AT THE INTERSECTION OF LEGALITY & MORALITY

Hartian Law as Natural Law
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HARTIAN LAW AS NATURAL LAW

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Declaration

Except where otherwise acknowledged, this dissertation comprises my own work.
"The relation of law and morals is the Cape Horn of jurisprudence. The juristic navigator who would overcome its perils runs no little risk of fatal shipwreck."

—Rudolf von Jhering, *Geist des römischen Rechts*
Abstract

H.L.A. Hart is one of the dominant personalities of twentieth-century legal philosophy. After his election to the Oxford chair of jurisprudence in 1953, numerous essays of great range and conceptual power flowed from his pen. But in no area might his work be deemed more important than his success in advancing the anti-natural law line that notions of morality are unhelpful in, indeed are positively deadly for, careful accurate analytical study of law. This position may be captured in short compass by borrowing the celebrated slogan Hart draws from John Austin: the existence of law is one thing; its merit or demerit is another.

Yet, because Hart is so careful to develop arguments for a theory of law which have normative impact, as well as descriptive and conceptual power, important lines of divide that are typically taken to separate positivists from natural lawyers are strangely blurred. The theme advanced in this essay is that upon careful exploration of those standardized positivist/natural lawyer boundaries frequently assumed to exist, one discovers that on Hart’s own leading they have in fact quite faded away. In reconstructed form, a Hartian legal theory can be seen as a variant natural law position.

The three major sections of the dissertation respectively take up the debates concerning legal theories of adjudication (chapter II - The Jurisprudence of Discretion), obligation (chapter III - Social Morality & Legal Obligation), and the content of law (chapter IV - The Minimum Content of Natural Law). Although the development of a Hartian theory is shown to be preferred to alternatives (such as a Dworkinian theory of adjudication), it does not escape criticism. Indeed, the Hartian line seems seriously incomplete with regards to the notion of legal obligation and the role of moral commitments to internal viewpoints of law and law’s possible contents. Thus, the conclusion of each part is that a more complete Hartian theory requires certain key elaborations. In turn, these elaborations or reconstructions of a Hartian theory chip away more and more of the positivistic separation thesis until it crumbles and is gone. In the end, Hartian law is seen to unfold as natural law.
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Preface

Attempting to cross disciplinary boundaries when composing an academic study is typically fraught with dangers. This is no less true in a field loosely nominated 'legal philosophy' or 'philosophy of law.' However suggestive those names of interdisciplinary methods and themes, one more often than not runs the risk —to vary the metaphor— of falling between the two stools of academic philosophy and legal studies. Rather than finding that each discipline informs and enhances the workload of the other, they regularly appear to be at cross purposes in concern and style of argument [or at least are perceived to be pitted in academic battle by those entrenched in either discipline who are ready to man the barricades against any possible encroachments]. Consequently, too often one is uncovering articles and books which are at best either too philosophical to be of legal value, or too legally oriented to be of substantive philosophical interest; at worst they may be insufficiently developed in accordance with the demands of their disciplines to be of any use in either. Thus, and recognizing my own tendency too easily to play one discipline's concerns against the other in various contexts, it is with some trepidation I present the following study in legal philosophy for critical review.

The quotation from Jhering's work standing as the epigraph to the dissertation first came to my attention through reading Roscoe Pound's 1923 McNair Lectures, now collected in his LAW AND MORALS (1924; Rothman Reprints 1969). In the present context, it seems doubly apt: its message calls to mind the interdisciplinary problem noted above as well as the intradisciplinary jurisprudential one. I hope to have avoided all the obvious rocks and most of the invisible shoals, both in analyzing the courses sailed by others and in charting mine own. For much valued help in avoiding the many and varied philosophical and legal breakers in the waters during the passage of this project, I owe special thanks to Jerry Gaus, Thomas Mautner, Samuel Stoljar, Colin Thomson, and David Tucker. I am also grateful for the aid rendered by Peter Forrest in reviewing the logical formalizations and arguments presented in Appendix A. Responsibility for any remaining errors, lack of disciplinary fit, etc. are, of course, entirely my own. The necessity and value of salvage I leave to the reader.
I would also like to take this opportunity to thank ANU academic staff members in the Research School of Social Sciences for supporting the offer of a three-year university scholarship which made possible travel to and study in Australia, and to all the members of the department of philosophy in RSSS for tolerating an American lawyer in their midst. Honorable mention is similarly due the members of the Australian Society of Legal Philosophy who patiently heard and commented on my paper at the University of Sydney Law School [later released in Vol.11 of the ASLP Bulletin and revised for incorporation in chapter II], and the members of the Victorian Society of Legal Philosophy who offered helpful criticisms on my paper at the University of Melbourne Law School [revised for incorporation in chapter III].

A note about citation form and word usage. Because of the extensive use of legal materials throughout these pages, I have followed the standard Uniform System of Citation [a.k.a. the Harvard Bluebook] for footnotes and bibliographic references. In this system, virtually all cites follow legal case citation formats. Thus, a cite to John Austin’s Lectures will appear as


That reference is to be found in volume two of Campbell’s redaction of Austin’s lectures, on page 642 of his 1879 fourth edition. Likewise, journal article cites provide author, essay title, volume of journal, journal title, beginning page, quoted page, and date. For example, a quotation’s footnote which appears as


indicates that Harry Jones’ article is to be found in volume 74 of the CLR, beginning on page 1023, from 1974: the quotation being taken from that article at page 1038. [One general concession to non-legal technique appears in the Working Bibliography, viz. the provision of beginning and ending pagination for journal articles and book chapters referenced.] It is hoped that any readers unfamiliar with such systems will not find its use here cumbersome or difficult to digest. Exceptions to this format style occur only where classic material, e.g. works by Aristotle or Aquinas, is referenced. In such cases their traditionally adopted citation forms are provided.

Word usage and spelling throughout the text conform to American English standards [e.g. the -ize rather than -ise suffix is regularly used]. This route seemed the most reasonable course to follow since I am an American steeped in U.S. conventions and the
bulk of my sources beyond H.L.A. Hart’s work is of U.S. origin. But note that original usage and spelling are maintained in all quotations. Thus, United Kingdom source quotations and references will reflect U.K. conventions. Again, it is hoped that the adoption of this technique will not distract.

Finally, it should be observed that the bibliography appended is captioned a ‘Working Bibliography.’ Most every item listed there will be directly referenced in the text, and those articles and books did form the ‘working’ core of my reading program. That is, they compose a compact but broadly representative sampling drawn from the mass of available literature in the field, and constitute those essays which instructed and inspired me during my studies; I would not hesitate to recommend any of those works to interested readers. But many additional, principally pre-CONCEPT OF LAW, sources were actually utilized in preparing this dissertation. [The Index tracking names and cases may be useful to the reader in this regard.] Thus, footnotes will be found to contain the bibliographic information necessary to track all sources cited, following the notation format detailed above, irrespective of their inclusion/non-inclusion in Appendix B.
Acknowledgements

I wish gratefully to acknowledge permissions to quote from the following previously published materials of the Harvard University Press, and the Oxford University Press.

Patrick Devlin. THE ENFORCEMENT OF MORALS (Oxford University Press, 1965)

Ronald Dworkin. TAKING RIGHTS SERIOUSLY (Harvard University Press, 1978)

---------. A MATTER OF PRINCIPLE (Harvard University Press, 1985)


---------. LAW, LIBERTY AND MORALITY (Oxford University Press, 1963)

---------. ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY (Oxford University Press, 1982)

---------. ESSAYS IN JURISPRUDENCE AND PHILOSOPHY (Oxford University Press, 1983)

Joseph Raz. THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (Oxford University Press, 1983)

I also wish to thank the AMERICAN JOURNAL OF JURISPRUDENCE (Natural Law Institute, University of Notre Dame) for permitting me to incorporate substantial chunks from my essay Positivism & Polygamy: A Hart/Devlin Redivivus (Vol.33: forthcoming, Dec 1988) into chapter III.
Abbreviations

**Works and Terms**


*CMT* - consequentialist moral theory


*EM* - Patrick Devlin. *The Enforcement of Morals* (1965)


*LEM* - legal enforcement of monogamy


*PCAs* - principles characteristically available to judges

*PLT* - positivist legal theory


[For convenience, each title and its abbreviation will be reintroduced when first cited in each chapter.]
ANGLO-AMERICAN REPORTER NOTATIONS

A.C. [(HL)] – Law Reports Appeal Cases [House of Lords decision]

All E.R. [(HL)] – All England Law Reports [House of Lords decision]

Cal. [3d] – California Supreme Court Reports [Third Series]

Cal. App. 2d – California Appellate Reports, Second Series

CMD – Command Paper, Second Series

F. Cas. – Federal Cases: U.S. Federal Courts of Appeals and District Courts cases prior to 1880, reprinted in case number order

F. Supp. – Federal Supplement, U.S. District Court Reports

L. Ed. – Lawyers' Annotated Edition, U.S. Supreme Court Reporter

N.E. 2d – North Eastern Regional Reporter, Second Series


Q.B. or Q.B.D. [(CA)] – Queen's Bench Division [Court of Appeal decision]

S. Ct. – U.S. Supreme Court Reporter

U.S. [(# How.)] – U.S. Supreme Court Official Reports [volume of early Court decisions by named reporter, Howard (1843-1860)]

Wash. App. – Washington State Appellate Reports
Chapter 1

Introduction

"Decade after decade Fascists and Nazis, Communists and Mother in
the final of the World Cup... History has now to one side, eschew
the enmity of players and spectators of the armies that
will take its revenge." — A.W. Huxley

The imagery and language of gaming, so often involved in analytical writings of legal
philosophers as tools for understanding law and legal process, are perhaps most employed
by Bentham in the quote preceding this introduction to describe the compenetrative nature
of the arguments advanced and the connected view of the writer themselves to those very
enemies. If such description is apt, then it would be fair to assume that one of the
leading players, and foremost captors of the Anglo-American Profession, is the
expatriate, A. Herbert Linge! Adolphus Hart.

H.L.A. Hart’s work spans thirty years, covering at times obfuscation or even
muddled— the previously categorize now become to philosophy and law. Beginning with
his inaugural lecture, Or Natural and Theory in Jurisprudence,1 he 1943 legal writing up
the Oxford chair in jurisprudence, Hart set a new direction and pace for jurisprudential
styles. His vanguard introduced new content and application of philosophical
methodology, most notably the metaphor language Hart’s contrived for colleagues such
as J.L. Austin2 beyond new the open-air under world discussing the nature of legal


2Originally published under the same title in 1954 QUARTERLY REVIEW OF
"Laws, Laws and Liberalism", 1954 of 23, 305-313. POSTER 1: FOR CIVIL

3For great impact for Hart see Austin’s chronicler of speech who particularly way of performing

4A.J. Austin, 1950; TO BE (1950), HUMPHREY (1962) ed. based upon by
5LAW (1948), vol. q.19.
Chapter I.
Introduction

"Decade after decade Positivists and Natural Lawyers face one another in the final of the World Cup... Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensures that the losing side will take its revenge." – A.M. Honoré

The imagery and language of gaming, so often invoked in analytical writings of legal philosophers as tools for understanding law and legal process, are refreshingly deployed by Honoré in the quote heading this introduction to describe the competitive nature of the arguments advanced and the committed role of the writers themselves in those very essays. If such description is apt, then it also would be fair to observe that one of the leading players, and foremost captain of the Anglo-American Positivist team this century, is Herbert Lionel Adolphus Hart.

H.L.A. Hart’s work spans thirty years, covering—at times refashioning or even creating—the principal categories now common to philosophy and law. Beginning with his inaugural lecture, *Definition and Theory in Jurisprudence,* in 1953 upon taking up the Oxford chair in jurisprudence, Hart set a new direction and pace for jurisprudential work. His vigorous introduction, and continued close application of philosophical methodology, most notably the ordinary language analysis cultivated by colleagues such as J.L. Austin, breathed new life into older stale debates concerning the nature of legal

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2 Subsequently published under the same title in *70 LAW QUARTERLY REVIEW* 37 (1954), and reprinted as the lead essay in Hart’s *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1982). For compilation of Hart’s leading works, see the first section of Appendix B, *infra.*

3 Of great import for Hart was Austin’s theory of speech acts, particularly that of performative utterances. See J.L. Austin, *HOW TO DO THINGS WITH WORDS* (1962; ms. based upon his William James Lectures at Harvard University in 1955); and K.T. Fann (Ed.), *SYMPOSIUM ON J.L. AUSTIN* (1969), esp. part IV.
concepts and the meaningfulness of terminology employed by lawyers and jurists.\(^4\) Essays thereafter poured from his pen; and such is their range and conceptual power that even today

There is hardly a subject or issue in legal philosophy on which it is not natural, almost inevitable, to start with Hart's views. On some issues, we have not managed to go much further than he did. . . . In some fields he has defined the questions which we are all trying to answer, and has provided an answer of his own. In others he has revolutionized the 'state of the art' by changing the level and quality of public and professional debate.\(^5\)

But in no area might his work be deemed more important than his success in advancing the anti-natural law line that notions of morality are unhelpful in, indeed are positively deadly for, careful accurate analytical study of law. This position may be captured in short compass by borrowing the celebrated slogan Hart draws from John Austin: the existence of law is one thing; its merit or demerit is another.\(^6\)

Yet, because Hart is so careful to develop arguments for a theory of law which have normative impact, as well as descriptive and conceptual power, important lines of divide that are typically taken to separate positivists from natural lawyers are strangely blurred. As MacCormick scrupulously notes:

Great though Hart's distinction as a jurist is, greater than that of any other modern British jurist, one cannot claim for his work that it is flawless or that it presents an entire and complete view of law. Like all great work it has gaps

\(^4\)This is not to suggest that Hart's analytical method and results met with immediate universal approval; a good deal of criticism followed. See e.g. the critical essays of E. Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1080 (1956); and J. Cohen, *Symposium: Theory and Definition in Jurisprudence*, 29 [SUPP.] ARISTOTELIAN SOCIETY: PROBLEMS IN PSYCHOTHERAPY AND JURISPRUDENCE 213 (1955). But the debates which ensued themselves soon evidenced the philosophical facelift in style and content introduced by Hart's work.

\(^5\)R. Gavison (Ed.), *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 2 (1987). For provocative polemic that Hart's contribution is anything but salutary, cf. R.N. Moles, *DEFINITION & RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION* (1987), where it is vociferously contended that Hart's contributions to legal philosophy, most notably through his book *THE CONCEPT OF LAW*, are methodologically fundamentally flawed (at 5), epistemologically inadequate and confusing (at 5), and lead to serious distortions and serious error in understanding past theorists such as John Austin (at 7) and the relationship between law and other disciplines such as ethics (at 8).

\(^6\)J. Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832) [at 184 in Hart's 1954 edition]; quoted and relied upon by Hart in numerous writings and debates, such as *Positivism and the Separation of Law and Morals* and his exchanges with Lon Fuller.
and defects, like all great work it bears the marks of place and time, like all
great work it is eminently criticizable and owes some at least of its importance
to the criticisms it has provoked.  

The theme advanced in this essay is that upon careful exploration of those standardized
positivist/natural lawyer boundaries frequently assumed to exist, one discovers that on
Hart's own leading they have in fact quite faded away. In reconstructed form, a Hartian
legal theory can be seen as a variant natural law position. Though certain criticism and
restructured extrapolation of his work at pivotal points distinguishes the resulting theory
from what might fairly be ascribed directly to Hart, the position is sympathetically built
upon and remains faithful in important ways to Hart's corpus, and thus properly takes
the appellation Hartian—much as John Rawls' theory of justice lays claim to being
Kantian and my past reconstruction of Rawls' own Kantian theory of international
justice lays claim to being Rawlsian.  

To gloss Rawls' subsequent defense of his Kantian label in support of this claim: Our natural law result here is not, plainly, Hart's view,
strictly speaking; it departs from his texts at many points. But the adjective 'Hartian'
expresses analogy and not identity; it means roughly that the position sufficiently
resembles Hart's in enough fundamental respects so that it is far closer to his view than
to alternative legal theories appropriate for use as benchmarks of comparison. 

Thus, the object of our argument should be distinguished from an older line run by the
Scandinavian realists that many positivist theories of law are not to be distinguished
from natural law positions because of their common retention of voluntaristic notions of

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8 J. Rawls, A THEORY OF JUSTICE viii, 3 & 11 (1971); D.W. Skubik, Two Models for a
Rawlsian Theory of International Law and Justice, 14 DENVER JOURNAL OF INTERNATIONAL
LAW AND POLICY 231, 233 (1986).

9 Cf. Rawls' original version:

Justice as fairness is not, plainly, Kant's view, strictly speaking; it departs from his
text at many points. But the adjective 'Kantian' expresses analogy and not identity; it
means roughly that a doctrine sufficiently resembles Kant's in enough fundamental
respects so that it is far closer to his view than to the other traditional moral conceptions
that are appropriate for use as benchmarks of comparison.

J. Rawls, Kantian Constructivism in Moral Theory, 77 JOURNAL OF PHILOSOPHY 515, 517
(1980).
law and a fresh line advocated by several theorists that positivism and modern law positions can be shown to be converging or open to being syncretized. Rather, the conclusion reached is that Hart’s positivism, fairly elaborated, unfolds as a more traditional natural law position.

For all that, it might initially be tempting to dismiss the importance of the project from the outset on the grounds that any move in describing the reconstructed theory as a natural law variant instead of positivistic in character is finally primarily a semantic one; and resolution of that debate surely best falls within the scope of lexicographers, not legal philosophers. After all, it could plausibly be argued, natural law theories bear all the marks of a Wittgensteinian family of games—none bearing any single necessary relation to the others. Thus, the result of reclassification is a simple bandying of words to no discernible effect for the theory or its adherents:

\[\text{Thurio. Sir, if you spend word for word with me, I shall make your wit bankrupt.}\]

\[\text{Valentine. I know it well, sir: you have an exchequer of words, and, I think, no other treasure to give your followers; for it appears, by their bare liveries, that they live by your bare words.}\]

Conceding the abundance of natural law philosophies and the skeptical concern that may entail for categorizing variants, the game pictured by Honore above is a serious one: the enterprise need not be reduced to the Bard’s thrust and parry of the tongue; the tag indeed can prefigure important differences in content and consequence. The exact nature and spread of these differences will be detailed as the argument progresses.

\[\text{10 See e.g. A. Hagerström, INQUIRIES INTO THE NATURE OF LAW AND MORALS (C.D. Broad trans. 1953); and K. Olivecrona, LAW AS FACT (2nd ed. 1971). Of course, as Olivecrona recognizes (at 83), Hart’s model is not subject to this reduction because his is a non-voluntarist position.}\]

\[\text{11 See e.g. the work of N. MacCormick and O. Weinberger: “We tend to characterise theories in the philosophy of law as belonging either to positivism or to natural law. . . . In contemporary legal theory there is in fact a not insignificant tendency for the two theories to converge.” AN INSTITUTIONAL THEORY OF LAW: NEW APPROACHES TO LEGAL POSITIVISM 111 (1986), with special reference to chapters V & VI; and the ‘normative positivism’ synthesis of positivism with natural law in R. Tur, CRIMINAL LAW AND LEGAL THEORY, in W. Twining (Ed.), LEGAL THEORY AND COMMON LAW 195, 203-206 (1986).}\]


\[\text{13 From Shakespeare’s Two Gentlemen of Verona, II.iv.37-41.}\]
But this problem of classification reaches further than the worry touching descriptions proper for a natural law position. The term ‘positivism’ itself is likewise encumbered with an unhelpful array of meanings and its own veritable plethora of doctrines –again not together all conceptually consistent ones, either. At a conference sponsored by the Rockefeller Foundation at Bellagio, Italy in 1960, no fewer than eight major alternative descriptions were offered by participants (and some of these categories were themselves composed of multiple alternative sub-themes), ranging from the simple unification of various anti-natural law positions to a formal theory positing legislative ethical relativism. In an article predating this conference, H.L.A. Hart (one of the five senior participants at Bellagio) set forth five meanings or doctrines concerning positivism “bandied about in contemporary jurisprudence,” only three of which he ascribed to the utilitarian tradition in jurisprudence (viz. the analytical jurisprudence established by Jeremy Bentham [1748-1832] and his disciple John Austin [1790-1859]), that camp in which Hart places himself. Fuller analysis will be provided in chapter III, but the core tradition to which I mean to appeal when invoking the term positivism is that subset of tenets firmly held and shared amongst those writers most central to the development of modern legal positivism in Anglo-American jurisdictions: by name I mean to include Bentham, Austin, Hans Kelsen, and Hart; by tenets shared I mean to include only (a) there is a strict separation of law and morals (i.e. there exists no conceptual or necessary connection between what the law is and what the law on some critical account ought to be), and (b) legal concepts are amenable to analytical study. Combined, the position affirmed is that the exposition and devising of legal concepts, indeed of a complete theory of law, can be performed without reference to any background moral criteria or qualities.

