed, what caused the court (Justice Gray dissenting) to hold against Palmer? Dworkin contends that the maxim of the common law which requires that no man shall be allowed to profit from his own wrongdoing was of controlling influence here.⁴ This maxim, that 'no man may profit from his

¹MR, p. 23.

²Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

³Riggs, p. 509. ⁴MR, p. 24.

own wrong', is clearly not a rule, for it does not possess the characteristic of 'all-or-nothingness'. "In fact, people often profit, perfectly legally, from their legal wrongs. The most notorious case is adverse possession--if I trespass on your land long enough, I will gain a right to cross your land whenever I please."¹ And this is not a case of a rule having an exception; there are innumerable cases when the maxim would not be held to apply, in fact, it is theoretically impossible to list all of the 'exceptions.'² And the maxim does not necessitate decision; "it states a reason that argues in one direction. . . ."³ The maxim represents, then, a principle of law.

The second example is the case of Henningsen v. Bloomfield Motors Co.⁴ The case involved a suit for damages which Henningsen brought on account of injuries which he and his wife had incurred in an accident caused by an alleged defect in their automobile. As I have mentioned above, one issue in the case was the question of the validity of the warranty in the contract signed by Henningsen; it restricted liability for defective parts to the replacement of those parts, which excluded, e.g., claims for medical expenses (which were being sought here). Another issue presented was whether the manufacturer of the automobile, Chrysler Corporation, a co-defendant with the car dealer, Bloomfield

¹MR, p. 25. ²See MR, p. 26. ³Ibid.

⁴Henningsen v. Bloomfield Motors Co., 32 N.J. 358, 161 A. 2d 69 (1960).

Motors Co., was liable for damages resulting from the use of its defective product. Henningsen's suit was successful, in spite of the warranty, which stated that "this warranty [is] expressly in lieu of all other warranties, obligations or liabilities."

Again, on Dworkin's account, principles and policies were of crucial significance in the court's reasoning. He lists five instances where the court refers to these legal materials, including "Freedom of contract is not such an immutable doctrine as to admit of no qualification in the area with which we are concerned"; ". . .the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must examine purchase agreements closely to see if consumer and public interests are treated fairly"; "the courts generally refuse to lend themselves to the enforcement of a 'bargain' in which one party has unjustly taken advantage of another."¹

These principles and policies have, Dworkin asserts, legal standing. "Most would have said that it was his [the judge's] duty to take the measure of these principles and that the plaintiff was entitled to have him do so."² While generally we cannot prove that a proposition is a legal principle or policy, which a court must take account of,

¹All quoted in MR, p. 24.

²MR, p. 36.

by referring to "an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and understandings"¹ we can often clear up this question.

The final question remains, however: has Dworkin eliminated, or shown by his theory the eliminability, of judicial discretion? Dworkin's discussion² forces us to specify what sense of discretion is meant here. For he admits that, in two senses, the judge does have discretion: in the sense that "for some reason the standards an official must apply cannot be applied mechanically but demand the use of judgment, and in the sense that the judge has, or may have, the final word on the law of the case, the judge has discretion."³ But on the face of it these are obvious, even trivial points. The more important point is that the judge does not have judicial discretion in what Dworkin terms the 'strong sense', when we say that someone has discretion because "on some issue he is simply not bound by standards set by the authority in question,"⁴ or, in our case, he is not bound by the law.

It seems to me that there are two bases for Dworkin's denial of judicial discretion in the strong sense (although admittedly these are not clearly distinguished in his

¹MR, p. 37. See further on this JD, p. 635, and SRLT, p. 876.

²See MR, JD. ³MR, p. 32.

⁴MR, p. 33.

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writings). The first set of arguments¹ consists in a rebuttal to reasons which positivists might advance for thinking that Dworkin's model retains strong judicial discretion. The positivist might say that principles cannot be binding, to which Dworkin replies that "there is nothing in the logical character of a principle that renders it incapable of binding"² the judge. By this he means that there is nothing intrinsic to principles which shows that they are not 'valid law'. This, of course, may be said to be the very point at issue, and so any positivist who would use this argument would be begging the question.

A second argument of the positivists might be that principles are not binding in another sense: because they do not dictate a particular result in a case, they are not binding upon the judge. And Dworkin admits that "only rules dictate results, come what may. . . . Principles do not work that way; they incline a decision one way, though not conclusively. . . . This seems no reason for concluding that judges who must reckon with principles have discretion because a set of principles can dictate a result. If a judge believes that principles he is bound to recognize point in one direction, if any, are not of equal weight, then he must decide accordingly. . . ."³

Is Dworkin's argument on this successful? It seems, at first, that Dworkin is being inconsistent: in the above

¹MR, pp. 35-37. ²MR, p. 35. ³MR, p. 36.

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quote, he says both that principles only 'incline a decision one way, though not conclusively', and that they 'can dictate a result'. But this may only be an obscure way of expressing the fact that ordinarily principles cause us to incline one way, sometimes a principle or a set of principles may determine a result, and there is no way of specifying a criterion which principles must satisfy in order to determine a case. This does seem compatible with the drift of Dworkin's thesis, and it saves it from inconsistency. The cost of saying this, though, is that (in the sense here meant) principles are not in general binding, though exceptionally they may be. In general, then--in the majority of hard cases--there remains discretion on the part of the judge. The move which we might expect Dworkin to make here is to say that principles are binding in a prima facie fashion: ceteris paribus, that is, they are binding. Even should this be granted, however--and it needs to be remembered that Dworkin's model purports to be an accurate description of our system; it must not only be consistent but true as well--there remains the problem of conflicting principles. W.D. Ross also held a notion of principles (rules) which were binding in a prima facie fashion, and he found himself forced to say that in cases of conflict it must be left up to the individual's perception to decide which shall prevail. But this Dworkin cannot say. For if we 'leave it up to perception', we have implied that there are no rules on the exercise of this perception, in which case we could scratch

our 'perception' and substitute 'discretion'.

Dworkin's answer, however, might be found in what he says to the third objection which a positivist might make. He might say that principles are not binding upon the judge because they are controversial; Dworkin responds:¹

It is true that generally we cannot demonstrate the authority [read: 'validity' or 'legal existence'] or weight of a particular principle as we can sometimes demonstrate the validity of a rule. . . . There is no litmus-paper for testing the soundness of such a case [which turns upon the use of a principle, and justifies its use by demonstrating the principle's weight and authority]. But again this does not distinguish the judge from other officials who do not have discretion. The sergeant has no litmus paper for experience, the referee none for aggressiveness. Neither of these has discretion, because he is bound to reach an understanding, controversial or not, of what his orders or his rules require, and to act on that understanding. That is the judge's duty as well.

His reference to the sergeant and the referee refers back to two instances where, Dworkin claims, we would say that a person does not have discretion in the sense required (that he is not bound by a standard set by authority). A sergeant is told to pick five of his most experienced men for a patrol; a referee is told to choose the most aggressive boxer: in each case, the decision, while it is controversial, is controlled by a standard, and hence does not represent an exercise of discretion in the required sense.