Is this positivist position a stable one? Or, to put a somewhat different query, can a legal theorist fully perform his tasks while subscribing to these tenets? In chapter II, we shall turn to recent debates pertaining to legal theories of adjudication in order to address issues raised by these questions. There, we shall contrast and evaluate Dworkinian and Hartian conceptualizations of judicial discretion and legal reasons for theoretic completeness and coherence. Argument developed in sections 1-4 and Appendix

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A will establish (1) the Dworkinian schema is seriously –indeed fatally– incomplete; (2) the Hartian position is quite viable; and (3) Dworkinian attacks against the Hartian model fail to destabilize those core concepts detailing the judicial exercise of (quasi-)legislative powers. Nonetheless, important lacunae in the Hartian position do come to light: the model is awkward at important points, and does not appear wholly to cohere with modern practice. Attention in section 5 shifts then to an attempt to work through the limitations identified in II.4.2 and II.4.3. The isegetical work required for reconstruction is not ponderous, but it does come at a price. Specifically, we find that in at least hard, and often in even easy and mid-range, cases judges must find and apply moral principles in order to justify decisions rendered. Thus, we end with a necessary conceptual device for systematically linking moral norms to the legal process of judicial decision-making in any substantial theory of adjudication. Such is not yet a necessary connection breaching tenet (a), above; but this result does suggest further probing might warrant other fruitful connections.

Following this lead, we move in chapter III to take up issues of social morality and notions of legal obligation. What does it mean to say that some individual has a legal obligation? Does it, and if so how does it, differ from social or moral obligations? More narrowly, what constitutes a judge’s legal obligation to apply a rule in any particular case? We look to answer these queries by first focussing on the liberal consequentialist theories held by positivist adherents such as Hart when they take up issues concerning the legitimacy of basic social institutions. We take a close look here at the institution of marriage qua monogamy in Western societies and the criminal sanction typically attaching to bigamy. We shall discover that no consequentialist moral theorizing currently on the market provides clear justification for that institution or for sanctioning nonconforming behavior. Surprisingly, we also find that there seems to be no positivist legal obligation to obey or apply this institutional rule, either. Building upon Hart’s famous distinction between ‘having an obligation’ and ‘being obliged,’ we come to realize that judges are only legally obliged, they do not have a legal obligation, to follow or apply such rules. To generate a full account of legal obligation, a Hartian legal theory requires recourse to moral notions of commitment from an internal point of view. Thus, we reach a position from within the theory whereby critical moral evaluations are indeed

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16 Technical argument is pursued in the appendix to meet Dworkin’s formalized attack against positivistic no-right-answer positions. It is not intended to provide a self-sufficient formalized foundation for rejecting a Dworkinian account of adjudication. The purpose of our counterargument is to demonstrate that the debate can only be resolved on substantive grounds, as taken up in the chapter, rather than on logical or semantic bases.
necessary for developing a complete conceptual account. And this requirement does breach separation tenet (a), given above.

Still, we remain some distance from traditional natural law accounts requiring rules to have certain content, or that their content be consistent with certain moral criteria, for those rules to qualify as laws. We have reached a point where Hartian theory has taken on the character of a modern natural law position similar to that of Rudolf Stammler, and that is a significant shift for a Hartian theorist. But this position still falls short of classic robust positions of justice. In our concluding chapter IV, we turn to the question of content for a Hartian theory of law.

We begin by asking under what conditions law is possible and necessary, and so turn to analyses of the circumstances of justice offered by Hume and elaborated by Hart. Once more following Hart’s lead, we investigate the notion of a minimum content of natural law. While allowing that such content does exist, Hart presumes its contingency and formal nature to avoid non-positivistic results. Yet, given the argument later developed, we come to appreciate the necessary nature of those minima and furthermore that their nature exceeds the formal. Notions of justice to generate content are found to be required. Again, a Hartian theorist is led to concede a necessary connection. And this connection is of such strength that we can no longer distinguish Hartian law from natural law. Having begun with one, we end with the other.

A final word about method. Theories of law can, of course, be classified as positivistic or natural law positions. They can also be categorized according to their function. The functional categories are three: descriptive, conceptual, and normative. A descriptive (on occasion misleadingly called ‘instrumentalist’) theory serves to provide an account of actual legal practice in a(ny) system of law. That is, the theory sets out what legal actors in fact are doing. Such theories are evaluated on the basis of how well they reflect the workings of the institutions they attempt to model; the more accurately they are constructed, the better tools they become for understanding both what is now going on and what is likely to occur in the future. Conceptual theories of law serve to provide accounts of what it means for there to be ‘legal’ practice; often, what it means for there to exist a legal system in a(ny) society or community. That is, the theory attempts to account for the use of notions tied to that of ‘the legal’: notions such as adjudication,

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17 A foundation of natural law principles acting as formal constraints but permitting development of laws with variable content across societies. See his THE THEORY OF JUSTICE (1902; I. Husik trans. 1925).
obligation, rights, duties, punishment, primary and secondary rules, etc. A normative theory serves to provide an account of what the law, laws, and/or legal system ought to be, do, or contain. That is, this account tells us how things should be in law, irrespective of that account’s descriptive or conceptual discontinuity.

In light of these distinctions, the format for each of the following chapters may be seen to conform to a general pattern: the particulars of an historic legal case are reviewed to throw up several issues for special consideration—this requires a briefly developed descriptive analysis of the area of law involved; the issues are refined and pursued to cultivate a broader conceptual frame for analysis; the conceptual theories produced are then scrutinized to determine descriptive fit and normative implications. For all that, there are of course various levels of interaction between these categories. 18 Few theories of law, and most assuredly not Hart’s, fall within only one functional group. Even where internal divisions might be drawn, the notion of descriptive fit itself, for example, is subject to conceptual development, and cultivation of a conceptual frame may require normative commitments to complete the project. Accordingly, where these interactions are thought to be seminal in formulating an argument, the point will be noticed. 19 Else, contextual cues and the general pattern noted above can be assumed to hold.

18 For fuller account of some important differences and possible interactions between conceptual, descriptive and normative theories of law, see P. Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 MICHIGAN LAW REVIEW 473-476 (1977).

19 See e.g. the opening paragraph of II.3.1 and III.1.2, infra.
Chapter II.

The Jurisprudence of Discretion

"The discretion of a Judge is the law of tyrants: It is always unknown: It is different in different men: It is casual, and depends upon constitution, temper, passion.—In the best it is oftentimes caprice: In the worst it is every vice, folly, and passion, to which human nature is liable." —Lord Camden

II.1. A Problematic Case

Legal philosophical disputes concerning the proper meaning or scope of terms such as 'discretion' when applied to judicial decision-making often turn on ordinary language analyses of such terms, and concomitantly on analyses concerning what legal officials say they do in reaching conclusions of law. What is less often investigated is the link between conceptions of the power(s) of judicial discretion and those conceptions' concomitant conceptualizations of legal reasons.

This chapter argues that the concept of discretion might better be explicated as part of a deeper theory evaluating the various competing perspectives which define the judicial role and inform the powers properly attaching to that office in modern democratic society. Although competing judicial perspectives are seldom transparent in the verbiage of most courts' opinions, there does exist one class of cases wherein the clash of rival positions are peculiarly highlighted. This class is composed of those rare cases in which the legal disposition on the one hand is agreed to unanimously; yet, one finds upon examination on the other hand that the various reasons offered are strikingly divergent. Such opinions offer fertile ground for constructing and evaluating the broader views which ground the single disposition. The United States Supreme Court offers a forum, and in particular the case of *Rochin v. California* (1952), where we find instances of definitive deeper theoretic splits. There, Justice Felix Frankfurter, writing for the Court, represents an almost paradigmatic, if somewhat anachronistic, Dworkinian: talk of

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fundamental rights and liberties for example is a central feature in his opinion. Conversely, Justices Hugo Black and William Douglas appear to don the garb of Hartian statutory construction by focusing on ordinary language and core meaning analyses. Thus, we find represented in the opinions proffered apparently straightforward applications of two competing conceptions of discretion in judicial decision-making.

Yet, pegging jurists by too simply depicting the legal theories to which they are (or are supposed to be) committed can be misleading – both for the jurists and the theories. We shall see that the best justificatory strategy available to Frankfurter, and indeed the best way to read his opinion for the Court’s majority, is a Hartian one; while the strongest attack available against his position is a Dworkinian one. These interpretative flips will enable us to see the opinions, the reasonings advanced, and the applicable theories in new light. We are thus led to ask first about reasons, and only then about powers of discretion in this and like cases. Finally, we are led to ask and to begin to formulate an answer to the query, what is at stake in—and how do we go about choosing between—these alternative theoretic accounts of judicial decision-making?

II.1.1. Rochin v. California

On the morning of 1 July 1949, three Los Angeles County deputy sheriffs forcibly entered Tony Rochin’s home on information that he was selling narcotics. Finding him in the bedroom, they also spied two capsules on a night stand beside his bed. Before the officers could reach him Rochin quickly grabbed and swallowed the capsules. A fight ensued as they sprang to take him, with the officers attempting physically to choke or otherwise force the capsules out of him. Failing in this, they arrested Rochin and removed him to a nearby hospital where, against his struggles, a doctor “pumped” his stomach\textsuperscript{21} and thereby retrieved the capsules. At trial, the capsules were shown to have contained morphine, with the result that Rochin was convicted of illegal possession of a narcotic preparation and sentenced to sixty days’ imprisonment. This conviction was affirmed on appeal, and further appeal hearings were denied him by both the California

\textsuperscript{21} More specifically: while Rochin was handcuffed and struggling, an orderly strapped him down to an operating table, a doctor forced a tube down his throat and pumped an emetic solution through the tube into Rochin’s stomach to induce vomiting. \textit{Cf. People v. One 1941 Mercury Sedan}, 74 Cal.App.2d 199, 168 P.2d 443 (1946) (marijuana suction-pumped from stomach of car’s occupant).
Court of Appeal and the California Supreme Court.\textsuperscript{22}

On a writ of certiorari to the California Court of Appeal, the United States Supreme Court reversed Rochin’s conviction. The justices were, in fact, unanimous in deciding to reverse.\textsuperscript{23} But, the Court was not unanimous as to the appropriate reasons for founding a reversal. Moreover, the reasons advanced by the majority in an opinion by Frankfurter, J.,\textsuperscript{24} are excoriated in separate, though closely connected, concurrences by Black and Douglas, JJ.\textsuperscript{25} The discussion following focuses on three questions for highlighting that Court’s internal, fundamental disagreements in the \textit{Rochin} case which might also be illuminating for purposes of introducing legal philosophical queries (a) generally with regards to the judicial process, but (b) more particularly, respecting the best of various conceptions of the power(s) of judicial discretion and these conceptions’ concomitant conceptualizations of legal reasons:

1) what sorts of reasons are advanced in Frankfurter’s majority opinion as informing or determining the case’s disposition?

2) why were these reasons rejected as judicially illegitimate by Black and Douglas?

3) what sorts of reasons do they offer in the alternative for legally disposing the case?

In this context, a reason constitutes a \textit{legal} reason if, and only if, it provides for

\textsuperscript{22}For a detailed description of the various facets of the case and rehearsals of the treatment received by Rochin at the hands of the officers and hospital staff, see the procedural history and factual summaries provided by the lower state courts, \textit{People v. Rochin}, 101 Cal. App. 2d 140, 225 P.2d 1 (1950), \textit{hearing denied}, 225 P.2d 913 (1951) (Carter and Schauer, JJ., dissenting); and that of the U.S. Supreme Court majority, \textit{Rochin v. California}, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

\textsuperscript{23}The bench tally was 8-0. Minton, J., did not participate in deciding or hearing the case.

\textsuperscript{24}The five who joined Frankfurter to form the majority were Vinson, C.J.; Burton, Clark, Jackson, and Reed, JJ.

\textsuperscript{25}342 U.S. at 175 & 177 (Black, J., concurring); and 342 U.S. at 179 (Douglas, J., concurring).
II.1.1 ROCICH V. CALIFORNIA

identification and application of judicially cognizable principles and rules to cases.\(^{26}\)

II.1.2. Levels of analysis

The differences between the majority and minority opinions might be investigated at two levels. At the first level, focusing on legal doctrines invoked, we discover that the majority base their holding on a substantive interpretation of the due process clause found in the Fourteenth Amendment,\(^{27}\) while the minority base their concurrences on the self-incrimination clause\(^{28}\) found in the Fifth Amendment.\(^{29}\) This particular doctrinal difference, however, does not of itself disturb the case's outcome for, at least in Rochin's case, the result of their reasonings is the same; thus, Black and Douglas write concurring, not dissenting, opinions. Though quite interesting questions concerning American state

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\(^{26}\)The adjective 'cognizable' and its cognates here and infra to be understood per their legal usage, i.e. as terms of art delineating those facts or propositions which judges are permitted to notice or acknowledge in decision-making at bar—deriving from Bentham's coinage of 'cognoscible'; and not in their philosophical usage (differentiating cognitive from purely mental acts as in the philosophy of mind and language), or in their psychological usage (differentiating subjects' perceptual acuities).

\(^{27}\)"No State shall make or enforce any law which shall ... deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, §1. Briefly, the argument presented is that evidence obtained in such shocking manner, contra due process, must be excluded at trial.

\(^{28}\)"No person ... shall be compelled in any criminal case to be a witness against himself ...." U.S. CONST. amend. V.

\(^{29}\)Briefly, the argument presented is that no legal distinction properly exists between compelling self-production of oral testimony or real evidence; thus, such evidence must be excluded at trial. For purposes of a more formal legal analysis under U.S. constitutional law, it can be noted that the Fifth Amendment limits state action only as applied to the states through the due process clause of the Fourteenth Amendment—often referred to as the incorporationist doctrine of constitutional law, whereby federal governmental limitations in the first eight amendments of the Constitution are selectively applied to the states. Thus, even the minority must technically rest their holding on the same clause as the majority. The difference, of course, is that the majority rely on a substantive notion of Fourteenth Amendment due process simpliciter; the minority rely on only a procedural notion of due process here to reach the substantive self-incrimination standard.
and federal constitutional practice arise at this level of legal analysis, they will not be addressed in discussion below.

At a second, and for our purposes here more important, level of analysis, this Court's clash in reasoning revolves around disparate political and legal philosophies concerning the role courts should play in modern democratic society, and the limitations/constraints (i.e. standards of adjudication) to which judges should adhere when deciding controversial cases so that that role is best realized. As Justice Frankfurter himself has noted in another context:

the words of the constitution ... leave the individual justice free, if indeed they do not compel him, to gather meaning not from reading the constitution but from reading life. It is most revealing that members of the court are frequently admonished by their associates not to read their economic and social views into the neutral language of the constitution. But the process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of the justices are their "idealized political

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30E.g. is the majority's decision precedentially sound? and, does it matter to a state's criminal defendant in this or subsequent cases that the dispositional standard is due process and not self-incrimination? (As regards this latter question, consider the position of Rochin or a future defendant subject to more modern, non-invasive scanning techniques which could yield similar evidence of guilt: due process considerations might well uphold use of such tests, while a strict self-incrimination analysis would strike down any compelled test subjection.) On a somewhat historical note, why frame the basic issue as one of due process at all: the briefs and oral arguments of counsel for both petitioner and respondent focused on Fourth and Fifth Amendment standards concerning search-and-seizure and self-incrimination (see reporter service summaries, 96 L. Ed. at 185-186)? The majority apparently developed and applied a substantive due process theory to this case of its own accord.

31Cf. the creation and role of a "relevant" jurisprudence as framed by Lasswell and McDougal in their seminal work on 'Jurisprudence As Theory About Law':

In any community, the legal system is but a part of a more inclusive system, the system of public order, which includes a preferred pattern for the distribution of values and a preferred pattern of basic institutions. ... In the aggregate, a legal system is to be appraised in terms of the values to be maximized in the total context of public order.

picture" of the existing social order.32

It is to this second level of interpretation we now turn.

II.2. Rochin & Reasons

II.2.1. Frankfurter & the majority

Frankfurter marshalls a number of maxims both to capture and to ground the majority's intuitions characterizing the treatment Rochin received at the hands of those acting with the power and on behalf of the state as wholly unacceptable and ultimately unconstitutional. He variously invokes

* "canons of decency and fairness which express the notions of justice of English-speaking peoples ..."33

* "personal immunities which ... are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' ..."34

* "personal immunities which ... are 'implicit in the concept of ordered liberty' ..."35

* the standard that "convictions cannot be brought about by methods that

32 F. Frankfurter, *Supreme Court, United States*, 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 474, 480 (1934). Cf. Frankfurter's invocation of the interesting word 'compels' in his *Rochin* opinion as noted in text at footnotes 45 and 91, infra. But see my query in footnote 91, infra, regarding the meaning of its use in that context.

For an in-depth review of the clashes between Frankfurter and Black during their tenure on the Court, see Mark Silverstein, *CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING* (1984). "[T]he debate between Frankfurter and Black was not simply over particular results in particular cases but in a larger sense over the role of courts and judges in the American democratic system." *Id.* at 130 (footnote omitted).


34 *Id.* quoting Mr Justice Cardozo from *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1933) (denial of defendant's request to accompany jury on a view not a breach of due process).

35 *Id.* quoting Mr Justice Cardozo from *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (appeal by the state in a criminal case not an infringement of due process).
Given these principles which Frankfurter discovers both in precedent and in intuitive response to the facts of the case, he proceeds to set forth his understanding of the judicial role in applying such constitutional standards to specific fact patterns.

These standards of justice are not authoritatively formulated anywhere as though they were specific. In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. Yet, even the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

Since even a gloss on a constitutional provision may not fix its content or scope, Frankfurter explicitly recognizes that fixing an interpretation for purposes of deciding any single case "is a function of the process of judgment," with the result that decisions are "bound" to differ not only from time to time, but from judge to judge at the same

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37 Query their precedential status, given that some of these principles are undisputedly, while the remainder are arguably, drawn from the cited cases' obiter dicta rather than their ratio decidendi.


39 Note that though this argument is couched in general terms, it is, contrary to the broad arguments founded in rule-scepticism, descriptive of a process regularly attributable only to highest courts of review: "To me, the record in this case reveals a shocking series of violations of constitutional rights. However, as a member of an intermediate reviewing court, I am bound by the decisions of the [California] Supreme Court. For that reason only, I concur in the judgment." So opines Justice Vallee, of the Second District Court of Appeal in California, in a concurrence to the opinion affirming Rochin's conviction. 225 P.2d at 3.

40 Compare, for example, time-dependent variations in the contractive and expansive nature of First Amendment "free speech" clause judgments during times of war [Schenck v. United States, 249 U.S. 47 (1919) ('clear and present danger test' established, upholding conviction under the Espionage Act of 1917 for distribution of anti-draft circulars)] and times of peace [Yates v. United States, 354 U.S. 298 (1957) (reversed Smith Act convictions by distinguishing advocacy of doctrine from advocacy or incitement of illegal action)].
time.41

Still, he asserts, these “vague contours” do not permit judges to “draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.”42 Judges must give heed to “considerations deeply rooted in reason and in the compelling traditions of the legal profession.” These standards of adjudication include due recognition of stare decisis, the procedural confines of the particular dispute before the Court, opposing societal interests, and of the need “[t]o practice the requisite detachment and to achieve sufficient objectivity” while acknowledging “incertitude that one’s own views are incontestable and alert tolerance toward views not shared.”43 In sum, proper judgment requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.44

Accordingly, Frankfurter determines that application of these general standards, principles, and limitations compels the majority to decide that “the proceedings by which this conviction was obtained .... shocks the conscience ... [and] ... is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit constitutional differentiation.”45 Though evidence might otherwise be relevant and credible, the Court, in applying due process guarantees, is not blind to how it is obtained. Convictions must not follow from prosecutions based on evidentiary matter procured without respect to “decencies of civilized conduct.”46

41 342 U.S. at 170. California, for example, was not alone in permitting introduction of even illegally obtained evidence at trial, but applicable standards differed widely from state to state prior to Rochin. Similarly today, state practice is not strictly uniform, though divergence is much less.

42 Id.

43 Id. at 171.

44 Id. at 172 (citation omitted).

45 Id. at 172.

46 Id. at 173.
In a closing nod to the minority, he attempts to assimilate the Fifth Amendment concern expressed by the concurrences to his Fourteenth Amendment due process analysis:

It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach. ... Coerced confessions offend the community's sense of fair play and decency. So here, to sanction [this] brutal conduct ... would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society. 47

On such argument a reversal readily, indeed according to Frankfurter necessarily, follows.

II.2.2. Black & Douglas respond

Justices Black and Douglas are both deeply concerned that, however advantageous the majority's reasoning for Rochin, the judicial philosophy expounded by Frankfurter actually "must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." 48 Black here makes general reference to several ultra vires economics-based decisions (since overruled) 49 and then drops a footnote simply citing some earlier First Amendment decisions by the Court, still controlling, with which he strongly disagrees as clear and convincing evidence for his concern; while Douglas concludes his concurrence with the following observation:

The damage of the view sponsored by the Court in this case may not be conspicuous here. But it is part of the same philosophy that produced Betts v. Brady, denying counsel to an accused in a state trial against the command of the Sixth Amendment, and Wolf v. Colorado, allowing evidence obtained as a result of a search and seizure that is illegal under the Fourth Amendment to be introduced in a state trial. It is part of the process of erosion of civil rights of

47 Id. at 173-174 (footnote omitted).

48 Id. at 177 (Black, J., concurring) (footnote omitted).

49 E.g. in Burns Baking Co. v. Bryan, 264 U.S. 504 (1924), the Court applied a similar strict scrutiny means-end due process test to invalidate a Nebraska statute requiring that bread loaves be of standardized weight. The state had enacted the statute in an effort to protect consumers against fraud by short weights, but the Court deemed such regulation unnecessary and too economically restrictive.
the citizen in recent years.\textsuperscript{50}

Black therefore concludes that the standards which the majority has claimed to have discovered are in reality quite "nebulous"\textsuperscript{51} and "evanescent."\textsuperscript{52} When applied they feature "accordion-like qualities"\textsuperscript{53} which, in Douglas' words, "make[s] the rule turn not on the Constitution but on the idiosyncrasies of the judges who sit here."\textsuperscript{54} More importantly, it is argued that the majority's philosophy more firmly entrenches a dangerous trend whereby the Court arrogates to itself discretion not granted by the Constitution and thereby creates a power to invalidate any and all state laws on Fourteenth Amendment due process grounds. Even were some such limited discretionary power to review and, when necessary, to strike down some state practices constitutionally implied,\textsuperscript{55} Black notes that "one may well ask what avenues of investigation are open to discover 'canons' of conduct so universally favored that this Court should write them into the Constitution?"\textsuperscript{56}

Resuming Black's theme, Douglas notes that the majority of U.S. states in fact follow the California rule; only a minority of four states explicitly preclude introduction of similar self-incriminating evidence: "Yet the Court now says that the rule which the majority of states have fashioned violates the 'decencies of civilized conduct.' To that I cannot agree. It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration."\textsuperscript{57} Finally, with Black's rhetorical question addressed to the majority as to why only notions of English-speaking peoples

\textsuperscript{50}342 U.S. at 179 (citations omitted).

\textsuperscript{51}Id. at 175.

\textsuperscript{52}Id. at 177.

\textsuperscript{53}Id.

\textsuperscript{54}Id. at 179.

\textsuperscript{55}Black explicitly accepts, indeed elsewhere argues for, such discretion by implication; e.g. with regards to deciding whether a search or seizure is "unreasonable" under the Fourth Amendment.

\textsuperscript{56}342 U.S. at 176 (emphasis supplied).

\textsuperscript{57}Id. at 178.
should be investigated to discover "immutable and fundamental principles of justice."\textsuperscript{58} Douglas points to the fact that Continental criminal procedure does not accord even "basic" common law self-incrimination protections\textsuperscript{59} much less substantive due process review to the extent envisioned by the majority.\textsuperscript{60} Thus, the majority can hardly purport to ground their decision to reverse Rochin's conviction by applying self-evident universal principles of justice, whether appeal is made to Western civilized societies generally or domestic jurisdictions specially.

\textbf{II.2.3. The minority's alternative}

Having nonetheless rejected the majority's two central claims (1) of having discovered objective, precedentially-sound, applicable legal principles of justice and standards of adjudication, and (2) of having then applied those principles and standards to the facts of the case "in the spirit of science," Black and Douglas still wish to reach a legal reversal. To do so, they advance a rather straightforward self-incrimination analysis as an alternative, and more sound, basis for decision. Reconstructed in simplified constitutional premises and conclusions, their argument takes the following polysyllogistic form:

1. The Fifth Amendment's self-incrimination clause renders compelled testimony inadmissible at trial;

2. Compelled real, not only oral testimonial, evidence is comprehended by that clause; therefore,

3. By (1) and (2), compelled real evidence (e.g. the capsules from Rochin's stomach) must be deemed inadmissible at trial.

4. Fifth Amendment standards of evidentiary admissibility apply to state, as well as federal, criminal proceedings;

5. California convicted Rochin in a state criminal proceeding using compelled testimony (viz. the capsules); therefore,

\textsuperscript{58} Id. at 176.

\textsuperscript{59} Id. at 178.

\textsuperscript{60} Nor do all English-speaking peoples play by the same evidentiary rules: the U.K.'s House of Lords, for example, has never imposed a general rule excluding evidence illegally obtained.
II.2.3 THE MINORITY'S ALTERNATIVE

6. By (3)-(5), Rochin's conviction is contrary to Fifth Amendment standards or, in other words, is unconstitutional.\footnote{Suppressing the enthymeme for deriving unconstitutionality from convictions contrary to constitutional standards.}

7. Unconstitutional convictions must be reversed; therefore.

8. By (6) and (7), Rochin's conviction must be reversed.

Q.E.D.

Black designates this chain of reasoning "faithful adherence to the specific guarantees in the Bill of Rights" and claims that it "insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority."\footnote{342 U.S. at 175.} Douglas goes on to note that the Fifth Amendment standard thus applied "is an unequivocal, definite and workable rule"\footnote{Id. at 179.} in contrast to the uncertainty and diversity of rulings entailed in attempting to apply the majority's philosophy. This view accords with the reported early development of the doctrines of constitutional interpretation and judicial review:

A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion.\footnote{T. Cooley, CONSTITUTIONAL LIMITATIONS 123-24 (8th ed. 1927). \textit{Also see} M. Edelman, DEMOCRATIC THEORIES AND THE CONSTITUTION (1984) where thorough review is provided of Cooley's influence on judicial thought.}

Why, then, the convoluted due process argument from the majority? Why could the majority not adopt this simpler argument as its own? The crux of the disagreement, and the reason for the majority's rejection of the minority's analysis, concerns premise (4), above. It is a pivotal premise for the argument, but the majority could not concede its validity, for as Douglas notes,\footnote{See quote in text at footnote 50, supra.} the Court had previously established and quite recently
upheld precedent for permissible introduction of illegally obtained evidence in state courts. Thus, unless the majority were willing now to apply Fifth Amendment protections to state defendants and to overrule its own affirmation of an opposing, strong line of prior case law, they could not adopt the minority’s argument. Yet, faced with the shocking treatment Rochin had endured and because of which he had been convicted, there is no doubt that Frankfurter felt compelled to descry some ground for reversal. So it is, perhaps, not surprising that Black and Douglas hold the majority to have invoked broad discretionary power to chart a complicated substantive due process course to achieve that result. “But,” as Douglas is quick to allege, “we cannot in fairness free the state courts from [the Fifth Amendment] command and yet excoriate them for flouting the ‘decencies of civilized conduct’ when they admit the evidence.” The Court cannot have it both ways.

II.3. Discretion & Reasons

II.3.1. Discretion & ordinary language

Whether it is the case that Frankfurter was impelled to invoke the aforementioned discretionary powers of review and nullification in Rochin in order that he avoid the divisive constitutional incorporationist debate, and whether such discretion is in fact well-supported in U.S. constitutional law, are questions which go well beyond the scope of this chapter, interesting though they may be. Nonetheless, it remains useful for our

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66 In Wolf v. Colorado, 338 U.S. 25 (1949). Recall that this is one of the cases cited by Douglas as evidence for the weaknesses of the majority’s philosophy.

67 Black and Douglas had earlier joined together dissenting over this very issue of constitutional differentiation between state and federal trial court standards in Adamson v. California, 332 U.S. 46, 69-90 (1947).

68 This line of case authority was finally overruled nine years later in Mapp v. Ohio, 367 U.S. 643 (1961), though specific guarantees of all Fifth Amendment protections were not fully extended to cover state proceedings until Malloy v. Hogan, 378 U.S. 1 (1964).

69 342 U.S. at 179 (emphasis supplied).

70 An inquiry similar to the historical query raised in footnote 30 at page 27, supra. “Frankfurter and Black were the major protagonists in this early debate” concerning “nationalization’ of the Bill of Rights.” M. Silverstein, footnote 32, supra, at 130-131, n.3.
Frankfurter majority

Basis of decision:
14th Amendment due process

Basis of reasoning:
standard-oriented

Interests involved:
balance of societal interests

Decisional latitude:
wide creativity

Black/Douglas minority

5th Amendment self-incrimination

rule-oriented

individual v. societal interests

narrow construction

Figure II-1: Capsule: Ranges of Disputes

purposes to ask whether the majority’s or minority’s analysis better represents a model of legal reasons and standards of adjudication which should inform judicial decision-making. That is, unless the answer to the question “which model of decision ought to govern?” is antecedently either intersubjectively demonstrable or intuitively clear—and that without dissent, any attempt to provide a conceptual account of adjudication must pass into a normative debate about the criteria that ought to bear on judicial decisions.

We can begin our normative investigation by asking about the role of discretion in judicial decision-making and how the identification and application of Frankfurterian principles differ from the identification and application of Douglasian rules. For even assuming arguendo both the legitimacy and normative priority of Frankfurter’s analysis, it is not at all clear just how necessarily expansive the scope of discretion becomes in his account, or how unnecessarily narrow it remains in the minority’s counter-analysis. Put

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71 I.e. broad process of judgment v. strict construction of rules powers, as outlined in Figure II-1.


73 I am indebted to George Fletcher for this point.
somewhat differently, we might ask how much adjudicatory uncertainty and difference in outcome either of these accounts can affirmatively allow, or permissively tolerate, and still function as an institutional marker for a rule of law, not of men.

Contemporary debate concerning the best conceptualization for the power(s) of judicial discretion usually opens with an ordinary language analysis of the term 'discretion' itself. George Fletcher, for example, delineates four different senses in which the word is variously used by "normal people," lawyers, and observers of the legal process: "(1) discretion as wisdom [i.e. use of judgment]; (2) discretion as managerial authority; (3) discretion as personal input; (4) discretion as power." He argues that senses (3) & (4) are confused reductions, and, given ordinary language, are better captured under his proffered conception of 'prerogative.' He thus reserves senses (1) and (2) for discretion properly so called, and then restricts in-case judicial decision-making to sense (1), alone. Similarly, Rolf Sartorius begins his analysis by outlining a version of "the plain man's view" of the judicial process — that the job of the judge is to apply the law— and then defends that view against a version of legal realism which finds extra-legal considerations and the exercise of a legislative discretion underlying decisions in hard cases. Like arguments are also reflected in Paul Weiler's "adjudication of disputes" model of judicial decision-making. After urging that an arbiter within this model cannot be "conceded the power of enactment" and cannot, then, be considered to exercise "legitimate" power of "discretion to settle a matter just because it needs settling," Weiler summarizes with the claim:

Thus it is important that jurisprudence shed the fallacy that simply because the legal rules do not decide the case with objective, impersonal, logically necessary and self-evident certainty, and because the same issue appears to opposing counsel and majority and dissenting judges to be reasonably amenable to different solutions, then there is no reasoned way of justifying one solution.

74 G. Fletcher, Some Unwise Reflections About Discretion, 47 LAW AND CONTEMPORARY PROBLEMS 269, 276 (No.4, Autumn 1984).

75 Id. at 281-83.

76 R. Sartorius, Social Policy and Judicial Legislation, 8 AMERICAN PHILOSOPHICAL QUARTERLY 151 (No.2, April 1971). Also see R. Sartorius, The Justification of the Judicial Decision, 78 ETHICS 171 (1968) upon which the former article is built. In both essays he gives some place to understanding judicial language as well as ordinary language.

as more probable than another.\textsuperscript{78}

All of these accounts are consistent with, implicitly follow or explicitly build upon the writings of Ronald Dworkin. Fletcher, himself, attributes the origin of “the contemporary philosophical critique of discretion” to Dworkin.\textsuperscript{79} Thus, to simplify analysis here, we shall take Dworkin’s work on the concept of discretion to be paradigmatic, understanding that there is a great deal of spill-over though without considering the connections and differentiations which would be required for a fuller analysis covering all the authors mentioned.

Dworkin focuses discussion on what he judges to be three gross distinctions amongst a collection of shades of meaning proper to the term ‘discretion’ in common usage. Two of these distinctive meanings are labelled “weak,” while one is said to be “stronger.”\textsuperscript{80} The first weak sense of discretion, says Dworkin, simply indicates that judgment must be used by an official in applying a standard set by some particular higher authority. That is, without meaning more, we indicate that a standard has been set which cannot be mechanistically applied. He provides an example here of a sergeant who is ordered by a superior officer to choose five experienced men from his unit for a patrol [TRS, at 32]. An articulable standard has been provided, viz. “experienced men,” by an appropriate higher authority but the sergeant must use his own judgment in the choosing when applying that standard to fill patrol slots according to orders: he has no “litmus paper” for experience [TRS, at 36] and reasonable men might interpret that standard in different ways [TRS, at 69]. An example of lack of any discretion in even this weak sense would

\textsuperscript{78}Id. at 435-36 (original emphasis). Weiler’s notion of probable justification is a curious one and requires unpacking, but analysis will not be pursued here. The general work of justification will be taken up in section II.5, infra.

\textsuperscript{79}G. Fletcher, footnote 74, supra, at 273, n.13.

\textsuperscript{80}R. Dworkin, The Model of Rules, 35 UNIVERSITY OF CHICAGO LAW REVIEW 14 (1967), reprinted in his TAKING RIGHTS SERIOUSLY (1978) [hereafter cited as TRS]. The discussion following is taken primarily from chapter 2, The Model of Rules I, section 5, “Discretion,” at 31-39; and chapter 3, The Model of Rules II, section 4, “Do judges have to have discretion?,” at 68-71. Though his TRS claims and conclusions remain essentially unchanged, note should be taken that Dworkin’s recent work on discretion significantly turns from both ordinary language analysis and understanding judicial language to central claims concerning how lawyers’ adversarial language ought to be understood. See e.g. his Is There Really No Right Answer in Hard Cases? in R. Dworkin, A MATTER OF PRINCIPLE (1985). For detailed, critical review of the logic deployed against so-called ‘semantic positivism’ by Dworkin in the essay last mentioned, see Appendix A: Hard Cases and No-Right-Answer Answers, infra. For an aside to Dworkin’s ambiguous stand with reference to ex post facto determinations, see footnote 101. infra, and the work by Kress there noted.
obtain were the sergeant ordered to choose his unit’s five oldest men, a standard capable of simple mechanistic application.

Now, an objection has been imagined here. Since virtually any standard might on some fact pattern require use of a weak discretion in that judgment must be employed, lack of discretion here either represents a vacuous category or the resultant choice becomes arbitrary in a stronger sense than Dworkin wishes to countenance. Consider the following: a sergeant ordered to choose the five oldest is in a quandary; the first four were easy to select by birthdates, but there is a tie for place #5—two soldiers are identical twins and so share the same birth statistics. Who is to be chosen? How is flipping a coin any more or less arbitrary than discovering which twin ‘broke water’ ahead of the other and is thus the firstborn?81 But this proposed counter-example is overdrawn. Surely one can imagine the more typical case wherein the sergeant experiences no dilemma: the rule easily selects five men without quarrel, relieving the sergeant of any analytical task beyond record checking.82 In such a case, notions of even weak discretion in Dworkin’s first sense do seem out of place. The sergeant is decidedly not employing independent rationales in the choosing, and that is all the example need show to make the limited point of lack of discretion coherent. In extremis, should our sergeant ever run up against the twins problem, an argument could be advanced that neither coin-flipping nor detailed record searching is necessarily arbitrary. Rather, either option could make sense in light of the first weak sense of judgment, though a fuller description of the facts may be required to determine which is the better solution. For example, in choosing five for KP duties, saving time and administrative energies to fill the last position may dictate coin flipping; the sound judgment of the sergeant being that such selection more efficiently serves the simple purpose behind the order given. To push the example further to insist that similar background rationales or independent judgments of an order’s or rule’s purpose(s) exist in every case confuses the determination that a mechanical rule is/is not appropriate on the facts with the ability of the person so directed ever to apply a rule mechanically. Conceding the former point does not of itself affect the non-discretionary character involved in a rule’s execution.83


82 I can personally vouch to being selected for several duties of greater or lesser importance on just such a criterion while a noncom in the U.S. Air Force.