But surely these cases are inapposite to the case of the judge who wishes to employ Dworkin's method. The

¹MR, p. 37.

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referee knows what his standard is; the sergeant knows what his standard is. The judge does not know what standard, what principle or policy, to apply; for the controversial character of principles, which Dworkin admits, is that we have no way of telling what is a legal standard, principle or policy.¹ We are not merely confronted with a question of weight; we are confronted with a question of existence also. So the referee and the sergeant are faced with a controversial decision which is, however, guided by standards, but the judge is not--the fact of the standards themselves is controversial.

There is a response which Dworkin might make to this; it involves us in what, I believe, is Dworkin's second type of argument against the existence of judicial discretion in the strong sense. The response is that the judge is always bound to decide in accordance with what he feels is the law. This denies to the judge a fourth sense of discretion, the sense in which someone has discretion if he does not feel himself bound by any standards. We may call this the subjective sense of discretion. On the subjective sense, a person will fail to have discretion if he feels that he must (is obliged to) reach a certain decision on the basis of standards, even though an outside observer of his decision process would say that the person could have reached a different decision, consistent with his

¹For a suggestion which Dworkin makes on this (which brings him closer, I think, to the theory of pragmatic consistency) see below, and SRLT, p. 876.

obligations. In this sense, if a judge is confronted with a statute which is in fact ambiguous, but whose ambiguity the judge does not recognize, the judge does not have discretion to reach what he feels is the true decision, although in fact the statute allowed him another decision. All that is required is that it be felt that there is one correct decision, not that there be one correct decision.

In what we quoted earlier, it seems as though Dworkin is taking this tack: "If a judge believes that principles he is bound to recognize point in one direction . . . then he must decide accordingly." (Emphasis added.) He is more certainly taking this tack in his article "Judicial Discretion," where he is responding to the charge that sometimes, at least, there is no clearly 'uniquely correct result' forthcoming, even when principles are brought to bear:¹

A legal arrangement could, I suppose, include an area of discretion after some point along the spectrum of difficulty. But the arrangement we have includes no such feature. Judges often acknowledge decisions to be hard, and sometimes, though usually extracurricularly, admit that some decisions are based on 'hunches' or 'guesses'. I understand such a judge to mean that at times he believes one decision to be the right decision, but has difficulty in stating his reasons for so believing and has no great confidence that such reasons would convince others. This does not mean that he has abandoned the attempt to reach the right decision and is now simply reporting his personal preference, a judicial thumbs up or down. And it surely does not mean that the parties have changed their posture from litigant to supplicant, like prisoners after conviction and waiting sentence. The judicial predicament arises precisely because the

¹JD, p. 637.

judge may not switch roles when his own becomes too difficult, but must press on even though his hypotheses become more dubious and his speculations more tenuous than he would like.

In a later article, Dworkin speaks, in a similar vein, of the requirement that we assume, in the absence of demonstration, that X is the right decision.¹

Frankly, I find this to be a fascinating argument; and it may well be valid. It holds (and here I borrow from some similar remarks by Graham Hughes)² that the litigants are entitled to a uniquely correct resolution of their case, and thus are entitled to demand of the judge that he grant it. What is the corresponding duty of the judge? Here, it seems, Dworkin's argument turns upon an equivocation. The judge does not have a duty to give the uniquely correct resolution. He can't have such a duty, for he does not know what that resolution is (ought implies can). Rather, the judge must be said, on this argument, to only have the duty to act as though, to assume that, he must give the uniquely correct resolution;³ he is not entitled to assume that the legal system gives him the power to exercise a discretion which could, equally well, have reached an opposite result. Again, though, this does not show that in fact, an outside observer, looking at this decision, could not

¹See PC, pp. 153-155.

²Hughes, *supra*, pp. 415-16.

³On pragmatic consistency's failure to provide, in all cases, a 'uniquely correct resolution', see the section on problems for the theory (at the close of Chapter V).

say: "Yes, he could have reached another decision. He did have discretion. He could have refused to admit P as a valid legal principle; he could have adopted R instead. He need not have given X the weightiness and importance which he gave it."

This 'objective' sense of discretion--where a judge not merely feels himself bound to a given result, but is actually so bound, and must be recognized by competent observers as being so bound--has not been shown by Dworkin to be lacking in the legal system; he has not proven its absence. It is, I think, a perfectly normal sense of the word, and is in fact that sense in which most often we want judicial discretion limited. We are not satisfied that the judge feel that he reaches the right decision, we want him to reach it in fact.¹

This said, we can, I think, grant Dworkin his point that principles are always available to guide (in some sense) the judicial reasoning process. For he later admits that there are principles and policies so broad as to be always applicable: e.g., the "conservative principles of legislative supremacy and precedent."² These principles, and other similarly broad principles, may always be called into play, in order to justify decisions. However, they need not have been; other, more progressive principles

¹This last argument seems to be MacCallum's point; cf. MacCallum, *supra*.

²MR, p. 39.

could have been appealed to. Dworkin's schema may grant us a logic of justification of some sort, but it fails to grant us a usable logic of discovery--and, therefore, fails to provide adequate guidance to the judge in his performance of the judicial function. In an almost prescient passage, Hare comments on the usefulness of employing principles which function like Dworkinian principles:¹

Another, and less laudable, way of achieving generality in our moral principles is to treat them as a set of general maxims to which, in some cases (perhaps only verbally) we subscribe; we may as often as not, in our actual particular moral judgments, depart from them, but they form the background of our moral thinking (its mythology, we might almost say). Perhaps, though, a man whose moral 'principles' are like this is freed from a charge of hypocrisy (at the cost of incurring another charge of woolly thinking) by the fact that his principles are expressed in very vague terms, so that by judicious interpretation of them he can square his set of moral principles as a whole with any moral judgment that he finds himself making. As a practical guide to action such a set of principles has small value, because, at any rate in difficult cases, a wide variety of actions can be called conformable to them. Another expedient is to interpret the principles strictly and precisely, but to adjust and vary (how?) the 'weight' which we give to them in particular circumstances. It is not, however, as a guide to action that such principles are attractive, but rather because they give a certain 'tone' to the moral life; a man can call himself a man of principle, while making his actual moral judgments in the way that most of us do.

One line of attack, therefore, to which Dworkin is open is that he has not dealt with the important problem of limiting objective discretion of judges. There is a way of making this point within the categories provided us by the theory of pragmatic consistency: as in our previous

¹R.M. Hare, Freedom and Reason (Oxford pb. ed. 1963), 3.6, pp. 45-46.

example, that of the rule-departure model, Dworkin has emphasized the role which high-level purposes play, while neglecting the more concrete guidance which is afforded by low-level purposes of rules. Those 'principles and policies' to which Dworkin refers--e.g., 'no man may profit from his own wrongdoing'; 'there is a special obligation on the courts to examine automobile purchase agreements carefully'; 'a court will not lend itself to the enforcement of unjust bargains'--can usefully be characterized as desiderata or goals of the legal system which lie behind numerous rules of law. However, as described by Dworkin, these remain 'pure purpose', without accompanying rules which would serve to indicate the limitations placed upon the pursuit of these purposes. In addition, it might be said that as 'pure purpose' these are so abstract that they lend themselves to invertibility (or, are vulnerable to the reductio ad absurdum); once given a content, we are not willing--as, of course, Dworkin recognizes--to follow them to the limits of their logic. They therefore fail to satisfy the requirement of neutrality in law.