83 The twin’s case is taken from an objection put to me by Jerry Gaus.
The second weak sense of discretion is invoked when we wish to indicate "that some official has final authority to make a decision and [sic] cannot be reviewed and reversed by any other official." This second weak sense accords with H.L.A. Hart's characterization of a decision's infallibility collapsing into its finality with reference, for example, to a decision taken by a supreme tribunal. Thus, the U.S. Supreme Court can be said to exercise discretion in this second weak sense whenever it takes a decision since there is no higher review authority in the hierarchy of the U.S. legal system.

Finally, a third, and stronger, sense of discretion is sometimes connoted. Dworkin says, "We use this sense not to comment on the vagueness or difficulty of the standards [first

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84 TRS, at 32. Though some sense can be made of the phraseology here, it is doubtful given the context that Dworkin means reviewing and reversing the official, rather than the official's decision. I take him to mean the latter, however common courthouse idiom in some jurisdictions for a trial judge to speak of himself as "being reversed" by an appeals court, and however proper in some limited contexts the former meaning attaches. Cf. his phraseology in TRS, at 69, where "decision" is the grammatical referent.

85 H.L.A. Hart, THE CONCEPT OF LAW at 138-144 (1961) [hereafter cited as CL]. The concepts of infallibility and collapse are adumbrated in Fletcher's distinction between a decision's declaration and assertion:

Declamations are acts that have force by virtue of the authority of the declarant. They might be politic or impolitic, useful or deleterious, but they are not true or false.

Assertions are different. An assertion or a claim about the meaning of the Constitution presupposes that the claim could be wrong, though in making the assertion, of course, we seek to get the matter right.

G. Fletcher, Two Modes of Legal Thought, 90 YALE LAW JOURNAL 970, 973 (1981).

Should a decision be unreviewable, i.e. final, then for all practical legal purposes this distinction collapses.

86 Though only of minor significance for purposes of the example here, a "decision" (the ratio and holding of the case) should be distinguished from a "judgment" (the specific disposition as to the parties in the case), and both of these distinguished from an "opinion" (the written reasonings of a single justice or group of justices). While one can rightly speak of a Court's (i.e. the majority's) decision, judgment, and/or opinion, only the last term can be ascribed correctly to an individual justice or minority of justices of a multi-member tribunal. Thus, only the Court exercises discretion in this second weak sense; individual justices do not.

87 This is not to say that the law cannot afterwards be radically altered by the U.S. Congress through legislation or by the Congress and the States through constitutional amendment enacted in negative reaction to the Court's decisions. Indeed, such enactments have followed a number of politically unpalatable rulings. But that is a different issue. See CL, at 138. But cf. G. Fletcher, footnote 74, supra: "However infrequently the amendment process is invoked, it cannot be said that the Supreme Court exercises unreviewable power to decide any way that it likes" (at 276).
weak sense), or on who has the final word in applying them [second weak sense]," [TRS, at 32] but to say that not one of the standards set by the particular higher authority is applicable to or controls the decision to hand. Thus, our sergeant may be said to exercise this third, stronger sense of discretion if ordered plainly to choose "any five men" for a patrol [Id.]. Nonetheless, Dworkin urges, this stronger sense of discretion

is not tantamount to license, and does not exclude criticism. ... An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion. ... Someone who has discretion in this sense can be criticized, but not for being disobedient .... He can be said to have made a mistake, but not to have deprived a participant of a decision to which he was entitled .... 88

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<th>Weak-1</th>
<th>Weak-2</th>
<th>Stronger</th>
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<td>Judgment per authoritative standards</td>
<td>Finality or non-reviewability of judgment</td>
<td>Judgment sans authoritative standards</td>
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**Figure II-2: Dworkinian Discretion-Kinds**

**II.3.2. Frankfurter & ordinary language**

Of these three, to which sense of discretion may it be said Frankfurter appeals? Although sitting as a justice, and speaking for a majority, of a Court whose decisions cannot be reviewed and reversed, he does not invoke Dworkin's second weak sense noted above to support the judgment that Rochin's conviction by a lower court should be

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88 TRS, at 33. Consider the case of choosing between twins for KP at page 39, supra: the sergeant might be criticized for wasting administrative time and energies to determine exact birth times to choose the eldest, but neither twin could rightly complain of the choice made in any event.
reversed. The Court’s role as the highest tribunal was never denied or at issue. Neither does Frankfurter seem to resort to the third, stronger sense to justify the majority’s judgment. He never indicates, for example, that the Court is lacking controlling standards to apply to the facts of the case. Indeed, principles are cited in abundance.

It is clear, I think, that Frankfurter is attempting to appeal to a form of the first, weak sense of discretion to support the majority’s decision. Over and again, he invokes canons, standards, the peoples’ conscience and sense of justice in a non-mechanical, exacting and continuing process of judgment. While application of these principles, he notes, may from time to time and from judge to judge yield differing results, it happens the majority are compelled to decide in this case that the treatment Rochin received shocks the conscience; even those of hardened sensibilities, he assures us, would have to agree. Just as our sergeant, above, would be led to select those five soldiers who met every reasonable standard telling experience, standards of fairness or due process dictate reversal, here.

What is less clear is the degree to which Frankfurter can be said to have succeeded in his attempt to invoke a weak sense of discretion to legitimize the majority’s reasonings, for what Black and Douglas explicitly deny in their concurring opinions is just that Frankfurter has succeeded in appealing to a judicially sanctioned weak sense. Rather, although they concede that what Frankfurter has done is to invoke certain principles to reach a decision, they deny that the principles to which Frankfurter alludes are furnished by the particular authority relevant to the exercise of the Court’s discretion, viz.

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89 This is not to overlook the fact that political or even legal questions of federalism can arise in a case like Rochin (e.g. what are the jurisdictional bases whereby the federal Court can properly review a state court’s decision?), but that is a different issue from, for example, exercising the Court’s power to review and reverse the decision of a lower court which purported to change or ignore an applicable Court-established legal rule of decision.

90 As set forth in subsection II.2.1, beginning at page 28, supra.

91 Note that this phrasing seems a bit odd. One might observe that one’s conscience is shocked; or that one’s conscience, for whatever reason now insensitive, ought to be shocked. But what does it mean to be compelled to decide that one’s conscience is shocked, and then to cite that shock as reason for reversing a conviction? We are never told. Of course, such language might simply be Frankfurter’s florid way of invoking a ‘reasonable man’ standard of shockingness, much like the Court’s later formulations regarding community standards of obscenity in First Amendment free speech cases, or societal conceptions of cruel and unusual punishments for purposes of Eighth Amendment claims. But then, recall that Douglas’ canvassing contemporary state standards tells against Frankfurter’s usage: stomach pumping may not have been an everyday police practice, but neither was it rare and most assuredly was not held to be shocking when Rochin was decided. See text at footnote 57, supra.
U.S. Constitution, as stipulated by the first weak sense: they discern them to be substitute, intuition-supplied standards of adjudication and fairness relied upon by the majority merely to reach an otherwise desirable conclusion. If Black and Douglas are correct, then the majority must first establish that these extra-constitutional principles are available to them under the third, stronger sense of discretion. This, Frankfurter has not done.92

In their turn, Black and Douglas claim to provide an alternative constitutional analysis which remains true to the relevant authority (and thus fits within the first weak sense of discretion) by invoking rules and standards of adjudication which can be located in or derived from an appropriate proof text.93 While loath to acknowledge explicitly what Hart calls the “open texture of law” with its core and penumbral meanings which necessarily “leaves to courts a law-creating power” [CL, at 141], the minority do declare a concern to limit strictly the recognition and scope of standards of adjudication in cases wherein such standards rely for their very existence upon their acceptance and use by most judges of the time [CL, at 142]. Thus, while they might hesitate to admit the “open texture” of constitutional terms of art such as ‘unreasonable’ or, as in Rochin the scope of ‘self-incrimination,’94 they would defend restrictive use of widely recognized judicial devices, such as the “plain meaning rule” for statutory or constitutional interpretation, though they be uncodified doctrines of judicial review. Yet, they would be right to insist that there are palpable limits to this sort of judicial creativity and that it settles well below the Frankfurterian stratosphere of non-derived principles.

92 Recall, here, Black’s concern over canons being written into the Constitution. See quote in text at footnote 56, supra. As Laurence Tribe notes in his treatise, with specific reference to Frankfurter’s Rochin opinion:

References to history, tradition, evolving community standards, and civilized consensus, can provide suggestive parallels and occasional insights, but it is illusion to suppose that they can yield answers, much less absolve judges of responsibility for developing and defending a theory of what rights are “preferred” or “fundamental” and why.


93 Thus the minority’s rule-orientation noted in our text at footnotes 62 and 63, supra. The converse doctrine to Black’s and Douglas’ full incorporation reading of the Constitution, then, naturally follows: that being the “reverse incorporation” view which posits a substantive outer boundary to federal constitutional due process rights. See their dissent in Adamson v. California, 332 U.S. 46, 69 (1947), for a partial explication of this view; and L. Tribe’s chapter, Liberty Beyond Contract, in his treatise, footnote 92, supra, at 564-575.

94 Why, for example, decry stomach pumping as self-incriminating while constitutionally permitting forcible blood sampling, as Douglas explicitly allows?
But does it matter that a standard or principle be so rooted in a constitution as to be capable of being categorized uncontroversially a *legal* principle or rule? Alternatively, what consequence if a standard is located outside legal boundaries? Dworkin seems to think much rides on the distinction and, though for somewhat contrary purposes, so do Black and Douglas. In their views, whether a principle is legal or extra-legal bears directly upon the binding nature of that principle in judicial determination of legal entitlement. If legal, a judge is bound by that principle; that is, the judge is responsible to take it into account on appropriate fact patterns when reaching a particular decision of law. If extra-legal, a judge is not bound by that principle; that is, the judge is not responsible to take it into account on any fact pattern when reaching a particular decision of law. These notions of judicial obligation are founded upon a familiar democratic political theory ideal that judges should apply the law, not make the law. Thus, a reason constitutes a *legal* reason if and only if upon calculating the weights of applicable *legal* principles judges are led/directed to an unique outcome for the dispute.

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95 TRS, at 29 and 44.

96 As developed, the distinction is used by the justices to constrict judicial eisegesis in interpretation of the Constitution; while Dworkin's approach readily lends itself to support of judicial creativity.

97 Dworkin uses this notion of legal obligation to support a corollary that the parties to the dispute not only have a right to have that principle weigh-in during decision-making; but that one of the parties will, on the basis of correct weighing of all applicable principles, have a right to a particular favorable decision. TRS, at 35 and 81.

98 Black and Douglas would extend this notion of non-obligation to support an express corollary that the judge has a responsibility *not* to take extra-legal principles into account. Dworkin, on my reading, only implicitly acknowledges this judicial limitation, but such implication seems naturally to follow his differentiation of principle-based from policy-based decisions. TRS, at 90-100. Yet, this point is difficult to reconcile with his insistence that extra-legal policy-based decisions are to be taken into account when interpreting the legal principle for possible extension to cover new fact situations. Black and Douglas would draw back from such an extension.

99 TRS, at 82-84; and Tribe, footnote 92, supra, at 9-13.
In accompanying terms of discretion, then, only the two weak senses encompass legitimate judicial action when mechanical rule application is blocked or fails on the facts. The third, stronger sense can lead only to *ex post facto* determinations and/or usurpation of legislative powers by the courts. Consequently, if the minority’s analysis is correct, Frankfurter not only has not, but cannot, delineate a stronger sense of discretion to legitimate the extra-constitutional principles upon which he relies to transform his reasons into legal reasons, for this sort of discretion is not encompassed within a Dworkinian conceptualization of the judicial role. In short, the majority have exceeded its authority.

II.3.3. Reasoning & ordinary language

In contrast to an analysis of discretion-by-kind with its linkage to legal reasons, consider an alternative conceptualization of judicial decision-making. As in the previous section, we could make reference to several authors. These legal philosophers also present analyses quite consistent one with the other and all might reasonably take the slippery label ‘realist’ in their support of ascribing a strong sense of discretion to judges.
II. 3. 3 REASONG & ORDINARY LANGUAGE

Similarly, all take as one primary focus the problem concerning legal reasons generated by this ascription, as well-summarized by Thomas Perry:

If it really is possible, as it often seems to be, for a judge to obtain either of two contrary results from the materials he has to work with—that is, from the existing body of law and the facts of the case before him—and if the judge is required, and claims, to render the legally correct decision, then how can this reasoning be valid? And how can the law be said to provide a rational system of controls? If it is legally possible for different judges to justify contrary dispositions of one and the same case, then isn’t legal reasoning sham reasoning?103

And once again, while time could be taken to delineate each of their various responses to this problem, it will simplify analysis of the issues important to us here to take the work of a positivist protagonist in the contemporary debate as paradigmatic, viz. H.L.A. Hart’s Concept of Law.

Sufficiently a legal realist (as that label is bandied about in American jurisprudential circles), Hart is prepared quite readily to concede that courts do sometimes exercise a law-creating power:

at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative [i.e., quasi-legislative] bodies perform centrally in the elaboration of variable standards. In a system where stare decisis is firmly acknowledged, this function of the courts is very like the exercise of delegated rule-making powers by an administrative body [CL, at 132].

But that the courts have occasion so to act is not simply a function of legislative abandonment of the field (as does occur from time to time) or activist judicial seizure of law-making functions (though admittedly this, too, occurs). Rather, due to the very nature of natural languages like English, however smoothly devices such as precedent or legislation work to communicate standards of behavior “over the great mass of ordinary cases,” these “will, at some point where their application is in question, prove

102 See e.g. K. Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges, 75 COLUMBIA LAW REVIEW 359 (1975) (providing a strong critique of Dworkin’s and Sartorius’ work); T. Perry, Judicial Method and the Concept of Reasoning, 80 ETHICS 1 (1969) (providing a philosophical analysis of judicial reasoning as a third type, distinct from deductive and inductive accounts); and P. Weiler, footnote 77, supra (providing as a second analysis of judicial decision-making a “judicial-policy-maker” model).

103 T. Perry, footnote 102, supra, at 1 (original emphasis).
indeterminate."\(^{104}\) Making a determination at that point will require making choices based on general aims (Dworkinian legislative policies), not just principles—whether designated legal or extra-legal.\(^{105}\)

This is not to deny that even very general standards will feature core or paradigm, clear cases. Take as an example Hart’s familiar example, “no vehicle may be taken into the park.”\(^{106}\) Some obvious items covered by the excluded class ‘vehicle’ are automobiles, motorcycles, and buses. But how is a judge to deal with a dispute arising from use in the park of an electric-powered cart by a disabled senior citizen? Is it a ‘vehicle’ and therefore excludable, or just a vehicle and therefore permissible? Alternatively, how might the judge determine the proper range of quiet enjoyment so as better to apprehend the required scope of the excluded class? These queries, in turn, give rise to the issue of the existence and scope of the judge’s discretion to decide the dispute one way or the other. But that issue is not, perhaps, best framed by the earlier noted differentiations offered by Dworkin. Neil MacCormick, for example, initially agrees with Dworkin that “judicial discretion exists only within the framework of some predetermined standards.”\(^{107}\) Yet he quickly adds,

> Where these standards are legal rules, the discretion extends only within rather a restricted field, though rarely eliminated completely. Where the rules give no guidance or give ambiguous guidance, recourse may be had to other standards of judgment. But since these standards are all less precise than rules, the discretion involved in interpreting and extrapolating from them is greater.

\(^{104}\) CL, at 124-125. Recall, here, Frankfurter’s words regarding the “want of fixity of meaning ... of constitutional provisions.” Quoted in our text at footnote 38, supra.

\(^{105}\) Cf. the \textit{ex post facto} character of due care standards noted by Hart [CL, at 128-129] and the view concerning the role of judges propounded by Lord Denning M.R. regarding the development of negligence theory and the standards of due care, “These recent developments compel us to examine the whole question. It is, I think, at bottom a matter of public policy, which we, as judges, must resolve.” in \textit{Dorset Yacht Co. v. Home Office}, [1969] 2 Q.B. 412, 426 (CA); with Dworkin’s emphasis on enforcement of existing legal obligations [TRS, at 44] and the view concerning the role of judges put by Viscount Dilhorne, “Where I differ [with Lord Denning] is in thinking that it is not part of the judicial function ‘to alter all this.’ ... We have not to decide what the law should be and then alter the existing law. That is the function of Parliament.” in \textit{Dorset Yacht Co. v. Home Office}, [1970] A.C. 1004, 1051 (HL) (V. Dilhorne, dissenting).

\(^{106}\) CL, at 125. This specific example one might expect to find codified as a local statute, but notice that it might be understood as an uncodified natural extension to an uncodified community principle regarding quiet enjoyment of public open spaces, as well. Thus, the problem posed by this sort of example is not confined to rules per se.

Discretions’ come not in differences of kind ... but in differences of degree .... The larger the degree of discretion the more nearly the judge approximates to a law-maker in settling his own rulings on disputed points, even though in doing so he is still interpreting and applying relatively vague legal standards.\(^{108}\)

That is, discretion is of but one kind –being the power to ‘fix’ an entitlement, a power existing to a greater or lesser extent whenever entitlement is not wholly pre-determinable– with the central issue framed as one of the range or degree of that discretion over a particular decision to be taken.\(^{109}\)

If discretion is a matter of spectral degree rather than disjunctive kinds, running from wholly non-discretionary, mechanical application of a clearly defined statutory rule at one pole to an entirely discretionary, law-creating decision at the other,\(^{110}\) then theoretical categorization of standards as legal/extra-legal is for the most part overshadowed (if not entirely eliminated) by determinations of those standards of

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\(^{108}\)Id. Compare the like position of a judge within a civil law system attempting to fill intra legem or praeter legem gaps, as codified in most systems’ Codes:

1. The Code governs all questions of law which come within the letter or the spirit of any of its provisions.

2. If the Code does not furnish an applicable provision, the judge shall decide in accordance with customary law, and failing that, according to the rule which he would establish as legislator.

3. In this he shall be guided by approved legal doctrine and judicial tradition.


\(^{109}\)Cf. the definitions of discretion offered by Henry Hart and Albert Sacks: “the power to choose between two or more courses of action each of which is thought of as permissible.” H. Hart and A. Sacks, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 162 (1958); and Kenneth Culp Davis: “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.” K. Davis, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969). Although Davis goes on to emphasize that his working conception of “discretion is not limited to what is authorized or what is legal but includes all that is within ‘the effective limits’ on the officer’s power” (Id. original emphasis), we need not follow so far in formulating a conception explicating judicial decision-making.

\(^{110}\)Cf. Greenawalt’s similar formulation: “We might more accurately think of a spectrum of ranges from simple factual judgment to wide freedom of choice than to think of a dichotomy of two [weak and strong] senses.” Greenawalt, footnote 102, supra, at 366. Similar language is employed throughout Galligan’s recent, elaborate treatise on discretion. See D.J. Galligan, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION (1986).
Recourse to rules, Recourse to rules, Recourse to principles
& principles

Mechanical application, Application to, Rules conflict, No rules to
of existing rule(s) to core penumbra apply

Figure II-3: Hartian Discretion-Spectrum

adjudication characteristically available to the judge at the time of decision. 111

At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision. These are regarded by the courts as something which they are not free to disregard in the exercise of the authority to make those decisions which cannot be challenged within the system. ... This circumscribes, while allowing, the creativity of [any individual judge]. Such standards could not indeed continue to exist unless most of the judges of the time adhered to them, for their existence at any given time consists simply in the acceptance and use of them as standards of correct adjudication [CL, at 141-142].