In pragmatic consistency, the use which we found most legitimately served by high-order principles is the buttressing of decisions which are arrived at by means of rules, purposively interpreted. This is also recognized by Dworkin, when he speaks of the principles serving to 'incline' and not 'necessitate' decisions in the main. We may also agree with Dworkin when he says that high-order

purposes can, in some instances, necessitate a decision. But again, we part company over the question of the importance of the use of these principles. Dworkin sees them as being the answer to the query, 'how is it that judges are permitted to change existing rules of law'?¹ Pragmatic consistency would put the onus of a justification for change in the law as that law is mechanically interpreted upon the low-level purposes which these laws may be said to serve. In short, Dworkin has placed a faulty emphasis upon high-order purposes in the law.

In what sense can I declare that Dworkin's emphasis is 'faulty'? First, and most obviously, it is faulty relative to Dworkin's goal of demonstrating a lack of judicial discretion (in a significant sense). Granted the truth of his theory, that problem would remain.

Significantly, I think Dworkin's analysis also fails as an adequate description of the way judicial reasoning proceeds in the Anglo-American countries. Low-level purposes are often employed, and we get no inkling of this in Dworkin's work. Particularly in his analysis of cases it is evident that a concentration upon principles and policies has blinded Dworkin to the influence of more simple purposive reasoning in the law. It would be best to show this in some detail.

Let us take first the case of *Riggs v. Palmer*,² the case of the murderer's inheritance. Dworkin's view of the

¹See MR, pp. 38-39.

²Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889).

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case was that it turned upon the application of the maxim, 'no man may profit from his own wrongdoing'. It is clear from the court's opinion, however, that this maxim served at best as a secondary reason for the decision (in the buttressing function). The court begins reference to this maxim by saying, "Besides. . . .";¹ this 'besides' surely indicates, coming as it does at the close of the argument, that we have here a secondary justification. What then is the primary argument which the court supplies?

The opinion, after referring to Palmer's claim, and after remarking on the fact that the 'literal' rule supports this claim, goes on,²

The purpose of these [i.e., testamentary] statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it could never have been their intention that a donee who murdered the testator to make the will operative should have any benefit from it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of the law to meet it, it cannot be doubted that they would have provided for it . . . a thing which is in the letter of the statute is not within the statute, unless it be within the intention of the makers.

The court goes on to cite precedent for this method of interpretation. That this is reasoning of the sort described by pragmatic consistency is clear--the intention of the legislature requires that Palmer's claim fails. But the judge goes further than this, and attempts to show that

¹MR, pp. 23-24. ²Riggs, p. 509.

not only did the legislators not intend this result, but that in addition the purpose immanently present in this law would be defeated by granting Palmer the inheritance. An argument that a literal application of the law would defeat that law's purpose is, of course, a very strong argument.¹

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceful, and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate?

Allowing property to devolve by violence, under a statute whose intent was, inter alia, to insure peaceful devolution of property, would be to defeat the law's own purpose. The above quote was immediately preceded by mention of that paradigm of pragmatically-consistent reasoning, the Bologna case involving a barber who opened a vein in the street. And it is only after all this, which concerns the low-level intent and purpose of testamentary law, that we are referred to that Dworkinian maxim which operates at such a higher level.

In the case of Henningsen v. Bloomfield Motors Co.,² the reasoning is a great deal more complicated. The case, it will be recalled, involved a suit for damages in excess of what a restrictive warranty allowed. There are, as Dworkin notes, certain principles and policies appealed to in the case. These could, again, be interpreted as buttressing

¹Riggs, p. 511, italics added.

²Henningsen, 33 N.J. 358, 161 A. 2d 69 (1960).

tactics. Christie,¹ for example, argues that the result was practically foregone, and that existing law served to justify the decision. At any event, there are arguments subsumable within the model of pragmatic consistency which appear in the opinion:

1. The court establishes that the intent of the modern law of sales is to reduce the scope of caveat emptor, "and in some measure to impose a reciprocal obligation on the seller to beware." This reveals "a trend and a design in legislative and judicial thinking toward providing protection for the buyer." The principle emerging from this kind of survey could, however, appear in Dworkin's model as well as in that provided by pragmatic consistency (it finds an analogue in pragmatic consistency in the survey conducted by Justice Brandeis in the Strathearn case, discussed above).

2. Warranties in general were established for the protection of the consumer, not the vendor (and the need for warranties was determined by statute); the sort of warranty which Bloomfield and Chrysler granted defeats the purpose for which warranties had been established. "Warranties were developed in the law in the interest of and to protect the ordinary consumer who cannot be expected to have the knowledge or capacity or even opportunity to make adequate in-

¹Christie.

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 spections of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose. . . . But the ingenuity of the Automobile Manufacturers Association, by means of its standardized form, has metamorphosed the warranty into a device to limit the maker's liability."¹

3. The court does not feel that with regard to the disclaimer of the warranty, the court is faced with a conflict between two principles (freedom of contract and equity to buyers); rather, pragmatic consistency with regard to freedom of contract itself requires that the warranty not be given effect. On this point the court quotes Chief Justice Hughes: "While it is important to preserve that liberty [of contract] from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard."² The court goes on to demonstrate that today freedom of contract cannot always be achieved by the traditional reliance on a free market; freedom of contract itself is opposed to contracts of adhesion, where one party has all the bargaining power, of which the contract in question is an instance.³

¹Henningson, p. 78.

²Dissent in Morehead v. The People of New York ex rel. Tipaldo, 298 U.S. 587, 627. *Italics added.*

³Henningsen, supra n. 1.

4. In services of a public and quasi-public nature it had been held necessary that, for a limitation of liability to take effect, the consumer must understandably consent to that limitation. The court believed that the same reasons which made the doctrine necessary in services ("because members of public generally have no other means of fulfilling the specific need represented by the contract") applied to automobiles, so that the principle should be extended and find application in this case.¹

On the level of description, then, I would contend that Dworkin has failed us. There remains at least one other test for a theory of reasoning: is it consistent? And it may be said, I think, that Dworkin's theory is not consistent: it involves us in a logical paradox. This has been brought out by Tapper:²

Since it is characteristic of rules that where they apply the result follows automatically, and since in such a system the area of application would be well-defined, it might be expected that in the area covered by the rules some certainty of prediction could be achieved, and a stronger distinction between the application of rules and principles established. Any such expectation would be disappointed on account of the co-existence with such rules of principles. It is characteristic of principles not only that they do not automatically determine results, though they may determine them as a matter of choice, but also that the range of circumstances to which they may be applied cannot be listed in advance. It follows that no area can be pre-empted for the exclusive operation of rules. But if rules and principles overlap in a given situation and indicate different results, a choice must be made between them. Either the result is determined by the

¹Henningsen, p. 92.