A delightful metaphor concerning this restrained field within which judges do exercise some creativity is offered by Harry Jones. He notes that the “special ground rules” which apply to judicial decision-making

differentiate judicial law-making from legislative law-making as, say, a painter working with the pigments and in the visual tradition of the Renaissance might be contrasted with a contemporary avant-garde artist, who is likely to execute any design that comes into his mind and with any materials

111 Not, as Dworkin erroneously interpolates with an out-of-context quote, “standards he ‘characteristically uses’. “ TRS, at 34; with footnote to CL, at 144.
that come to hand.\textsuperscript{112}

Thus, the importance of recognizing the quasi-legislative status and \textit{delegated} powers of the courts.

But what, then, do we do with a case like \textit{Rochin}? How might we analyze the majority’s and minority’s arguments according to this alternative framework? It would seem that what is primarily required is a determination of what principles are duly available to the justices for use in reviewing Rochin’s treatment and conviction. For Frankfurter, the task is to demonstrate that the canons and principles to which he appeals do in fact form an adjudicative core recognized and used by judges of the time for just this sort of decision; i.e., that precedent and recent constitutional history support the core to which he so strongly appeals. On the other hand, the tasks for Black and Douglas are (1) to demonstrate that the canons and principles cited as determinative by the majority do not in fact form a recognized adjudicative core, and (2) to demonstrate a recognized alternative. Thus, a reason constitutes a \textit{legal} reason if and only if upon calculating the weights of principles [of whatever sort] characteristically available, judges are led/directed towards a field within which an outcome for the dispute at bar can be situated. Greenawalt’s analysis of judicial duty when tied to an analysis of reasons is pertinent here:

when a judge is left to decide among controversial and complex theories of moral and social philosophy, each of which can find some support in our structure of government, all the legal profession demands and all the framers of statutes and constitutional provisions could reasonably expect is that a judge act reasonably and conscientiously choose the theories he thinks soundest. If these two requisites are met, we do not think the judge’s actions merit blame, a typical consequence of a perceived failure to perform a duty, even though we would have acted differently. It is in this sense at least we can say that a judge has discretion when faced with very difficult cases.\textsuperscript{113}

Given these tasks, it would seem the majority have successfully completed their project:

\textsuperscript{112}H. Jones, \textit{An Invitation to Jurisprudence}, 74 \textit{Columbia Law Review} 1023, 1038 (1974). Contrast the scientistic metaphor invoked by Oliver Wendell Holmes, Jr.:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.


\textsuperscript{113}Greenawalt, footnote 102, supra, at 377.
Frankfurter has taken great pains to locate the principles invoked within the ambit of past decisions and the current trends of the Court concerning due process. Conversely, the minority have failed to fulfill either of their own tasks. They frankly admit their alternative principles are not altogether recognized, though they argue that these should readily be acknowledged at the constitutional core. And however equivocal their arguments, Black and Douglas have plainly admitted that Frankfurter’s standards are recognized, though they are adamant that such should not here (or elsewhere) be utilized.

Note that within this analytic framework it would not suffice for Black and Douglas to demonstrate only that the particular result on application of a common, recognized core would be controversial. It is the controlling core of principles and standards for transforming reasons into legal reasons which must be in contention, not the decision. Thus, theirs is not the Dworkinian problem of determining and balancing recognized principles’ weights one against another to reach the correct decision.\(^{114}\) Rather, the minority’s prime concern, and to a lesser extent a concern shared by the majority, is to delimit the acceptable range of decision\(^ {115}\) within which reasonable decision-makers can (and will) disagree when mechanically-applicable rules defining a relatively tight discretion-restrictive field are lacking. Within this framework, deciding whether the disabled senior citizen’s electric-powered cart is an excludable vehicle and determining whether Rochin’s stomach being pumped accords with due process require identical judicial processes. Both call for preliminary policy judgments and compromises,\(^ {116}\) as well as declarations of rights, by the judges based upon the contemporary system of rules

\(^{114}\)TRS, at 290.

\(^{115}\)I.e. the scope of the declared entitlement, and the precedential value to be accorded that declaration. As noted by John Austin,

The direct or proper purpose of its \(\text{a law made judicially} \) immediate author is, the decision of the specific case to which the rule is applied. ... Inasmuch as the grounds of the decision may serve as grounds of decision in future and similar cases, its author legislates substantially or in effect: And his decision is commonly determined (not only by a consideration of the case before him, but) by a consideration of the effect which the grounds of his decision may produce as a general law or rule.


\(^{116}\)Recall, here, Frankfurter’s notion of the Court’s role in balancing opposing societal interests \(\text{see text at footnotes 42 and 43, supra}\) and Lord Denning’s view on judges and public policy decision-making \(\text{noted in footnote 105, supra}\).
of judgment in order to arrive at a now-determinate entitlement and future-determinate precedent.

II.4. Reasons & ‘Fit’

II.4.1. Dworkinian discretion, reasons & ‘fit’

One criterion of the value of any conceptual devices comprising a descriptive theory of law must be their overall ‘fit’ with the form and substance of the judicial system(s) it is attempting to capture. That is to ask, does the model accurately depict how officials of a judicial process (such as judges) do what they do (and to the extent distinguishable, what they say they do) when making determinations of legal rights? Even a normative theory can be expected to strike important chords of resonance with the system(s) it is attempting to guide or reform. It is just such conceptual and descriptive complementarity which makes possible pragmatic prescriptives.\textsuperscript{117} The discretion-by-kind conceptualization outlined above\textsuperscript{118} does exhibit a relatively strong fit with Anglo-American, particularly U.S. constitutional, judicial decision-making processes: Frankfurtian-style creativity is virtually always justified by reference to principle-oriented, rather than policy-oriented, reasoning; and however apparently unprecedented the result in a case at bar deduced from the application of a core set of principles, prior decisions or historical doctrinal developments can be adduced to support its validity.\textsuperscript{119}

The primary weakness of this sort of legal reasoning, on the other hand, appears in that it can offer only post hoc rationalizations for finding the invocation of many such principles\textsuperscript{120} consistent with the first weak sense of judicial discretion. This weakness is

\textsuperscript{117}For brief review of the distinctions between these functional categories, see the closing paragraphs of the Introduction, beginning at page 21, supra. For fuller account of some important differences and possible interactions between conceptual, descriptive, and normative theories of law, see P. Soper, \textit{Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute}, 75 \textit{Michigan Law Review} 473, 473-476 (1977).

\textsuperscript{118}Subsection II.3.1, beginning at page 35, supra.


\textsuperscript{120}E.g. privacy and other central principles exemplified in the cases noted in the previous footnote.
particularly evident in relation to articles comprising codified constitutional authorities, like the U.S. Constitution and the U.K. Articles of Union, as well as congressional and parliamentary legislation, which often operate expressly to limit judicial decision-making to strict construction terms of reference. Simply to posit that a standard is a legal principle which binds the judge because a judge knew or might have known of the standard’s existence, did or could have determined it would aid adjudication of the dispute at bar, and on that basis became or could have become bound to apply it in that particular case is no answer to the questions of the standard’s legal pedigree in fact, or the standard’s relationship to codified authority at bar. A rich variety of “good Samaritan” principles can be readily identified in common law societies, for example, and most of these standards would easily aid adjudication of a dispute concerning a positive \( \text{oikatio in rem} \) to effect a simple rescue, but no common law jurisdiction recognizes such principles as being legal in character or gives them any legal effect.\(^{121}\) As Sartorius has admitted, there must be

some ultimate criterion by which one can in principle determine whether or not any given standards [sic] is a legal standard; a criterion closely conforming to the spirit, if not the letter, of Hart’s rule of recognition.

\[\text{It seems to me that any adequate solution to what I have called “the problem} \]

\[\text{121 Cf. J. Austin, 1 LECTURES ON JURISPRUDENCE 381-382 (R. Campbell ed., 4th Ed. 1879)(negative nature of a ius in rem and its correlative obligation) with J. Feinberg, HARM TO OTHERS 126-186 (1984)(arguing for limited positive duty to rescue). Contrast the comparable role of facts v. legal facts (per the description in footnote 100, supra) for proving foreign law in a contract case:}\]

HANDY, J. ... I should like to add a fact, however, of which my brothers are probably ignorant. It happens that my wife’s cousin was attorney for Pressman in that litigation, and I have learned through him that the case was argued before the Magistrate on grounds that had nothing to do with the contract’s having been signed on April 15. ... When his decision was rendered it was so palpably mistaken that it was not even necessary for the plaintiff to take an appeal; the defendant settled out of court for the full amount of the claim. In a conversation with the Magistrate later my wife’s cousin joked with him a little about the case....

THE CHIEF JUSTICE. If Justice Handy does not desist at once from his persistent habit of bringing into our discussion matters outside the record, on which no proof properly cognizable by this court has been presented, I shall have to inquire what disciplinary steps are open to me to put an end to this practice.

From The Case of the Contract Signed on Book Day, artfully crafted by Lon L. Fuller in his treatise THE PROBLEMS OF JURISPRUDENCE 71, 81 (Temp. Ed. 1949). That such facts could aid resolution of the case at bar does not establish those facts’ cognizability.
of recognition" which does not leave room for the exercise of [strong] judicial discretion must include the claim that there is such an ultimate test of what is, and what is not, binding law.\textsuperscript{122}

But such a test or criterion is explicitly repudiated by Dworkin, and remains unexplicated by writers such as Fletcher and Sartorius who are otherwise sympathetic to a 'committed approach' to adjudication.\textsuperscript{123}

What Dworkin then has taken to be a strength, in that the catalogue of principles remains open-ended and in consort with a society's political morality; but recognized as a weakness by Sartorius, in that some mode of fixing applicable standards for the judge must exist; becomes a fatal flaw, an Achilles' heel, for the theory in practice. Without a set procedure or accepted background theory for fixing a principle's legal pedigree for use in legal reasoning, it is not at all clear that a model incorporating conceptual devices of reasoning tied to discretion-kinds can effectively differentiate legal principles—to which the theory requires jurists make reference—from the extra-legal principles which the model concedes exist but towards which judges can not legitimately reach for their decision-making. The equivocal status of any principle must, to that extent manifest, undercut the strength of principle-orientation validity and the precedential value of any case law so supported. If so, then it is also not at all clear that the model can effectively distinguish the first weak sense of discretion from the third, stronger sense. And that distinction in kind forms the very foundation of the model, its claims of discretionary legitimacy, and the accompanying definition of legal reasons. Thus, if Dworkin should be correct that in principle no criterion, whether simple or complex in form, can ever be constructed for cataloging or distinguishing legal and extra-legal principles [TRS, at 64-67; 341-344], the theory can only collapse.


II.4.2. Hartian discretion, reasons & ‘fit’

The discretion-spectrum conceptualization outlined above\(^\text{124}\) likewise exhibits a relatively strong fit with regards to the widely-shared understanding amongst common law officials, including judges, of judicial discretion, the role of indeterminacy of language in statutory materials and formulations of common law doctrines, and the evolving nature of standards of adjudication in common law jurisdictions.\(^\text{125}\) Particularly strong is the conservative orientation of the model due to its emphasis on incremental case law developments, and its predictive value in discerning judicial trends.\(^\text{126}\)

The primary weakness of this sort of reasoning, however, appears in that it is at a loss to explain and rationalize the incorporation of those cases or principles which break admittedly new legal ground and become the decisional foundation for future litigation, abruptly replacing previously well-established principle(s) and/or rule(s).\(^\text{127}\) That sometimes "all that succeeds is success" (CL, at 149) does little to explain and provides nil to rationalize or justify such judicial quasi-legislative pronouncements. Conversely, it is not difficult to argue that the model too readily explains and rationalizes those cases

\(^{124}\) Subsection II.3.3, beginning at page 45, supra.

\(^{125}\) As in part evinced by Diplock, L.J., "The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors." *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26, 71 (wherein the now mature and flourishing contractual doctrine of frustration he colorfully characterizes as having been "foaled by ‘impossibility of performance’ out of ‘condition precedent’." Id. at 70.) *See generally*: O. Holmes, THE COMMON LAW (1881); B. Cardozo, THE NATURE OF THE JUDICIAL PROCESS (1921); K. Llewellyn, THE COMMON LAW TRADITION (1960); and R. Cross, PRECEDENT IN ENGLISH LAW (1968).

\(^{126}\) *Cf.* CL, at 143 (a positive rule-sceptic contention regarding predictions) and W. Prosser, THE LAW OF TORTS 802-818 (4th ed. 1971) (historical development of right of privacy in Anglo-American tort law).

\(^{127}\) *See e.g.* Sindell *v. Abbott Laboratories*, 607 P.2d 924 (California 1980) (DES drug manufacturers held liable in tort for harm to users despite absence of proof of causal nexus, with liability apportioned according to novel market-share theory of probable harm); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (right to governmental subsistence benefits substantive, not discretionary and charitable, in nature); and *Haughton v. Smith*, [1973] 3 All E.R. 1109 (HL) (reformulating the criminal law regarding impossible attempts: no attempt now to be chargeable unless offense-in-chief could have been committed). This last decision was strongly criticized by Hart in *The House of Lords on Attempting the Impossible*, reprinted in his ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 367-391 (1983), and was subsequently altered by legislation in the opening sections of the Criminal Appeals Act 1981.
which quite predictably don’t break new ground, but should.  

In a section covering ‘Philosophical Foundations: Judicial Creativity,’ Kenneth Davis attempts to ameliorate such discontinuities by proffering a five-point formula both for explicating and circumscribing judicial lawmaking:

(1) Judges should not violate discernible legislative will except on constitutional grounds. (2) Judges should refrain from changing the law unless they believe their reasons for doing so will persuade most other judges to follow the precedent they establish. (3) Judges should carefully weigh the disadvantages of making the change, including whatever damage is done to the interest in stability of law .... (4) Judicial changes should normally be limited to the kind of questions which call for professional insights and skills and should normally leave to the legislative body the kind of questions on which significant political groups are taking opposing positions. (5) Judges ... should try to avoid letting their personal preferences, as distinguished from their broad understanding, control their action.

But, as Davis recognizes, this formulation is significantly vague and is open to differential strengthenings or weakenings by particular judges, for “Every judge has to find his own position.” Thus, it is not clear that this model can effectively accommodate important varieties of decisions in a consistent, comprehensive manner.

II.4.3. Quasi-coherence & prescription

Both conceptions of discretion and reasons, then, display important strengths and weaknesses, and seem to do so in relative inverse relation. That is, the prime strength of one conception (principle-orientation to justify doctrinal developments) is a weakness of

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128 See e.g. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (holding that whether enslaved or free, “descendants of Africans” not capable of being granted national citizenship); *Lochner v. New York*, 198 U.S. 45 (1905) (holding 10 hr. daily/60 hr. weekly maximum work periods for baking employees violative of freedom of contract principles); *Rummel v. Estelle*, 445 U.S. 263 (1980) (imposition of life sentence under Texas recidivist statute for three felony-theft convictions —together involving a total of $229.11 in money and goods— held not violative of Eighth Amendment “cruel and unusual punishment” clause); and *Sidaway v. Bethlem Royal Hospital Governors*, [1985] 1 All E.R. 643 (HL) (doctrine of ‘informed consent’ not recognized, where patient underwent surgery resulting in severe disability without being informed beforehand that such injury was possible). The first two cases noted have since been overruled. The two more recent cases remain good precedent.


130 Id.
the other, and vice versa (wide discretion range for access to standards). This inverse
relationship may at first instance seem somewhat surprising, but that result does help
clarify the deeper points of philosophic contention hidden in the muddle of constitutional
charge and counter-charge exhibited in Rochin-type opinions. Neither conceptualization
considered above neatly fits the arguments proffered by either the majority or minority;
nor is it impossible to find central tenets of both conceptions embedded in Frankfurter’s,
Black’s and Douglas’ analyses. And it might be more disconcerting if this amalgam were
not evidenced in the case. As Hart notes in another context, “No one expects judges ...
to have much time for philosophical discussion .... A judicial bench is not and should not
be a professorial chair.” In fact, current lack of theoretic ‘fit’ lends force to the claim
that speculative, as opposed to practical, disagreements can best be resolved only by
developing a common framework for legal reasoning upon which practical decision-
making must rest.

Compare, for example, the mix of explanatory options available for analyzing newly
developing theories of litigation as a form of pressure group lobbying. Evidence not
contested of this legal ‘lobbying’ of the U.S. Supreme Court can be garnered from

the activity of the [N.A.A.C.P.] in inducing the Supreme Court to develop
doctrines favourable to the “integration” interest in the United States. Especially important was the gradual development of such doctrines from easy
cases as deprivation of the right to vote in elections and then in primaries,
through restrictive covenant litigation, to “separate but equal” public
education, and finally anti-miscegenation statutes. Such a development shows
the importance not only of a “conceptual bridge” in “legal” reasoning, but also
a “political” Supreme Court awakening and educating the nation to the
problem.

The range of explanans here invoked to cover the explanandum of judicially-sanctioned
desegregation runs the gamut from radical ideological and political consciousness-raising
to conservative penumbral doctrinal developments built upon core precedents. Because

131 H.L.A. Hart, Prolegomenon to the Principles of Punishment, reprinted in his
PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 2 (1968).

132 This assessed need for a comprehensive framework is akin to Max Weaver’s delineation of
analytical/heuristic models grounded in the patterns of dual and triple theories of adjudication,
and should not be identified or confused with Dworkin’s unitary ‘soundest’ coherence theory. See M. Weaver, Is a General Theory of Adjudication Possible? The Example of the Principle/Policy
Distinction, 48 MODERN LAW REVIEW 613 (1985).

133 Weiler, footnote 77, supra, at 447 (emphasis added; footnotes omitted).
such accounts are both relatively accurate and common, no complete explanans can be expected to well position either of the two major theories delineated above into their common law legal systems.

Nonetheless, any theoretical untidiness in the Hartian model may sufficiently be subject to reconstruction and fuller ‘fit’ after all. The weaknesses noted above need not be fatal, as seemed the case for the competing Dworkinian theory of adjudication. Let us turn then in the final section of this chapter to the suggestion of linkages heretofore overlooked between moral and legal reasons in an attempt to develop a normative account which captures the strengths of our models while attempting to avoid any fatal shortcomings.

II.5. Reasons & Morals

II.5.1. PCAs & justification

An oft cited deep criticism of the Hartian model is its too limited focus on legal rules and its inability to account for the existence or appropriate application of legal principles in judicial decision-making. Such formed the principal grounds for Dworkin’s own initial attacks on positivist legal theories, and to some extent is reflected in the weaknesses highlighted in subsection II.4.2, above.

Oft cited rejoinders suggest two separate lines of response. First, the word ‘rule’ might be understood expansively so as to include principles within its ambit since there is in fact no supportable distinction in kind (as Dworkin supposes) between them. Rather, like the Hartian understanding of the term ‘discretion,’ so-called rules and principles together can be located in any given case along a spectrum running from

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134 We set to one side here the stormy debate concerning Dworkin’s pedigree; i.e. whether his challenge and the theory(-ies) he advanced are alternative modern natural law sorts, or actually comprise only a variegated position from within the positivist camp.