²Tapper, p. 630.

application of the rule, or it is not. If it is, then any suggestion that the principle was also applied can be dismissed as so much mouth-wash. If it is not, and the principle really has a chance of influencing the outcome, then there is no rule in the required sense. The reason for this is that principles are ex hypothesi too vague to constitute exceptions to rules.

In other words, once it is granted--as Dworkin does grant--that a principle may prevail and yield a decision in conflict with a rule, then that principle constitutes an exception to the rule. But, since principles are so indeterminate, we cannot say in advance when the principle will prevail over the rule. We cannot therefore specify all of the exceptions to a rule; and this is required (theoretically) under Dworkin's account. (On rules' exceptionlessness, see MR, p. 25.)

Is there a way out of this difficulty? I suggest that what should be done here is to give up that part of the Dworkin model which sees the legal system as consisting of two sets of materials, rules and principles/policies, which can be sharply distinguished. The distinction between rules and principles should, instead, be viewed as a question of degree, the degree to which the legal material involves and delimits purpose. Principles are pure purpose; rules closely specify direction to that purpose (how the purpose may or must be achieved); and these are points along a continuum, they do not constitute different species. We may be able to specify exceptions to rules with greater precision than may be done with principles, but this does not constitute a difference in kind. There may be more-principle-like rules,

and more-rule-like principles. Every rule contains within itself, however, some element of principle (purpose). Therefore, a conflict between a rule and a principle may be in fact viewed as a conflict between two principles.

This is, finally, the position which Dworkin takes up. In speaking of cases where a principle seems to conflict with a rule, he says,¹

The court must be understood as deciding that the set of principles calling for the overruling of the established rule, including the principle of justice . . . are as a group of greater weight under the circumstances than the set of principles, including the principle of stare decisis, that call for maintaining the rule as before. The court weighs two sets of principles in deciding whether to maintain the rule: it is therefore misleading to say that the court weighs the rule itself against one or the other set of principles. Indeed, when Raz [who also raises the question of the logical consistency of Dworkin's theory] describes the weighing of either a legal or a moral rule, he in fact talks about weighing the principles and policies that the rule serves, because that must be what he means when he speaks of the 'goal' of the rule.

The importance of this statement of his views is that it reveals a trend, I believe, towards a theory of reasoning which will more closely correspond to the theory of pragmatic consistency. I mentioned, at the beginning of this section, that I shall attempt some documentation of this change of heart which Dworkin appears to be undergoing.² The change which I see is towards a view which will not sharply differentiate between rules and principles, but which

¹SRLT, supra n.

²I understand from conversation with Prof. Martin Golding that Dworkin is changing his views still further. The papers in evidence of this are as yet unpublished.

rather sees these as existing in a kind of confluence, or complex interplay. It identifies, as does pragmatic consistency, principles with purposes, and sees these as deriving from legal rules: principles are those purposes which legal rules are designed to serve. It then uses those purposes which legal rules embody so as to guide the interpretation and application of those rules.

This shift is most apparent in Dworkin's "Philosophy and the Critique of Law" (although, as we have seen intimations of it may be seen in his "Social Rules and Legal Theory"). Dworkin distinguishes (in the former of these articles) between first-order practices, which concern claims of right and of obligation, and second-order practices "that furnish conventions for criticizing and applying first-order practices."¹ "They provide, for example, that if it is unclear whether someone has an obligation under a particular practice, it is relevant, in reaching a decision, to consider the point of the practice, that is, the principles or policies the practice might be said to serve, and also to consider the impact of other policies to which the community is committed. . . . The theory provides that one must approach these hard cases . . . by attempting to identify the principles and policies that the established rules serve, and then interpreting these rules, or designing new rules, in that light. . . ." ² Again, in

¹PC, supra, p. 150.

²Ibid., p. 151, p. 153.

"Social Rules and Legal Theory" Dworkin expands upon the relation between rule and principle in a way similar to that of pragmatic consistency. He says that the way (which he believes would be best) of determining whether a principle is a legal principle is by listing all of the valid legal rules, and "We might then ask what set of principles taken together would be necessary to justify the adoption of the explicit rules of law and institutional rules we had listed."¹ It appears that here Dworkin is speaking of purposive or rational justification; and if so, then he is at one with the theory of pragmatic consistency in developing purposes out of rules by a systematic determination of what purpose this law, taking all into account, could be seeking.

This is too slim a case to prove that Dworkin is moving closer towards pragmatic consistency, but it does seem to me that the trend is present. Dworkin would, no doubt, be surprised to find that he had crept into Lon Fuller's bed. What this indicates is, I think, the enormous unifying and explanatory power which the theory of pragmatic consistency affords to students of jurisprudence. The red thread of pragmatic consistency has been seen to run from Austin to Blackstone, from Fuller to Frankfurter to Dworkin. It appears in court cases of the seventeenth century as in current court cases; and, once recognized, serves to illuminate the nature of the reasoning which went on.

¹SRLT, supra, p. 876.

APPENDIX A

FURTHER EXAMPLES OF THE USE OF
PRAGMATIC CONSISTENCY

In the text I have already furnished illustrations of the use of pragmatic consistency in American court cases, but have tried to keep these at a bare minimum so that the continuity of the text might not be destroyed. A number of further examples, arranged according to the previously-supplied classification of hard cases, will be given in this appendix. I must reiterate the fact that I do not mean to overwhelm the reader, by these cases, into thinking that pragmatic consistency is the sole method used in the American judicial system. Again, however, these cases serve, beyond their illustrative value, to show that pragmatic consistency is apparently a method which may legitimately be used by courts, as court restraints are currently understood.

Preconditions of Rule Lost

It will be recalled that cases in this category are such as represent a change in the law as a response to an underlying change in the factual presuppositions of that law. An area of the law which has undergone this kind of change is that area which includes those parts of the law which present an interface with husband-wife relationships.

As these relationships have changed, the law has (at times) struggled to keep abreast of the changes, which has resulted in the creation of novel common-law doctrine to replace outmoded or archaic doctrine.

One case of this sort is Oppenheim v. Kridel,¹ which was the first case in New York State to sustain an action for criminal conversation brought by a wife against her husband. Criminal conversation is an action in tort for damages in compensation for, among other things, sexual intercourse of an outsider with one's spouse.² The common law (which, however, had been changed in other jurisdictions) held that this action could only be brought against a wife by her husband, not against a husband by his wife.³

The court, in upholding the suit, said that "whatever reasons there were for giving the husband at common law the right to maintain an action for adultery committed by his wife, exist today in behalf of the woman for a like illegal act. . . . If he had feelings and honor which were hurt by such improper conduct, who will say today that she has not the same. . . ? . . . The statements that he had a property interest in her body and a right to the personal enjoyment

¹Oppenheim v. Kridel, 236 N.Y. 156 (1923).

²See Black's Law Dictionary (West, rev. fourth ed. 1968), p. 448, under heading "criminal conversation."

³See Oppenheim, quoted in Hart and Sacks, The Legal Process (Cambridge: Tentative mimeo ed. 1958), p. 479.

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of his wife are archaic unless used in a refined sense worthy of the times which give to the wife the same interest in her husband. . . . Surely she is as much interested as the husband in maintaining the home. . . ."1

In a case from another branch of the law which yet maintains the same sort of interface with husband-wife relations a similar result was reached, using similar reasoning. United States v. Dege² presented the Supreme Court with the question of whether the common law of conspiracy ought to be changed so as to permit conviction of a married couple of conspiring together. Under previous common law such a charge could not be sustained, for the principle had been that 'husband and wife are one' (and, as has also been said, the husband is the one). Speaking for the Court, Justice Frankfurter rejected this appeal to precedent: "For this Court to act on . . . the medieval view . . . would require us to disregard the vast changes in the status of women--the extension of her rights and correlative duties--whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally, but emphatically so in this country."³

What changes had occurred to justify these changes in the common law? It appears that a confluence of changes was present in justification of these decisions: changes

¹Ibid. in Hart and Sacks, pp. 480-481.

²U.S. v. Dege, 364 U.S. 51 (1960). ³Ibid.

in related areas of law, e.g., the criminal law of adultery; changes in other jurisdictions than the one in which the novel proposition was being presented; changes in the stance of the law to marital relationships generally; and, not least of all, changes in society's conception of these marital relationships. In terms of the method of pragmatic consistency, we can say that the reasoning leaned upon both a change in the 'given facts' of the law, and upon a higher-order principle found in a category of the law (domestic relations) and in a line of decisions.

A last example, from a different branch of the law entirely, illustrates a complex interplay between a rule of law, changing facts surrounding that rule, and changing public policy. The change of law to which I am referring is the abolition of the common-law rule which made charitable institutions, notably charitable hospitals, immune from tort liability.¹ This immunity had been based upon three reasons: public policy which favored the support of hospitals which would care for the needy; the idea that contributions to such institutions should not be diverted for non-charitable purposes, i.e., the intention of the donors had been to give money that the sick may be tended to, and this intention ought to be effectuated; and an implied waiver on the part of those voluntarily entering these

¹See Seavey, Keeton and Keeton, Law of Torts (West, 1964), pp. 646-657, for cases and discussion.

institutions of all claims for injuries.¹ As the hospitals adopted the practice of insuring themselves against loss, this doctrine began to be questioned; if hospitals were to be made liable for torts committed, this would not directly divert funds away from patient-care, for the settlement of damages would be handled by the insurer. The implied waiver and consequent assumption of risk on the part of those entering these hospitals is perhaps best interpreted as a fiction for the sake of preserving the elegance of tort law. The actions in tort brought against the hospitals are perhaps sufficient to indicate that the patients at these institutions were unaware of any such 'waiver' on their part. In any event, the implied waiver was predicated upon the law being such as to exempt the charitable institutions from tort liability; pretty clearly, there would have been no waiver presumed had the hospitals been liable. This could not therefore be taken as a reason for sustaining the doctrine; it rather presupposes the doctrine.

In the early cases these propositions did not succeed.² Two reasons for this refusal to change were advanced:

1. The funds of the hospital are kept in trust for the purpose of caring for patients. These funds could not

¹See Williams' Administratrix v. Church Home for Females and Infirmary for Sick, 223 Ky. 355, 3 S.W. 2d 753 (1928).

²See Williams', *ibid.*; also see Cristini v. Griffin Hospital, 134 Conn. 282, 57 A. 2d 262 (1948).

be diverted to pay damages in tort suits, and what cannot be done directly should not be done indirectly.¹

2. The insurance rates which the hospitals had been paying would be raised if their liability would be extended; again, funds would be diverted from the hospitals' main task.²

In Pierce v. Yakima Memorial Hospital Ass'n,³ these arguments were rejected and the doctrine was abrogated. The alleged negligence in the case involved a nurse's injection of a foreign substance into the patient, which caused pain and permanent injury. Unlike the earlier cases, the Pierce case appeared in a context wherein most hospitals had obtained insurance which covered tort liability. Thus, the first reason advanced above had no place; no funds were being diverted for the purpose of insurance. The standard insurance policies which the hospitals obtained and needed for purposes other than tort provided tort coverage already. And it could not be said that the hospital should obey its benefactor's wishes and use the contributions purely for patient care. If it was the intention of the benefactors to provide patient care, we may say, by willing the end they will the means necessary to the attainment of that end'. This means includes the disbursement of monies not directly going to patient care but necessary for that end, e.g.,

¹See Williams', supra. ²See Cristini, supra.

³Pierce v. Yakima Memorial Hospital Ass'n, 43 Wash. 2d 162, 260 P. 2d 765, quoted in Seavey, Keeton and Keeton, supra n.

salaries of administrative staff, as well as payment for insurance coverage.

More importantly, however, the demands of public policy had changed as a result of a change in society. "The factors upon which any public policy is based--the relevant factual situation and the thinking of the times--are not static. They change as conditions change and as ways of looking at things change."¹ Today, these institutions are numerous, are in a helathy financial state, and are not the only means of obtaining health care open to the indigent. Owing especially to this last factor, public policy no longer required that the common-law exemption be granted today.

The change in the law, as I have said, was not immediately consequent upon a change in circumstances. At least one of the circumstances supporting the old doctrine, viz., that insurance premiums would go up if liability was extended, may well have still been operative. But, as the opinion in Pierce said, it is not only a change in conditions which may justify a change in the law; the law changes 'as ways of looking at things change' as well.

Ambiguity in the Law

The single case which I want to add here is United States v. Hood,² decided by the Supreme Court in 1952,

¹Seavey, Keeton and Keeton, supra n.

²U.S. v. Hood, 343 U.S. 148 (1952).

Mr. Justice Frankfurter speaking for the Court. The defendants were charged with a conspiracy to violate 18 U.S.C. (Supp. IV) section 215, and with substantive violations of that section, which provided:

Whoever solicits or receives, either as a political contribution, or for personal emolument, any money or thing of value, in consideration of the promise of support or use of influence in obtaining for any person any appointive office or place under the United States shall be fined. . . .

It was charged that the defendants had solicited contributions from individuals in return for the defendant's promised efforts to obtain for the contributors appointments as Chairman of the County Ration Boards of Pike, Amite, and Lawrence Counties. Without knowing more, as far as the law of the case is concerned there ought to be no problem; the rub was that it was stipulated in court that these offices did not exist, at the time of the solicitation of funds or thereafter.