135 For a comprehensive review of the conceptual and practical problems inherent in, and general failures of, distinguishing rules from principles, see P. Schlag, Rules and Standards, 33 UCLA Law Review 379 (1985).

136 See e.g. TRS, at 24-28, where a logical distinction is attributed: rules are said to apply in an “all-or-nothing” fashion; while principles are said to have “weight.”
clearly-dictates-results at one end to indeterminacy-in-application at the other.\footnote{This line is suggested by G. Marshall's \textit{The Roles of Rules} in D. Miller and L. Siedentop (Eds.), \textit{The Nature of Political Theory} 183 (1983):}

Second, while the thrust of the criticism regarding the absence of principles may be conceded, Hart's model might be interpreted/developed so as to incorporate legal principles without disturbing the conceptual foundation of its social facts orientation. Thus, the theory can be shown to have the flexibility necessary to take up the concept of principles distinct from rules while retaining previously formulated notions of discretion, rules and reasons.\footnote{This line is taken by N. MacCormick in H.L.A. Hart, at 40-43 and 126-130 (1981), where he offers "a possible Hartian clarification" (at 40) and "a perfectly comfortable fit" (at 127).}

Of course, these lines need not be mutually exclusive responses. A combinatoric response might note all the problems endemic in the distinctions proposed per the first line, nonetheless move to show that the distinctions aren't necessary to give some lack-of-principles criticism its bite, but then conclude by demonstrating per the second line how such remaining criticism can be absorbed without damage.\footnote{This approach to the Hart/Dworkin debate can be found in P. Soper, footnote 117, \textit{supra}, where Dworkin's claims are accommodated to Hart's positivism only after the irrelevance of a rules/principles distinction is established.} I take these rejoinders generally to be successful, and will not pursue their points further. No conceptual distinction between rules and principles seems either workable or, if some difference can be delineated, relevant to the understanding of reasons here. In contrast, we do need to attempt amplifying the Hartian model to account for the various kinds of decision-making standards caught within the net of "principles characteristically available" to judges \[hereafter PCAs\]. It will be argued that the primary kind so characteristically

\footnote{The conclusion might well be that all these \[ten\] types of indeterminacy or lack of specificity may be present in rules, principles, tests, policies, and maxims and that in particular they are present within rules. So little is to be gained by separating rules from principles; and little is to be lost by saying that law consists in the main of different kinds of rules (at 194).}

For an overview of six different types of rules discussed in legal and philosophic literature, see R. Flathman, \textit{Political Obligation} 77ff. (1972).
II.5.1 PC A S & J U STIFICATION 60

available is that of moral standards or principles, and that these PCAs work to
ground Hartian legal reasons in hard cases.

Recall that the Hartian model places substantial emphasis on standards generally
available to judges qua decision-makers in cases at bar. Now, these standards are not
all of a kind. They fall into several widely recognized categories. Some are specifically
legal, while others are decidedly prudential, economic, moral, or even

140 Though the term 'principle' will continue to appear in subsequent discussion, it is employed
loosely so as not to ignore the lessons provided by Schlag, Marshall and Soper noted above. Like
the more amorphous term 'standard,' it should be understood to refer to any guidelines — including
rules, maxims, etc. — to which a decision-maker can refer to justify a decision.

141 See text and quotation at page 49, supra.

142 E.g. the constitutional directive “The Citizens of each State shall be entitled to all
Privileges and Immunities of Citizens in the several States” U.S. Const. art. IV, §2; and the tort
doctrine that a negligent actor is liable for resultant, reasonably foreseeable harm. For analytic
discussion covering the latter doctrine, see Hart and Honoré, CAUSATION IN THE LAW 259-284 (2d ed. 1985).

143 E.g. consider the advice tendered to U.S. federal district court judges by R.J. Aldisert,
former chief judge of the U.S. Court of Appeals for the Third Circuit, on managing their
caseloads:

“Never, ever” grant a directed verdict, Judge Aldisert said. If you are in doubt, allow a
jury to reach a verdict and grant a judgment notwithstanding the verdict. A directed
verdict upset on appeal requires a new trial, but a J.N.O.V. upset on appeal only requires
reinstatement of the verdict.

Quoted in B. Weakland, Judging the Judges, 73 ABA JOURNAL 66 (1 June 1987).

144 E.g. widely received discounting and compound interest formulae for calculating awards
incorporating expected future incomes; and more controversially, efficiency norms for rationalizing
spreading-the-costs-of-risks decisions in tort and contract law. For discussion on such norms and
their extension into other areas of law as well, see R. Posner, ECONOMIC ANALYSIS OF LAW (5d ed. 1986), esp. chapters 1, 2, 4, 6, 9, 19 and 24.

145 E.g. the formal imperative of fairness ‘treat like cases alike’ [not to be confused with the
common law rule that precedent should control future dispositions]; and more concretely, ‘capital
punishment is just punishment’ [under some specifiably appropriate circumstances]. Hart
identifies the former principle with the “one essential element of the concept of justice .... So there
is, in the very notion of law consisting of general rules, something which prevents us from treating
it as if utterly neutral, without any necessary contact with moral principles.” Positivism and the
Separation of Law and Morals, 71 HARVARD LAW REVIEW 593 (1958); reprinted in his EssaYS
IN JURISPRUDENCE AND PHILOSOPHY 49, 81 (1983) (original emphasis). But see criticism of
Hart’s interpretation of this principle in D. Lyons, On Formal Justice, 58 CORNELL LAW
REVIEW 833, 848-858 (1973); and in D. Lyons, ETHICS AND THE RULE OF LAW 78-83 (1984),
where the principle is styled ‘the standard of strict adherence.’
Finally, and quite importantly, there are standards about standards. That is, while on one reading Hart’s account is a simple conventionalist one (standards available are standards actually shared), a more charitable interpretation encompassing a less simplistic conventionalism posits shared procedural (or second-order) standards concerning standards (of the first-order type) for decision-making in cases. Thus, standards need not be shared to be characteristically available. Rather, they become available through application of the shared procedure for developing standards to share.

Why are these PCAs crucial to the judicial role? Well, consider just what it is a judge is being asked to do, what role he is asked to fill. He is clearly being asked to settle the particular dispute put before him. And the simple fact that the court exists to act as an arbiter for the disputants is an important function for the smooth(-er) running of society. But unless what is required is simply an authoritative determination of what claims shall succeed (à la Hart’s game of scorer’s discretion; CL, at 138-141), the judge will present reasons for a decision reached under deliberation. That is, the judge both expects and is expected to justify the disposition he authorizes. Inter alia, PCAs are the tools with which a judge can craft justified decisions.

This aspect of the role of judge qua justifier was given contemporary currency in the legal philosophic work of Richard Wasserstrom:

Surely the kind of reasoning process that is evidenced by the usual judicial opinion is more suggestive of a typical justificatory procedure. ... For conceivably, at least, some judges have felt that before they render a decision in a case they must be able to justify that decision. They may have had a hunch that a particular decision would be “right,” they may have had a grudge against

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146 E.g. the ‘plain meaning’ rule of statutory interpretation; and the ‘parol evidence’ rule of contract.

147 E.g. widely shared concern that standards laid down in an opinion disposing of the instant case be crafted with an eye towards their (a) consistency or continuity with precedent; (b) ease/difficulty of application; (c) impact on future behavior of citizens and/or officials; and (d) impact on future caseloads and case dispositions.

148 This position is akin to Jules Coleman’s account of a social rule theory governing the rule of recognition itself, though the position sketched here is not so limited in scope. See J.L. Coleman, Negative and Positive Positivism, 11 JOURNAL OF LEGAL STUDIES 139, 159-160 (1982).

149 Cf. Aristotle’s notion of the judge being a “middle term or medium” [Rachman’s apt 1926 translation of μέσον] in the NICOMACHEAN ETHICS, V.iv.7 (1132a, 22-24).
a particular defendant or plaintiff, but they might also have felt that considerations of this kind do not count as justifications for rendering a binding judicial decision, and that unless they could justify the decision "they would like to give" by appealing to certain other criteria, the decision ought not to be handed down as binding upon the litigants.\textsuperscript{150}

But it is often overlooked that the notion of justification in decision-making, the place and function of persuasive reasons\textsuperscript{151} in judicial opinions, was early recognized by jurists themselves:

[The U.S. Supreme Court's] opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and [ ] its judicial authority should hereafter depend


\textsuperscript{151}By attaching the adjective 'persuasive' I do not mean to invoke the technical usage attributed by C. Perelman and L. Olbrechts-Tyteca: "We are going to apply the term \textit{persuasive} to argumentation that only claims validity for a particular audience, and the term \textit{convinving} to argumentation that presumes to gain the adherence of every rational being" in their work \textit{The New Rhetoric: A Treatise on Argumentation} 28 (1958; 1969). The notion that much argument is \textit{ad hominem} (<textit{lit.} directed 'to the man>') as opposed to the typical fallacious argument which might better be labelled \textit{in personam} (or perhaps \textit{contra personam} to distinguish the phrase from its legal cousin specifying jurisdiction) \textit{<directed 'against the person'>} is a useful one. For example, it could be observed that the arguments advanced in even this essay are directed towards a reasonably well-defined and limited readership, albeit couched in universalizable language. But however generally serviceable that narrowed notion might be, when deployed in their construction of legal reasoning I take the distinction and the 'particular audience' in view to be too restrictive, if not downright dangerous because morally non-cognitive relativistic, respecting the range of values and possible conceptions of justice admissible for discussion. [But cf. Perelman's revised views in his \textit{The Idea of Justice and the Problem of Argument} (1963; 1970) (with particular reference to chapters II & III).] Instead, the notions being appealed to here are those of 'soundness' and 'weight': persuasive reasons being sound reasons weightier than the alternative(s).
altogether on the force of the reasoning by which it is supported.\textsuperscript{152}

Thus, the provision of persuasive reasons to justify decisions in cases at bar should be, as in fact it has been understood to be, a central task for judges in the decision-making process.

II.5.2. Construal of cases

In easy cases (i.e. in those cases arising along the left end of the discretion spectrum in figure II-3, above), the task of justification is a relatively straightforward one. This description does not entail that substantial judicial resources need not be expended in resolving the dispute (e.g. time in extensive research of precedent); but it does mean that once the complex record has been closed and the groundwork has been laid, legal analysis and disposition of the case will readily\textsuperscript{153} follow. Mark the following easy case:

Dr. Davis, an Ob/Gyn resident in the local community hospital, performs a tubal ligation on Mrs. Peters as a routine sterilization procedure following a Caesarean delivery. Within 24 hours, she experiences severe back pain and there is blood in her urine. Examination by x-ray shows a blocked ureter in the pelvis and resulting kidney engorgement. Corrective surgery reveals that the ureter was blocked because it had in fact been surgically tied-off during the previous procedure. Mrs. Peters loses the engorged kidney, and subsequently sues for malpractice.

I know of no jurisdiction where P’s claim would fail, although the measure of damages

\textsuperscript{152}Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 282, 470 (1849) [Taney, C.J., noting the role of reasoned argument for overcoming use of precedent in the Court’s decision-making]. Later observation in the same vein by an eminent jurist:

The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.

\textit{Burnet v Coronado Oil}, 285 U.S. 393, 407-408 (1931) [Brandeis, J., dissenting; footnotes omitted]. For initial citations to both sources I am indebted to S. Perry’s essay, \textit{Judicial Obligation, Precedent and the Common Law}, 7 OXFORD JOURNAL OF LEGAL STUDIES 215, 247 n.112 (1987) [where it is argued, somewhat oddly I would opine, that they illustrate a 'weak Burkean' conception of precedent].

\textsuperscript{153}One is almost tempted to say ‘mechanically.’ And that would be meaningful and accurate if the adverb were understood to refer to the deductive strategy followed by the judge once premises for the legal arguments have been established. But since the latter term is commonly understood only with pejorative coloring (e.g. the simplistic mechanical jurisprudence of scientifically arranged case law derisively attributed to Christopher Langdell by Grant Gilmore in his DEATH OF CONTRACT (1974)), it will have to be avoided here.
might differ in some respects from court to court. Still, and this may in part explain the divergence in damages which might variously be awarded, the judge’s task need not be a simple one. He must weigh a host of factors gleaned from expert testimony and other legal facts to determine the actual past and present plus probable future pain & suffering of P; actual and probable economic harm to P; whether a punitive damages supplement is appropriate to punish D; how to structure a damages award, and so forth. Each query requires application of applicable statutes [e.g. does the jurisdiction place a cap on pain & suffering awards?] and PCAs [e.g. what principles guide punitive damages determinations?] to reach and justify the court’s disposition. Nonetheless, the process of arriving at a decision is straightforward, however time consuming or tedious the task.

On the other hand, as we move to the right along the spectrum and reach the mid-range cases (i.e. those cases falling along the middle points of the discretion spectrum), the task of justification is not always a straightforward assignment. And this is true even when the dispute is a relatively simple one.

Tom and Alice are first cousins. They wish to marry, but reside in jurisdiction X where a marriage ceremony celebrated between first cousins is void. But, X does fully recognize marriages performed in other jurisdictions. So, they travel to jurisdiction Y where first-cousin marriages are deemed valid, and so marry; thereafter returning to live in X. However, Y has also promulgated a law that any marriage performed in Y is void if the parties intend to reside outside Y and their jurisdiction of residence stipulates such marriages are void. Are Tom and Alice husband and wife?

Setting aside the complications which might ensue evaluation of the possible range of cases wherein a challenge to the validity of their marriage might arise (e.g. annulment proceedings versus petition for award of governmental spousal benefits), the central query concerns conflict of laws principles. When one jurisdiction needs to ‘borrow’ foreign law to determine the status of a transaction, particularly an other-jurisdiction-regarding law, how much law is it to borrow? Consider the following chain of reasoning for a court in X:

1. One PCA firmly entrenched in X is that the validity of a marriage is

154 We set to one side a-justified findings of fact which fall to the jury, though even there the findings must be justifiable, i.e. capable of being found to be reasonable, by the trial judge or appeals judges if challenged.

155 The hypothetical is based upon Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio Supreme Court 1958).
II.5.2 CONSTRUAL OF CASES

2. Since first cousins may marry in Y, the marriage of T-A is valid in X.

3. But the accompanying rule in Y excepts non-valid marriages in X for residents of X;

4. Since X's first cousins apparently can't marry in Y, the marriage of T-A is invalid in X.

5. But the court in X should interpret and apply Y's law as would a court in Y, and a court in Y would borrow X's lex loci PCA that recognizes first-cousin marriages from other jurisdictions;

6. So the marriage of T-A is valid.

7. But ....

And so goes the cross-referential conundrum. No amount of juggling the statutes, attempting to apply them of themselves, will resolve the query. A justification of either validity or non-validity will thus rest on the additional PCAs which can be marshalled and the balance struck between them to produce a persuasive decision.

Finally, in hard cases (i.e those cases falling along the right end of the discretion spectrum), the task of justification is anything but straightforward. Again, this is true even when the claims are readily comprehended.

Mr. and Mrs. Jones have legally separated as the first stage in divorce proceedings. Mrs. Jones had asked for a divorce so that she would be free to marry another man, with whom she is currently living. Eight months after

156 An ordinary PCA in virtually all jurisdictions whether common, civil, or socialist law based.

157 Commonly known as the problem of renvoi in private international law context, and artfully styled a "conceptualistic tennis match" in E.L. Sykes & M.D Pryles, AUSTRALIAN PRIVATE INTERNATIONAL LAW 100 (1979). Solutions on offer entail 'rejecting the renvoi' [i.e. cutting analysis at step 2 in our hypothetical]; 'partial or single renvoi' [thereby ending analysis at step 4]; or 'total or double renvoi' [reaching step 6, but likely refusing any extension — though refusal at that point to extend argument is unclear].

158 For the frameworks of generally accepted resolutions to such cases and those frameworks' PCAs, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS §8 (1971) [rejecting the borrowing of choice-of-law rules save in exceptional cases there outlined]; and the treatise by Sykes & Pryles, cited in the previous note, at 101-110 [rejecting conceptual directions for pragmatic concerns in the individual case].
their formal separation, Mr. Jones learns that Mrs. Jones is six-and-one-half months pregnant. Enraged that his wife is carrying another man’s child, he seeks her out. Finding her alone at home, he begins to beat her, and kicks her in the stomach yelling “I’m going to stomp it out of you.” The foetus is subsequently delivered stillborn, with a fractured skull. Is Mr Jones guilty of murder? 159

Murder is the unlawful killing of a human being. 160 If an individual is found guilty of murder, specifiable penalties attach. But of course, to be found guilty of murder is to have been adjudged the actor committing the proscribed act of unlawfully killing a human being. So the core query becomes whether Mrs. Jones foetus was a human being. Was it? 161 Since today the woman has the legal right to terminate her pregnancy even after foetal viability, can an individual properly be convicted of murder for causing the death of the foetus through assaulting the woman? Should it make a difference whether foetal death was the purpose of the assault? whether the woman had had plans to carry the foetus to term or had been considering an abortion? 162

Acceptable answers to these queries can only come from the attempt to construct persuasive arguments on the basis of existing law and the PCAs judges may utilize. In particular, judges must here employ moral PCAs. While arguably necessary even in the first easy case (e.g. should the PCA regarding punitive damages itself need some justification, recourse to some second-order moral PCA seems required) as well as the second mid-range example, the only PCAs capable of grounding a decision in hard cases are moral ones. This does not mean that judges have the right, much less the duty, to impose their personal moral judgments upon society:

The supposition that judges have authority to decide cases does not then entail that judges have authority to make binding decisions as to the reasons

159 The hypothetical closely tracks the facts of Keeler v. Supreme Court, 2 Cal.3d 619 (1970).

160 Most common law formulations append “... with malice aforethought” or some such phrase to denote the element of mens rea.

161 Interestingly, the Keeler court answered, “No.” Keeler was thus found innocent of murder. Note that this decision precedes the U.S. Supreme Court’s opinion on abortion in Roe v. Wade (1973), deciding that the foetus is not a ‘person’ for purposes of interpreting the reach of constitutional protections.

162 Cases joining these issues are just now percolating through the courts in the U.S., U.K. and Australia. There are no clear trends in decisions or rationales to date. For analytic discussion covering these problems, see G. Fletcher, RETHINKING CRIMINAL LAW 372-385 (1978).
that must be accepted as good reasons for the determinations they make of
rights and liabilities and the orders they accordingly issue.163

Rather, their task is to reach a decision justified by the PCAs extant in their role as
djudges.

In support of this analysis, Hart specifically notes that in hard cases judges need to
employ 'characteristic judicial virtues':

- impartiality and neutrality in surveying the alternatives; consideration for
  the interest of all who will be affected; and a concern to deploy some acceptable
general principle as a reasoned basis for decision. No doubt because a plurality
of such principles is always possible it cannot be demonstrated that a decision is
uniquely correct: but it may be made acceptable as the reasoned product of
informed impartial choice. In all this we have the 'weighing' and 'balancing'
characteristic of the effort to do justice between competing interests. Few
would deny the importance of these elements, which may well be called 'moral',
in rendering decisions acceptable.164

David Lyons suggests taking this analysis one step further in specific relation to hard
cases by arguing that the court's duty is to reach a decision in a "morally responsible
manner," and this will mean applying moral principles in hard cases because that is the
only way to proceed in concert with the virtues noted by Hart in the preceding
quotation. To proceed otherwise "would be a matter of judicial error."165 As cashed-out
by Harry Wellington, "The Court's task is to ascertain the weight of the principle in
conventional morality and to convert the moral principle into a legal one by connecting

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163N. MacCormick, footnote 150, supra, at 275 (footnote omitted).