On a mechanical reading of the section, without reference to the purpose of the statute, it appears to me, at least, plain that the defendants were not in violation of the law; and so, of course, they pleaded. Given, however, what we might imagine the purpose of the statute to be, there is a prima facie ambiguity, or, at least, a problem of construction: we might say either that the words are ambiguous as they stand, and the court must make a proper construction, or we might say that the words, when read in an intelligent fashion, put the defendant's case within the statute (although there will remain the problem of

conflict with the policy of strictly construing penal statutes). Either way, the problem of construction only arises because the purpose of the statute must be brought in. And although Frankfurter, in order to avoid the doctrine of strict construction of penal statutes, states that the statute obviously covers such acts as those of the defendants, he yet indicates that some sort of ambiguity is present. "Our construction of the statute does not offend the requirement of definiteness."¹ This declaration would be out of place if the problem of definiteness, or rather indefiniteness, ambiguity, did not arise.

It is clear how the method of pragmatic consistency is to be used here. The Justice felt that Congress, to avoid the evil of selling political office, chose to, in the traditional Jewish phrase, 'build a fence' around that evil, for the solicitation, as well as the sale, of offices was forbidden by the Act. "This Act penalized corruption. It is no less corrupt to sell an office one may never be able to deliver than to sell one he can." Therefore, the "statute is plainly broad enough on its face" to cover this type of situation.

Expansion of Laws

In Commonwealth v. McHale and others² the defendants

¹Ibid.

²Commonwealth v. McHale, 97 Pa. 407 (1881), noted in Hart and Sacks, *supra* n.

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were charged with having added fraudulent ballots in an election for the office of district attorney, and with having 'connived' with the election officer that these fraudulent ballots might be counted. The court noted that these charges do not fall under any statutory prohibition, as the statutes concerning elections were only concerned with the fraud of election officers. Were it not for the principle of strict construction of penal statutes, pragmatic consistency could have used these statutes to fill the gap. Given the principle, however, the court felt that recourse had to be to the common law--and there had existed no common-law crime regarding election fraud previous to this case. The court proceeded therefore to "examine the principles upon which common-law offenses rest."¹ The court found that in other jurisdictions indictments for casting more than one vote and for the disruption of a town meeting called for the purpose of election of selectmen were upheld. It reasoned that the principle of these cases, the goal which they were seeking to obtain in conviction, was broad enough to sustain a common-law crime of election fraud. These earlier cases had shown that all crimes "as especially affect public society are indictable at common law."²

Appeals to 'principle and purpose' are more common when dealing with common law than with statute law, because in the latter recourse may be had to a claim of

¹Hart and Sacks, p. 507. ²Ibid., p. 509.

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'ambiguity' instead. Sometimes, however, the court feels itself forced to make an open appeal to the principle of a statute, rather than to its language. Take, for example, the case of Wall v. Platt.¹ The operative statute had declared that railroad corporations are responsible to pay damages resulting from the passage of the railroad (most often, fires started by sparks from the locomotive stack). The defendants in this case, which involved that sort of suit for damages, were not the railroad corporation itself. The defendants had a receivership over the corporation, they had been appointed to administer the railroad, and act in other ways like the railroad, but they were not the railroad corporation itself. In the same chapter of the statute in question, in fact, there had been references to 'the corporation' which clearly excluded receiverships.²

Still, the reason of the matter demanded that the receiverships be held to this responsibility, and it was so held. The burden of the decision was supported by the idea that the statute in question is a remedial one, i.e., one which gives a remedy to a wrong where no remedy existed previously, and remedial statutes should be constructed liberally.³

Some have found difficulty with this doctrine; it is not easy to delimit the class of 'remedial statutes', for

¹Wall v. Platt, 169 Mass. 398, 48 N.E. 270.

²Ibid., p. 272. ³Ibid., p. 271.

presumably most statutes--hopefully all--remedy some situation or other, to the furtherance of the public interest. The appeal to this principle, however, if not altogether coherent, is clearly not the same sort of appeal as is one to ambiguity. The principle enables pragmatic consistency to operate in cases which involve an exceptional extension of a statutory provision, when the language, as was the case in Wall, pretty clearly does not support the use made of the language.

Narrowing of the Law

One of the richest sources of the law for the use of the method of pragmatic consistency is to be found in the law's response to the question of whether violation of a statutory duty which results in damage to some party is negligence per se (or, alternatively, conclusive evidence of negligence) or not. The reasoning on the problem seems to be capable of reconstruction as follows: Statutes are enacted so as to prevent certain harms or 'mischiefs'. The general standard for actionable negligence is that it is present when someone falls below that conduct which a reasonable man would exhibit in similar circumstances. A reasonable man will, ordinarily, defer to the wisdom of the legislature, and hence would follow statutes designed to prevent that hypothetical harm mentioned above so as to ensure that the harm does not result from his actions. The reasonable man would, however, discern that in certain circumstances to obey the statute would, in fact, achieve a

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result opposite to the one indicated by the legislature or, at the minimum, would fail to achieve the goal which the legislature had in mind that the statute should serve. In either of these situations, where a reasonable man would not have abided by the dictate of the statute in question, and a harm does in fact occur, if that harm is not the harm which the statute protected against, there is no negligence per se consequent to the violation of the statute (although the actor may of course have been negligent in other ways). As far as the context of actionable negligence goes, the reasonable judgment made, that the statute's purpose would not be served by obeying the statute, serves as a justification to infraction of the statute.

In the rule as actually stated, this argument seems to me to be presupposed. In the case of Martin v. Herzog,¹ concerning an automobile which struck a buggy at night, because the operator of the automobile had violated his statutory duty to turn on his headlights, Justice Cardozo wrote: "By the very terms of the hypothesis, to omit, willfully or needlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform." That this is only so in the case of a harm of the type which the statute had contemplated is brought

¹Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814.

out more fully in the Restatement of the Law of Torts.¹

"A plaintiff who has violated a legislative enactment designed to prevent a certain type of dangerous situation is barred from recovery [i.e., he is contributorily negligent] from a harm caused by a violation of the statute if, but only if, the harm was sustained by reason of a situation of that type." (The principle is one to determine what negligent action consists of, so it is used in defining both negligent action and contributorily negligent action.)

To conclude this subsection I will use a number of examples of cases which have employed this rule, which incidentally demonstrate both the propriety of using pragmatic consistency and the possibility of discovering the purposes behind rules so as to allow this method of interpretation to take hold.

The cases of Tedla v. Ellman² and Walker v. Missouri Pacific Railway³ are cases where a merely formal violation of the statutes in question occurred, i.e., the statutes were only violated upon a mechanical reading of the statutes, because to follow the statutes in their situations would have defeated the purpose of the rule (opposite-G).

Tedla v. Ellman involved the question of whether the violation of a statutory duty on the part of the plaintiffs

¹Sec. 409.

²Tedla v. Ellman, 280 N.Y. 124, 19 N.E. 2d 987 (1939).