164CL, at 200. Hart extends this thought in subsequent work:

- Frequently and in many important cases the law is not clearly settled and dictates no
  results either way. In such cases ... the judges have an inescapable though restricted
  law-making function, which standardly they perform by promoting one or other of those
  moral values or principles which the existing law can be regarded as instantiating.

Contrast the quote from Weiler with regards to finding a reasoned way of justifying judicial
decisions, in text at 38, supra.

it with the body of constitutional law.\textsuperscript{166}

In light of this analysis of hard cases, let's briefly return to the issue of 'fit' for a Hartian position and the weaknesses previously touched upon in subsection II.4.2, above. We can perhaps best do so by reviewing one of the illustrative cases there footnoted, \textit{Sindell v. Abbott Laboratories} (1980), and upon which the charge of absence from the model of essential explanatory/justificatory power was partially based.\textsuperscript{167} If that case can in fact be appropriately handled within a Hartian framework, the model will demonstrate sufficient robustness to overcome our concerns regarding coherence and prescription.

In \textit{Sindell}, five drug manufacturers were defending a civil suit against Ms Sindell's charge that they should be held jointly liable for personal injuries sustained by her [and other women similarly situated] resulting from her [their] mother's use during pregnancy of diethylstilbesterol [DES], a drug widely prescribed during 1947-1971 in the U.S. to prevent miscarriages. There was no dispute regarding causation: expert testimony was undivided over the negative side-effects traceable in women like Ms Sindell whose mothers ingested DES during pregnancy.\textsuperscript{168} The legal hitch lay in the inability of Ms Sindell to identify the particular manufacturer of the DES tabs actually used by her mother. There were in fact some 200 companies producing DES at the time in question, all tabs usually being marketed nationally through wholesale distributors to pharmacists for dispensing on a doctor's prescription. Since a single common formula was followed by all manufacturers, distinguishing marks were not employed and doctors regularly prescribed by generic, not brand, name. Thus, any one of the 200 companies then in business could have been responsible for Ms Sindell's injuries. But which one? Ms Sindell admitted that she did not, indeed under the circumstances could not, know whom to sue. So, she brought into court all those she could to argue that they should share the blame and the liability.

\textsuperscript{166}H. Wellington, \textit{Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication}, 83 YALE LAW JOURNAL 221, 284 (1973). This assumes, of course, that a conversion PCA [necessarily (?)] exists. That the 'conventional morality' to which Wellington and other academics & jurists so often appeal is a chimerical notion, such language merely covering over judges' personal substantive choices in morally controversial cases, see W. Sadurski, \textit{Conventional Morality and Judicial Standards}, 73 VIRGINIA LAW REVIEW 329 (1987).

\textsuperscript{167}See text and footnote 127, supra.

\textsuperscript{168}In her own medical case, the result was a malignant bladder tumor requiring surgical removal of the bladder. In addition, she suffered from adenosis, and required semi-annual monitoring through painful & expensive examination/biopsy to warn of further malignancies.
Now, one of the primary first-order PCAs in tort law is that liability will attach only for injuries “caused by the act of the [i.e. an identifiable] defendant or by an instrumentality under the defendant’s control.” Thus, identification of the tortfeasor is essential to the action at law. There are a few well-developed exceptions, but those alternative PCAs are narrowly drawn and are inapplicable here. In spite of this, a majority on the California Supreme Court decided that the identification PCA might properly be set aside to permit Ms Sindell’s suit to go forward. On what grounds? By linking two second-order PCAs to a first-order precedential rule, the majority were able to derive a modified first-order probabilistic guideline for application at trial in this and similar cases.

Specifically, the court found the “most persuasive reason” in a second-order PCA enounced in prior case law: “as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury.” Second, from “a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product” since they are better placed, for example, to spread the risk costs through insurance. When linked to a first-order rule grounding joint liability between two tortfeasors who are each held liable because each had a 50% chance of being the harm-causer, a natural extension of that rule would suggest that if Ms Sindell could analogously prove the manufacturers she brought to court together held a substantial percentage of the DES market, she would likewise be permitted to recover:

Plaintiff asserts in her briefs that Eli Lilly and Company and 5 or 6 other companies produced 90 percent of the DES marketed. If at trial this is established to be fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff’s injuries, and only a 10 percent likelihood that the offending producer would escape liability. If plaintiff joins in the actions the manufacturers of a substantial share of the DES which her mother might have taken, the injustice

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169 E.g. when the defendant(s) is(are) in the best position to bring out facts at trial, it is deemed unfair to require the plaintiff to identify the actual tortfeasor. In Ybarra v. Spangard, 154 P.2d 687 (1944), a patient was injured by one of the doctors or nurses attending him while he was unconscious. The court thus shifted the burden to each defendant to prove he/she was not the harm-causing actor. But here in Sindell the manufacturers are in no better position than the plaintiff to exonerate themselves or to inculpate another.

170 In Summers v. Tice, 199 P.2d 1 (1948), two hunters each shot in plaintiff’s direction at the same time; two of the shotgun pellets striking plaintiff in the face. It could not be determined which shooter was the source of the harm, but it was clearly one of them. Thus, plaintiff won full damages. As between the two negligent shooters, their payment share of the damages would be apportioned at 50%.
of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished.\textsuperscript{171}

The court's footnote numbered 28 indicated in the quotation above relates the notion of shared blame to shared liability as adopted by the majority:

The Fordham \textit{Law Review} Comment [Vol.46, 1978] explains the connection between percentage of market share and liability as follows: "[If] X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendant's objections on the ground of fairness lose their value."

Thus, a new first-order PCA is promulgated and applied through the invocation of second-order PCAs coupled to analogical reasoning using precedent.

In this way, PCAs can be created for future use,\textsuperscript{172} while also cohering with the Hartian framework outlined above. Additional evidence that this interpretation is sound flows from noting the minority's grounds for dissent: as we would have predicted/prescribed on the Hartian model, the dissenters challenged the status of the majority's second-order PCAs, not simply the decision \textit{inter se}.\textsuperscript{173} In brief, they attack the broad policy standpoint as a "deep pocket" theory of liability having no nexus with the traditional issues of causation or fault, cite an alternative PCA that no strict liability is to attach for experimental pharmaceuticals [the category under which DES in fact came], and reject the innocent plaintiff PCA as too weak to overturn the traditional nexus element [i.e. in the PCA hierarchy, there is a PCA that no second-order PCA can overturn the first-order identity PCA] in tort. Thus, coherence and prescription are broadly maintained across opinions, however the dispositions may differ on final vote.

Now it might be tempting to advance an argument that all this PCA talk is really just


\textsuperscript{172}And subsequently used not only by the creating agency and its direct subordinates, but as persuasive precedent, e.g. when other states' courts subsequently followed the California court's reasoning in deciding their own DES cases.

\textsuperscript{173}\textit{Cf.} the tasks outlined for the dissenters in \textit{Rochin} at page 50, \textit{supra}. 
a variation on the Dworkinian principles model. But this temptation should be resisted; for the PCAs within the Hartian framework remain, after all, determinable social facts, albeit controversial facts in some instances, subject to a more-or-less complex rule [or set of rules] of recognition. Thus Hart tells his readers that his work can at one level “be regarded as an essay in descriptive sociology” [CL, at v]. There need be nothing more mysterious in the claim that PCAs are controversial though positivistic than in the observation that theorists in other social science disciplines such as sociologists and anthropologists, for example, quite often dicker over the proper characterization of a society and its internal rules & workings. Such a position Dworkin explicitly denies his principles, for they are claimed always to be controversial, non-denumerable, and never subject to factual verification through analysis of social [or, as here, judicial] practice. Thus, however facially similar the position sketched above to a Dworkinian framework, the two should not be confused in any analysis of moral controversy within the theory provided.

In sum, we have here considered a Hartian positivistic framework for detailing a normative theory of adjudication (it tells us what judges qua judges ought to do in reaching decisions); a descriptive theory (it illustrates what judges do in fact, and even demonstrates that judges in general are doing as they ought to do); and to some degree a conceptual theory (it tells us what judges have to do to be judges). And this conceptual device of linking moral principles systematically to adjudication yields a substantial, albeit not yet a necessary, connection between law and morals. Whether this connection

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174 Dworkin himself has often made the claim that positivists are committed to social facts being uncontroversial, and that to the extent they admit controversy they merely take on a variation of his own position [and thus the debate about who is really in whose camp]. See TRS, at 343-347; and LAW’S EMPIRE (1986) [reconstructing a semantic positivism as an interpretive theory of law]. But besides the power of stipulation in defining one’s opponents, it is not at all clear why Dworkin denies controversy to positivistic PCAs or that his characterization of positivist theory actually captures any positivist theorist. For similar review and criticism of Dworkin’s claims, see K. Kress, The Interpretive Turn, 97 ETHICS 834 (1987) [Review of LAW’S EMPIRE].

175 For further development of an argument in this vein contra Dworkin’s claim that positivists cannot accommodate such theoretical disagreements, see C. Silver, Elmer’s Case: A Legal Positivist Replies to Dworkin, 6 LAW AND PHILOSOPHY 381 (1987) [where Dworkin’s use and abuse of Riggs v. Palmer is evaluated].

176 E.g. contrast the classic work of E. Durkheim, SUICIDE: A STUDY IN SOCIOLOGY (1897; J.A. Spaulding & G. Simpson trans. 1952) with L. Day, Durkheim on Religion and Suicide – A Demographic Critique, 21 SOCIOLOGY 449 (August 1987); and the pathbreaking work of M. Mead, FROM THE SOUTH SEAS: STUDIES OF ADOLESCENCE AND SEX IN PRIMITIVE SOCIETIES (1939) with D. Freeman, MARGARET MEAD AND SAMOA: THE MAKING AND UNMAKING OF AN ANTHROPOLOGICAL MYTH (1983).
can be shown to be stronger, or in need of being so strong as to challenge the traditional positivist position denying necessary conceptual connections between them, we shall take up in the next chapter.

Chapter III.

Social Morality & Legal Obligation

"The logic of the line, then, in a logic of commitment, and stabler are the properties born from the logic of morals." —Ralph Waldo Emerson

III.1. A Problematical Case

In the previous chapter we examined the role of "principles" characteristically available to judges in a Hartian special theory of adjudication, and concluded that we had not a significant connection between morality and a concept of the moral POL, and required to develop the notion of reasons from the bench. Still, a special theory of adjudication comprises only one part of any general theory of law. It remains to be seen whether moral norms, ethical conventions or critical, hold any place in conceptualizing or developing either of our legal theory's notions. Let us now consider the relation to the concept of obligation, more specially legal obligation, and its place within the theory's general conceptual framework outlining law and legal system.

In this chapter, we shall look at the role played by societal norms within modern complex legal systems to develop an argument that moral commitment to moral norms is necessary in filling out a viable conception of legal obligation within moral theoretical assumptions. To discover whether a Hartian theory truly requires a conceptual connection of that strength, and whether it can accommodate such a concept without one, let us begin by examining another problematic case that raises questions about the role of the empirical authority of the criminal law to maintain a basic societal institution. If the political-cum-legal theory advanced cannot legitimate that institution, we are in full notion of legal obligation, then further reconstruction of our Hartian model may be required.

377A John Fiske, Notes on the "Principles of Morals and Obligation."
Chapter III.
Social Morality & Legal Obligation

"The logic of the law, then, is a logic of commitment, and ... the law draws its properties here from the logic of morals." — Hadley Arkes

III.1. A Problematic Case

In the previous chapter we examined the role of ‘principles characteristically available’ to judges in a Hartian special theory of adjudication, and concluded that at least one significant connection between morality and a concept of law via moral PCAs was required to develop the notion of reasons from the bench. Still, a special theory of adjudication comprises only one part of any general theory of law. It remains to be seen whether moral norms, either conventional or critical, find any place in understanding or developing other of our legal theory’s notions. Let us now turn our attention to the concept of obligation, most specially legal obligation, and its place within the theory’s general conceptual frame outlining law and legal system.

In this chapter, we shall look at the role played by societal mores within modern common law legal systems to develop an argument that marked reference to moral norms is necessary in filling out a workable conception of legal obligation under even positivistic assumptions. To discover whether a Hartian theory truly requires a conceptual connection of that strength, and whether it can accommodate such a strong connection, let’s begin by examining another problematic case: this one concerning the use of the coercive authority of the criminal law to maintain a basic societal institution. If the political-cum-legal theory advanced cannot legitimate that institution, or yield a full notion of legal obligation, then further reconstruction of our Hartian model may be required.

III.1.1. Potter v. Murray City

Royston E. Potter was employed in September 1980 as a police officer in Murray City, a medium-sized southern suburb of Salt Lake City, Utah. He quickly proved to be an exemplary officer, receiving the city’s first-ever employee-of-the-month award. Yet, just two years later in November 1982, Potter was dismissed from active duty on the force, and his status as a Murray City officer was formally terminated that December. This firing was later affirmed after an internal appeal in a February 1983 decision by the city’s Civil Service Commission. In short, Potter was definitely out of a job. What had begun as a promising career for this father of five ended in Potter’s becoming a janitor and, a short time later, being excommunicated from the Church of Jesus Christ of Latter-Day Saints (commonly known as the Mormon church).

What had Roy Potter done to warrant such sanctions? Well, it seems Potter held the historic dictates of Mormonism, as enounced by founders Joseph Smith and Brigham Young, quite seriously, for he was not only maintaining five children but two separate households accompanied by two wives. Indeed, so deeply held were his and his wives' religious convictions regarding the fundamental nature of plural marriage relations that even given his dismissal from the police force when the double marriage came to the attention of his superiors; the resultant, well-publicized changes in occupation and church affiliation; and apparently aware that polygamy was a third-degree felony in Utah, Potter nonetheless subsequently took a *third* wife in 1983, established a third household, and was—at last public report—expecting two more children.178

Convinced that his dismissal and Utah’s anti-polygamy laws violated his First Amendment constitutional right to the free exercise of his religion, Potter filed a civil suit in the United States District Court of the Central District of Utah, naming Murray City, the city’s chief-of-police and civil service commission, the Utah state governor and attorney general, and the United States federal government as defendants. Not too

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178 For news reports covering Potter’s dismissal, see *Utah Case Revives Polygamy Dispute*, *New York Times*, 12 Sep 1983, A:16; and *Validity of Utah’s Ban on Polygamy Affirmed*, *New York Times*, 29 Apr 1984, 1:33. As regards the religious issue and excommunication, recall that the Church formally announced a ban on polygamous marriages in 1890 to prevent further persecution of LDS members, legal dissolution (i.e. disincorporation) of the Church, and confiscation of its and its members’ properties. However, the doctrinal status of this prohibition remains a bone of contention for the Church, with a significant minority—like Potter—continuing the practice, though the official position is to support secular demands of the times.
Frankly, I would judge that Roy Potter might have succeeded with a more sympathetic court. This appraisal finds its precursor in a prophecy propounded by Justice Douglas of the U.S. Supreme Court several years past. Writing in partial dissent from the majority's holding in the celebrated case, Wisconsin v. Yoder, Douglas warned that the ruling of the Court "opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time Reynolds [the seminal anti-polygamy case decided in 1878] will be overruled." Given the current range of constitutionally cognized fundamental rights and the fast-paced evolution of legal doctrine in those areas touching individual privacy, intimate association, and family law, I am inclined to predict that polygamy in general (i.e. plural marriage not restricted to those professing religious convictions on the subject), and tangentially same-sex marriage, will become not only de facto tolerated but de jure legitimated in the U.S. within the next 15-20 years.

179 Somewhat more surprising to a casual observer may be the fact that Potter was never in danger of criminal prosecution, even after 'going public.' But note should be taken that such prosecutions are quite rare in the U.S., and often only follow civil cases wherein a putative spouse has charged desertion and/or non-support by the bigamist. During Potter's case, for example, the parties involved stipulated that there had not been more than 25 criminal prosecutions for polygamy in Utah since 1952. Potter v. Murray City, 585 F.Supp. 1126, 1129 (1984).

180 406 U.S. 205 (1972), wherein Amish parents' right to remove their children from compulsory public school attendance beyond the eighth grade sustained on First Amendment freedom of religion grounds.

181 406 U.S. at 247. The reference is to Reynolds v. United States, 98 U.S. 145 (1878), the first of a series of cases wherein religious belief held no bar to bigamy prosecution and that anti-polygamy statutes are not constitutionally infirm.


III.1.2. Analytical jurisprudence & polygamy

I make this prediction not only on some narrow jurisprudential grounds arguably isolated to the American legal scene, but on several broader legal philosophic grounds concerning (a) the rather weak contingent connections which positivists usually take to be the only ones to exist between law and morality, and (b) the resultant incapacity of contemporary liberal political and legal theory — more specifically, that class of liberal theories of which Lord Devlin’s consequentialism and H.L.A. Hart’s utilitarianism are representative — to legitimate required adherence to a basic social institution such as marriage qua monogamous heterosexual relations through the coercive agency of law. I shall argue that the strongest propositions on offer connecting a legal system’s contents with a society’s positive morality fail to provide explanation for, or give foundation to, common deeply held political/legal views regarding such basic social institutions. Further, this argument will suggest that given Hartian legal-theoretic premises the relationship commonly held to exist between a society’s laws on the one hand, and that society’s mores supporting a legal obligation by judges to recognize and apply those laws on the other hand, fails to hold. Although the contrary has been vigorously asserted by theorists and practitioners like Hart and Devlin, I conclude that jurists no less and no more than citizens may have no obligation, moral or legal, to obey, uphold or apply the law on such theoretic grounds.

The argument will proceed in two parts. Its form is put schematically in figure III-1, below. In the first part covering specific application, I shall argue that the consequentialist moral theoretic [CMT] reasons proffered by Hart and Devlin fail to support the legal enforcement of monogamy [LEM], indeed that they plausibly ground non-enforcement, and thus the first claim fails. In the more general second part, it will be suggested that positivistic legal theoretic [PLT] propositions are alone too weak to

184 I here follow John Finnis’ use of ‘consequentialism’ as both a broader and narrower category within ethical theorizing. In its broader usage, consequentialism is the genus of which utilitarianism is a species, wherein maximizing or optimizing the [probable or expected] value of consequences of an act is the goal. Utilitarian theories then specify the various values to be maximized/optimized, e.g. pleasure or happiness summed over individuals or groups. In its narrower usage, as here attributed to Devlin, consequentialism denotes a variant species of theorizing wherein the [probable or expected] value of consequences is to be optimized, but computations take account of the intrinsic value attributed to certain acts, as well as taking account of the fact that any action performed is itself one of the consequences which follows a decision to act, and that some states of affairs can be ‘good in themselves.’ See J. Finnis, FUNDAMENTALS OF ETHICS 82-84 (1983), where he notes the term’s antecedent introduction by G.E.M. Anscombe. Excepting its attribution to Devlin, usage throughout this chapter will assume the broader category. I make no attempt here to more closely define Hart’s brand of utility.
ground obligation or enforcement results in even this core case, and thus the second claim fails. Finally, and as part of this latter analysis, it will be noted that given a plausible non-enforcement CMT result, combining PLT with CMT yields no cure. Thus, the third claim fails, as well.