³Walker v. Missouri Pacific Ry., 95 Kan. 702, 149 P. 677 (1915).

constituted contributory negligence, which would then bar the plaintiffs for recovery on their action. A jury had found that the accident, the striking of the plaintiffs by the defendant's automobile, had occurred solely through the negligence of the driver of the automobile. The defendant appealed this decision to the Court of Appeals of New York on the grounds that the plaintiffs had been guilty of contributory negligence as explained below.

The plaintiffs had been wheeling a baby carriage filled with junk on the right hand side of the Sunrise Highway on Sunday evening after dark, when they were struck by the defendant's automobile. This was in apparent violation of the Vehicle and Traffic law (Consol. Laws c. 71) which provided that "pedestrians walking or remaining on the paved portion, or traveled part of a roadway shall be subject to, and comply with, the rules governing vehicles, with respect to meeting and turning out, except that such pedestrians shall keep to the left of the center line thereof, and turn to their left instead of right side thereof. . . ." There was, however, testimony from a State policeman delivered at the trial that, at the time when the plaintiffs were struck, there was little traffic going east but very heavy Sunday traffic going west, so that it was safer for the plaintiffs to walk on the right hand side of the road, as they did, than to walk on the left hand side, as the statute apparently required of them.

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Justice Lehman noted in his opinion, which found for the plaintiffs, that we "may assume reasonably that the Legislature directed pedestrians" in the way that it did "because that would enable them to care for their own safety. . . . We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of life and limb of pedestrians must be observed when observance would subject them to more imminent danger."¹ To ascribe this intention to the Legislature would be wholly unreasonable, and it is therefore not ascribed.

In Walker v. Missouri Pacific Ry. the train of the defendant was stopped on Central Avenue for a period of time in order to repair the locomotive's brake rigging, which was dragging along the track. This was in apparent violation of a city ordinance and a state statute; the ordinance, for example, prohibited trains from stopping along Central Avenue for any length of time at all. As a result of the train's blocking of the thoroughfare, the fire department was delayed three to four minutes on its way to extinguish a fire in the house of the plaintiff, which was allegedly destroyed by reason of this delay. The appeals court held that a trial should be held in which the defendant could state the above facts as a justification of the train's stopping.

¹Tedla, supra, p. 991.

The cases of Strauel v. Peterson¹ and Pelkey v. Brennan² furnish examples when the disobedience of the statutory provision was justified not because following the statute would have defeated the statute's own purpose, as in the cases above, but because the harm which occurred was not of the sort which was contemplated by the statute. In the Strauel case, the court found that the plaintiff had purchased 26 diseased Black Angus Cattle, as a result of the failure of the defendant to comply with the Bang's Disease Act. This statutory violation was not held to be negligence per se, since a reading of the legislative history of the Act in question disclosed that the Act was a health measure, and designed to prevent a public, not a private, harm. In the Pelkey case a 13-year-old girl who was unaccompanied by an adult fell at a skating rink at 7 p.m. A statute had made it a misdemeanor for the operator of a rink to allow children under sixteen to come in unaccompanied at this hour. But the court found that the purpose of this statute was not the prevention of such accidents. The same statute set the same requirement upon operators of billiard halls and dancing halls; it was enacted to protect the children's morals, not to prevent accidents. Therefore, the violation did not in itself constitute negligence.

It appears to me that these cases, handled as they

¹Strauel v. Peterson, 155 Neb. 448, 52 N.W. 2d 307 (1952).

²Pelkey v. Brennan, 12 App. Div. 2d 215, 209 N.Y.S. 2d 691 (3d Dept. 1961).

have been there, furnish an example of the use which the method of analysis which pragmatic consistency affords in making the established law clearer. The law books put all of these cases I have mentioned under a single category, that of the basis of liability in the event of the breaking of a statute. But the distinction which I have made between these cases, that of disobedience to statute where obedience would defeat the purpose (opposite-G) as opposed to disobedience of a statute when obedience would simply not have served its purpose (not-G) is, I believe, reflected in the decisions themselves. In the case of an opposite-G 'disobedience', apparently, even if the harm which resulted from the 'disobedience' was of the sort which the statute was instituted to prevent, there is no negligent action there. In Tedla, the purpose of the statute was to prevent harm to pedestrians, and the disobedience caused that harm to the pedestrians, and there was still no negligence found. In Walker the purpose of the statutes was, no doubt, to prevent the harms consequent upon major thoroughfares having their traffic blocked, and the harm was caused because the traffic was blocked; and again no negligence was found. The rule given before from the Restatement of Torts, which was, in fact, referred to in the Tedla opinion, would not, strictly speaking, justify the result reached there. For if the rule is as the Restatement has it, that the plaintiff is barred from recovery as a result of a harm caused by that plaintiff's

violation of a statute designed to prevent that sort of harm, then plaintiffs in Tedla should have been barred but were not. In cases of not-G-justified violations, however, the crucial issue is whether or not the harm which occurred was of the type contemplated by the statute in question, as Strauel and Pelkey show.

The reason for this difference in handling the cases, apparently unremarked by the legal writers, is explicable given the method of pragmatic consistency. In cases where the violation is justified on opposite-G grounds, in fact no violation of the statute has occurred, when the statute is read as a reasonable man would. Walker, e.g., has it as follows: "This statute must be so construed as to permit trains to stop anywhere to prevent accidents."¹ The opinion in Tedla quotes approvingly from section 286 of the Restatement of the Law of Torts, "The provisions of statutes intended to codify the rules of conduct which are established by a course of judicial decision or by custom, are often construed as subject to the same limitations and exceptions as the rules which they supersede." The key here is that the construction of the statute, when done properly, demonstrates that, in fact, violations of the statute had not occurred. There was therefore not even a prima facie case of negligence through disobedience of statute here, for there was no disobedience of statute.

¹Quoted in Seavey, Keeton and Keeton, supra, p. 180.

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the question as to whether the old rule of evidence, that hearsay evidence as to a dying man's statement is only admissible in homicide cases, should be changed, so as to admit this kind of hearsay evidence in civil cases as well.

The original rule had been to allow hearsay evidence of a dying man's declaration in all cases, but, with an increasing mistrust of the jury's ability to correctly judge evidence, this exception to the general inadmissibility of hearsay evidence was restricted to cases involving homicide. This was in a special category (for hearsay evidence would often be the only way to discover and convict the murderer). In Thurston, the burden of the judge's argument was borne by reasoning that despite the dissimilarity between civil cases and those of homicide, the original reason for making death-bed statements an exception to the rule on hearsay evidence was broad enough to allow it to be submitted in civil cases. Some of the opinion, however, involved citation of a number of cases to the effect that "the tendency is towards the reception rather than the rejection of evidence, experience having shown that more harm results from its exclusion than from its admission."¹

A bald principle to the effect that 'evidence should be admitted always' is too broad to escape the peril of invertibility, but used, as it is, to buttress a case already established, the use of an invertible principle

¹Thurston, p. 627. See cases cited there.

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is acceptable. The tollens only works against decisive considerations.

The second point is that what might seem offhand to be an extension of a rule by low-level purposes may turn out to be problematical, and to involve high-level purposes, because the extension is one of a purpose found in one category of the law to another. Bishop v. Liston¹ presented such a case. The common law on the rape of minors had been changed by statute, so that the age for 'statutory rape' was set at eighteen years. The question presented to the court was whether in so extending criminal liability, had the law extended civil liability--to pay damages for intercourse with a minor--as well? Judge Good felt that it was, because, he said, "The purpose of the legislature in changing the common law as to the facts necessary to constitute rape, was to protect the virtue and chastity of female children of tender years. . . . The statute says that up to a certain age they are incapable of giving consent to the violation of their persons. . . . It further says to the libertine, who would rob a virtuous maiden, under the age of eighteen years, of . . . maidenhood, that he does so at his peril."²

Although this might appear to constitute a simple case of the extension of the law along the lines of its purpose, Bishop in fact does not present an example of the acceptable

¹Bishop v. Liston, 112 Neb. 559, 199 N.W. 825.

²Ibid.

use of pragmatic consistency. While we may feel that statutory rape laws and doctrines, which do not allow as a defense to the charge the response that the minor has consented (or even that she misrepresented her age), are proper in the criminal law, this need not mean that the doctrine should be moved to another category of law (torts). It is at least plausible to claim that, e.g., a woman seventeen years old who misrepresents her age should not be able to collect damages on account of a 'harm' which she has brought upon herself, even if public policy requires that her paramour be held criminally liable. To extend a rule from one category of law to another, then, requires attention to the purpose of the law to be extended, within its original context; the purposes of the criminal law are, in general, very different from those of the civil law.

APPENDIX B

PRAGMATIC CONSISTENCY AND
ARBITRARY RULES

One objection which could be made against pragmatic consistency is that it leaves absolutely every legal rule unsettled, because each legal rule is open to change on the basis of 'policy' considerations. This is one of the challenges made by Professor Hart against any purposive theory of law.¹ This appendix will furnish one response to this problem; our method of approach will be by way of the question of whether pragmatic consistency could allow a legal system to adhere in a consistent (though not necessarily absolute) fashion to an arbitrary rule.

Dickinson² gives as an example of such an arbitrary rule the rule of Roman law known as laesio enormis. "[An illustration] is the arbitrary rule of laesio enormis laid down by the Roman law to mark the line between the legally protected interest of the buyer in reaping the advantage of his bargaining ability. The rule arbitrarily fixes half the value as the point up to which the seller is protected and beyond which the buyer may not press him. These

¹See discussion above, Chapter III.

²In John Dickinson, "The Law Behind Law", 29 Columbia L.R. 113 (1929); and "The Law Behind Law: II," op. cit., p. 285.

purely arbitrary rules are perhaps more often set by legislative enactment than by courts"¹ and nevertheless, he goes on, the courts will also sometimes set them. Can this sort of establishment of, and obedience to, an arbitrary rule be justified in terms of pragmatic consistency, or does it represent an abandonment of the method?

The considerations in response to this cluster around the notion of a 'neutral' or 'indifferent hypothesis'. Poincare introduced this notion in regard to the philosophy of the physical sciences; for him, hypotheses are "of this kind when they are alternatives which cannot be distinguished by experiment."²

It has often been noticed that in one way, two different laws may achieve the same result--they will be 'neutral' relative to a goal--and that, therefore, the choice between them is, in one sense, arbitrary. The typical example concerns the establishment of laws governing traffic, especially rules concerning which side of the road a vehicle must stay on. What we need here is a rule which is consistently followed; the rule may, however, stipulate that the right side of the road must be used, or that the left side must be used. As far as the goal of reducing traffic accidents is concerned, these two are equally rational

¹In Dickinson, "The Law Behind Law: II," p. 300.

²In Peter Alexander, "Jules Henri Poincare," Encyclopedia of Philosophy, ed. Paul Edwards (New York: Free Press, 1967), VI, p. 362.

(until, of course, one rule has been adopted).¹

Rules of the road, then, serve as an example of this type of situation, in which it is more important that one rule be consistently followed than that we begin to make a purposive investigation to justify deviance from that rule (the short-form rule). The concept of a 'neutral hypothesis' has, however, yet wider application than this. It was said above that hypotheses are neutral when experiment will not distinguish between them. This may be, as in the rules of the road, because they are in fact indistinguishable; not only can we see no difference resulting from the adoption of different rules, we can see that there is none. This we may call (to succumb to a philosophical predilection) a neutral hypothesis in the strong sense. In the weak sense of 'neutral hypothesis,' on the other hand, we can see that two rules would, if adopted, yield different results, but precisely wherein that difference would lie--what the values of the alternatives are--is veiled in obscurity. Since we do not know what the difference between the resultant situations will be, we cannot make a judgment as to which situation will be closer to our posited goal; and therefore, relative to our state of knowledge the choice between the rules is neutral. We must still choose some rule, or nothing will be accomplished; and our choice will be, in

¹The two rules are, that is, ordinarily equally rational, and the rule which has been adopted ought generally to be followed. Sometimes, of course, one side is to be rationally preferred to the other; compare Tedla v. Ellman, in Appendix A.

some sense, arbitrary. But fallible human beings must make judgments on what they know, on phenomena, not on noumena. Our criterion of rationality must take account of this fact; and so we can say that choosing between two rules which constitute neutral hypotheses (in the weak sense) does not represent an abandonment of reason any more than does choosing between different rules of the road. In each case, whatever choice we make is rationally justifiable in the relevant sense: any choice will do as good a job as is possible towards attainment of our goal.

An example of this sort of weak neutral hypothesis can be given from the law of contract. It will make, as far as we can see, no significant difference in the long run that we hold a contract to be in effect from the time that it is signed by the second party and posted, rather than from the time at which it is received by the first party. The two rules are equally 'neutral'. One of them must, however, be adopted and consistently adhered to, if the business of the world is to proceed. The choice of one of the rules to the exclusion of the other is arbitrary; but that the choice be made is very far from being an arbitrary requirement. This is no doubt part of the basis for Roscoe Pound's belief that the rules of commercial transactions be rigidly formulated and 'mechanically' applied.¹

¹See Roscoe Pound, An Introduction to the Philosophy of Law (Yale, 11th pb. ed. 1971), pp. 70-71; and compare Richard Wasserstrom, The Judicial Decision (Stanford U., 1961), pp. 98-105.

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These considerations are neither very original nor very profound--which is not to say that they are not useful. They serve as, I believe, a sufficient response to the sort of challenge posed by the laesio enormis case. They also serve to show the mistake made by those who claim that the law, as presently constituted, could not be entirely rational (in the sense which pragmatic consistency requires) because, for example, neighboring jurisdictions with identical background conditions and identical goals have adopted and enforce differing rules of property.

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