I propose deliberately to leave to one side an otherwise significant class of non-consequentialist theories for two reasons. First, I am aware only of one, and that widely disparaged, deontological account concerned to legitimate monogamy, viz. Immanuel Kant’s delineation of marriage relations from Roman law principles of property and contract. Though some argument contra polygamy might modernly be constructed along the lines of lack of reciprocity, diminished personal autonomy, and/or an inhering deficiency of equal respect due moral agents, the difficulty encountered is that such argument lends itself to deployment against monogamy as well, at least as generally instituted today.

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185 See I. Kant, THE PHILOSOPHY OF LAW §26 (W. Hastie trans. 1887); and A. Ryan, PROPERTY AND POLITICAL THEORY 83-85 (1984). Though theological accounts have been constructed in the past and continue to be found in rabbinic and church literature, their creationist character resists classification into secular moral philosophic categories. Indeed, although the argument will not be pursued here, it seems that a successful deontological argument on secular autonomy grounds would be resisted by theological accounts generally motivated by a denial of man’s autonomy. See e.g. H. Thielicke, 3 THEOLOGICAL ETHICS 79-98 (J. Doberstein trans. 1964; 1979). While I believe a Judeo-Christian theological route is the only workable one, it is recognized that such arguments require adoption of special assumptions not widely shared; thus, these too are left aside here.

186 E.g. it has been noted, “If polygamy is to be outlawed or refused recognition out of concern for women who are parties to it, so in consistency ought monogamy.” J. Kleinig, PATERNALISM 160 (1983) (contrasting J.S. Mill’s argument contra slavery contracts with his acquiescence towards Mormon polygamy in On Liberty). Cf. Schopenhauer’s railings against monogamy in his essay, On Women, wherein the mass of London street-walkers are said to represent “real human sacrifices on the altar of monogamy.” E.B. Bax (Ed.), SELECTED ESSAYS OF SCHOPENHAUER 338, 348 (1914).
III.1.2 A: ANALYTICAL JURISPRUDENCE & POLYGAMY

Second, several more recent non-consequentialist theories, e.g. Dworkinian autonomy-based morals-neutral theories of law, to put it simply, aren't at all concerned with this sort of institutional problem, but usually call straightforwardly for society to get out and keep out of the business of regulating all sexual behavior tout court. This line of argument often requires not mere decriminalization of certain relationships, but de jure legitimation on equal footing with traditionally recognized ones. While it is uncertain just what such legitimation legislatively entails, it is clear that this type of liberal theory is institutionally revisionist in much the same way that a classical utilitarian account could require the overturning of considered judgments concerning, say, punishment of the innocent: the traditional intuitive judgment and its institutional instantiations must go. Thus, however significant this class of non-consequentialist theories may be, they do not, or simply refuse to, enter into this debate. I shall take up only those consequential accounts which do attempt some justification of monogamy.

In addition, to help avoid some misunderstandings, let me note some restrictions on word usage. ‘Polygamy’ is a rather loose term, often simply used to denote a generic hodgepodge of multiple sexual relationships, and as such is too inexact for our purposes. The term ‘polygamy’ will be used here to include only those unions in marriage covered by the anthropological categories of polygyny and polyandry, as

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187 See e.g. R. Dworkin, TAKING RIGHTS SERIOUSLY 240-265 (1978); B. Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE 177-180 (1980); L. Tribe, AMERICAN CONSTITUTIONAL LAW 921-934, 941-948 (1978), and his CONSTITUTIONAL CHOICES 238-245 (1985).

188 At least one jurist has recognized this problem. In an important dissenting opinion in Cleveland v. United States, 329 U.S. 14 (1946), Justice Murphy takes the majority to task for too easily classifying polygamy — specifically Mormon polygyny — with prostitution and debauchery under the Mann [White Slave Traffic] Act. See also Justice Henriod’s concurrence in In re State in Interest of Black, 3 Utah 2d 315, 283 P.2d 887 (1955); cert. den. 350 U.S 923 (1955) (juvenile court constitutionally permitted to deprive polygamous Mormon parents of custody of their children).

189 Union in marriage may be usefully defined as “the union between man and woman in the form recognized by their society entitling them individually to the specific kinship status of husband and wife, jointly to that of spouses with reciprocal rights and obligations, and to the procreation of legitimate children within the union.” H.R.H. Prince Peter, A STUDY OF POLYANDRY 23 (1963).

190 Two detailed anthropological studies from which the categories and their associated terminology is culled and which are also of value to the non-specialist reader: R. Clignet, MANY WIVES, MANY POWERS: AUTHORITY AND POWER IN POLYGYNOUS FAMILIES (1970); and H.R.H. Prince Peter, A STUDY OF POLYANDRY (1963). For an interesting short historical, if somewhat polemical, review of marriage relations, see David Hume’s Of Polygamy and Divorces and Of Love and Marriage collected in his ESSAYS: MORAL, POLITICAL, AND LITERARY.
III.2. CMT Principles

III.2.1. Principles of criminalization

In September 1957 the Report of the Committee on Homosexual Offences and Prostitution (more commonly known as the Report of the Wolfenden Committee, or more shortly, the Wolfenden Report) was presented to Parliament by the Secretary of State for the Home Department. Its controversial recommendations, based upon a good deal of expert legal, sociological and psychological testimony, included the decriminalization of ‘homosexual behaviour between consenting adults in private’ (62), a recommendation not in fact then taken up by the government. Yet, the importance of the Report lay less in its specific legislative proposals than in the principles detailed by the Committee, principles according to which it understood its task and supported its findings:

* We clearly recognise that the laws of any society must be acceptable to the general moral sense of the community if they are to be respected and enforced. But we are not charged to enter into matters of private moral conduct except in so far as they directly affect the public good (12).

* Our primary duty has been to consider the extent to which homosexual

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191 Relations can usefully be organized in the following patterns. A. Marriage relationships cover (1) monogamy — marriage of one man to one woman; (2) polygyny — marriage of one man to more than one woman [with some special practices typed as (a) levirate polygyny, being the ‘inheritance’ of widows, usually by dead husband’s brother; (b) sororal polygyny, being the marriage of one man to two or more sisters; and (c) serial polygyny, being the entry into more than one monogamous marriage by one man separated in time by non-death termination(s)]; (3) polyandry — marriage of one woman to more than one man [with some special practices typed as (a) fraternal polyandry, being the marriage of one woman to two or more brothers; and (b) serial polyandry, being the entry into more than one monogamous marriage by one woman separated in time by non-death termination(s)]; and (4) conjoint (group) marriage — marriage of more than one man to more than one woman. B. Non-marriage relationships cover (1) concubinage — one man cohabiting or in intimate relation with one or more women, not related by marriage, though some rights/obligations attach (woman sometimes designated ‘secondary wife’); (2) cohabitation — one woman cohabiting or in intimate relation with one or more men, not related by marriage, though some rights/obligations attach (man sometimes designated ‘secondary husband’); and (3) partnership — spillover category for cohabitation or relations without formal correlative rights/duties attaching. The usage proposed for ‘polygamy’ in this chapter [i.e. those unions captured only under A(2) & A(3)] also corresponds to that adopted by Justice Murphy in his Cleveland dissent, footnote 188, supra, at 25-26.

192 CMD 247 (1957).
behaviour and female prostitution should come under the condemnation of the criminal law.... In this field, [the criminal law's] function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence (¶13). 193

* It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern on behaviour, further than is necessary to carry out the purposes we have outlined (¶14).

In specific relation to its decriminalization recommendation, the Committee noted an argument which it deemed decisive:

namely, the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business (¶61).

As noted by Hart, these principles “are strikingly similar to those expounded by [J.S.] Mill in his essay On Liberty”194 and represent principles regarding the proper scope and function of criminal law which he, and initially Lord Devlin, completely approved. 195

I say ‘initially’ approved by Lord Devlin, for as he reveals in the Preface to his collected essays, subsequent study and preparation to deliver the second Maccabaean Lecture in Jurisprudence to the British Academy in 1959 convinced him that he could not continue to give assent to these sorts of restrained Millian propositions:

What I had in mind to do was to take other examples of private immorality and to show how they were affected by criminal law and to consider what amendments would be necessary to make the law conform with the statement of principle in the Report. But study destroyed instead of confirming [sic] the

193 Emphasis added to final portion of paragraph to indicate that wording which has become known as the ‘safeguards clause’ of the Report; mentioned in text at page 85, infra.

194 H.L.A. Hart, LAW, LIBERTY, AND MORALITY 14 (1963) [hereafter cited as LLM].

195 LLM, at 5; P. Devlin, THE ENFORCEMENT OF MORALS v (1965) [hereafter cited as EM]. Devlin had been one of the legal experts called to testify before the Committee and, though he had recommended only partial decriminalization of homosexual behavior, agreed with the recommendations as put forward in the Report.
He instead reaches the conclusion that “the true principle is that the [criminal] law exists for the protection of society” and not for the protection of individuals as stipulated by the Wolfenden Report [EM, at 22]. In brief, since a shared morality is found by Devlin to be essential to the existence of society, “it is not possible to set theoretical limits to the power of the State to legislate against immorality” [EM, at 12].

In support of these claims, Devlin proffers a variety of crimes and impermissible defences to crimes extant which can only be explained in terms of preserving society’s positive morality. His list includes euthanasia or consensual murder, consensual battery, duelling, and incest. All of these acts can take place “in private and without offence to others and need not involve the corruption or exploitation of others” [EM, at 7]; yet, we would not accept, he argues, the decriminalization or legitimation of these acts. As to positive basic social institutions mentioned to support his theses, he gives particular attention to marriage.

Whether the union should be monogamous or polygamous, whether it should be dissoluble or not, and what obligations the spouses should undertake towards each other are not questions which any society has ever left to individuals to

196Cf. the findings of the Special Committee on Pornography and Prostitution in relation to the philosophical and constitutional considerations canvassed in their 2-volume Report to the Minister of Justice and Attorney General of Canada in February 1985:

We appreciate fully that law, especially criminal law, has an important and often invisible impact in moulding and influencing peoples’ behaviour, and it is clear that some criminal law provisions affect behaviour beneficially without the instrumentation of enforcement. ...

We also disagree with the view that the criminal law should be confined to the tangible harm caused by one individual to another. ... Criminal law is, in part, a reflection of the values of society. ...

In short, criminal law has something to say about both the values of society and the need to protect them by a system of proscriptions and punishments. ... “The criminal law serves partly to protect against harm but more importantly to support and bolster social values. Protection against harm it seeks to achieve through deterrence, rehabilitation and —most successfully— prevention. Support of social values it manages through ‘morality play’ technique —by reassuring, by educating and above all by furnishing a necessary response when values are threatened or infringed” [quoting with approval from a position paper, The Limits of Criminal Law, by the Law Reform Commission of Canada].

The quotations above are drawn from Vol.1 of the Report, at 22-23.
settled for themselves. They must be settled according to the ideas of right and wrong which prevail in that society, that is, according to its moral law; and because the institution of marriage is fundamental to society the moral law regulates it very closely—much more closely than in most other subjects in which the moral and secular law both operate [EM, at 61]. 197

Picking up on a theme first sounded in his original lecture, Devlin goes on to notice that

Monogamy is so deeply rooted in our moral ideas that it would not be practicable to contend that the secular law should recognize any other form. But apart from that, the free-thinker in western civilization would, I believe, accept monogamy as good in itself. Polygyny and polyandry must result in the degradation of either the man or woman below the level of dignity which according to western ideas is deemed to be his or her right [EM, at 62-63]. 198

As regards the private contractual nature of marriage, Devlin argues that

though entered into by contract, [marriage] confers ... a status in society and that gives society a say in the terms of the arrangement. The law must therefore settle all the main terms of marriage, and it must settle also the relationship between spouses and third parties, which cannot be the same as if the spouses were two disunited individuals [EM, at 63-64].

III.2.2. Hart on monogamy

I have quoted Devlin at some length on this matter, but it is important to recall that many of his critics do not disagree with these sorts of comments, at least with reference to his view of the institution of marriage. It is also important to catch the underlying reason for Devlin's examples: they do not simplistically represent the ground of an appeal to take the law 'as it is' without the possibility of reform; nor are the examples used to

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197 The points raised in this quotation track closely the analysis proffered by the U.S. Supreme Court some 80 years earlier:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal. ... [U]nless restricted by some form of constitution, it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.

Reynolds, footnote 181, supra, at 165-166.

198 Cf. EM, at 9-10.
argue on fallacious naturalistic grounds that what the law ‘is’ describes the law as it ought to be. Rather, as Hart fully appreciates, most of these examples are not drawn from the area of sexual morals, and certainly many, who would wish to align themselves with Mill and protest against the use of the criminal law to punish practices simply because they offend positive morality, might hesitate or refuse to jettison the particular rules of criminal law instanced .... So if they are correctly classed as rules which can only be explained as designed to enforce morality their persuasive force is very considerable. We may indeed, to use [James Fitzjames] Stephen’s words, “be disposed to doubt” whether a principle that would condemn these particular rules could be right [LLM, at 29].

As regards Devlin’s positive example, the institution of monogamous marriage, Hart quite readily concedes that it forms part of the central core of legal and moral societal norms:

First, marriage is a legal institution and the recognition of monogamy as the sole form of marriage carries implications for the law related to wide areas of conduct: the custody and education of children, the rules relating to inheritance and distribution of property, etc. Second, the principle of monogamy is also morally pervasive: monogamous marriage is at the heart of our conception of family life, and with the aid of the law has become part of the structure of society. Its disappearance would carry with it vast changes throughout society so that without exaggeration we might say that it had changed its character.199

Thus, he is prepared to offer a defense for this institution, or more specifically a justification for the criminalization of bigamy, lest his own version of expanded Millian principles be found to be too narrow.

Now, Hart’s liberalism permits the justification of punishment for conduct on grounds other than direct harm to other individuals. He would expand Mill’s ‘harm principle’ to cover, for example, a good deal of paternalistic legislation:200 and also maintains that conduct which “jeopardises the collective interest which members of society have in the

199 H.L.A. Hart, Social Solidarity and the Enforcement of Morality, 35 UNIVERSITY OF CHICAGO LAW REVIEW 1, 10 (1967) [emphasis added to final sentence].

200 Whether Mill does in fact permit—or needs to permit—a narrow or wide conception of legitimate legal paternalism need not detain us here. Suffice it to note that Hart believes his principles are broader than Mill’s and permit what Mill would eschew. For a review of the narrow/wide debate, see R.J. Arneson, Mill versus Paternalism, 90 ETHICS 470 (July 1980); and C.L. Ten, MILL ON LIBERTY 109-123 (1980) [where the labels are weak/strong].
III.2.2 HART ON MONOGAMY

maintenance of its organisation” may justifiably be proscribed and punished. It is on this latter ground that his defense for the punishment of bigamy is made.

Denying that the crime of bigamy can only be classed as society’s attempt to enforce its morality, Hart catalogues several suggestions offered by others as reasons legitimating its punishment: (1) to protect public records from confusion; (2) to frustrate schemes to misrepresent illegitimate children as legitimate; (3) to punish the public affront and provocation of the first spouse; and (4) to limit the likelihood of desertion, non-support, and divorce. Admitting that these reasons “seem more ingenious than convincing” [LLM, at 40], he goes on to suggest that it could still be urged that “in a country where deep religious significance is attached to monogamous marriage and to the act of solemnizing it, the law against bigamy should be accepted as an attempt to protect religious feelings from offence by a public act of desecrating the ceremony” [LLM, at 41]. In short, that bigamy is a public nuisance.

But these reasons just won’t do. The difficulty with these sorts of reasons is that they generate justifications respecting monogamy which are both over- and under-determinative: they either beg the central question at issue, or (tend to) justify the criminalization of a broader range of conduct than bigamy, alone. That is reasons such as the protection of public records, etc. [(1)-(4) in text, and (1)-(2) in footnote 203] are only reasons for criminalizing bigamy if one presumes the legitimacy of monogamy; they


202 LLM, at 40; noting suggestions listed in commentary from the American Law Institute Model Penal Code, Tentative Draft No.4 (1955).

203 Similar utilitarian justifications are advanced by Graham Hughes: “the criminal prohibition of bigamy is or ought to be aimed at suppressing two evils: (1) the procurement of sexual relations by fraud, and (2) the confusion of a public system of registration on which a host of rights, duties, powers and privileges depends.” G. Hughes, Morals and the Criminal Law, 71 Yale Law Journal 662, 674 (1962). But note that Hughes rejects the very public nuisance notion upon which Hart relies [at 674-675], and which notion Hart admits would also be rejected by Mill [LLM, at 42; where reference should be made to J.S. Mill, On Liberty ch.4 <in the Toronto edition, J.M. Robson (ed.), 18 Collected Works 276, 284-291 (1977)>]. For a historical overview of the legal differentiation of public from private nuisance, and the criminal nature of the former, in English and American law, see W. Prosser, Law of Torts 571-602 (4th ed. 1971). But cf. the lack of such legal distinctions in Scotland, where nuisance is exclusively a matter for private civil proceedings.

204 Hart seems to recognize this, himself, given that his subsequent comments on the place of monogamy in a social order appear strikingly ambivalent on the issue of its possible overthrow. See his Social Solidarity essay, footnote 199, supra, at 12.
are not independent reasons justifying the underlying institution in question. In a polygamous society, these listed problems either would not exist, or would exist only to the same degree that they exist in any society plagued by promiscuous behavior. It might plausibly even be argued that polygamy would alleviate many of the harms noted here which are more closely associated with the high divorce and desertion rates of western monogamous societies.

Turning to the public nuisance argument, we find justification for two results clearly unwanted by Hart. First, the argument can be read as collapsing into Devlin’s broader principles regarding the use of the criminal law to protect societal interests in that Hart has openly yielded the majority a right to enforce its morality: his exception here, like the limiting language in the ‘safeguards clause’ of the Wolfenden Report, swallows the principle of non-interference. Irrespective of his protestations that a distinction exists between punishing bigamous immorality per se and punishing the nuisance value of that immorality [LLM, at 41], Hart is permitting the calculation of harm to be based upon the religious and/or moral sensibilities of the public at large. For while that punishment distinction is viable in some other contexts, it would seem that there is no distinction to be made here: the nuisance value is just that it is deemed immoral; the conduct is deemed legitimately criminal just because its immorality is deemed intolerable. The public character of the conduct to be punished here is not like the flagrant public display of, say solicitation for prostitution in City Walk during the noon lunch hour. Yet, some such public display separable from the underlying conduct is needed here to maintain the distinction for bigamy. As Devlin notes, “A marriage in a registry office is only in form a public act. ... No one with deep religious feelings is likely to attend in the registry office; and the chance of the happy couple as they leave the office running into a man who happens to combine deep religious feelings with the knowledge that one of the parties has been married before is remote.”

Thus, Hart’s distinction will collapse, and yield the

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205 EM, at 138. Cf. the doctrine of strict liability for blasphemous libel in Regina v. Lemon and Gay News Ltd., [1979] All E.R. 898 (HL). It seems fair to assume Hart would reject the result of that case, viz. convictions in a private criminal prosecution for mere publication of a poem found at trial to be blasphemous sustained. And the distinction offered here by Hart suggests a legal analysis (rejected by their Lordships) for differentiating, for example, mere publication from publication resulting in a breach of the peace. If this line is the proper analogue for bigamy, the nuisance value or harm must be separately grounded, not arising merely with public antipathy or “feelings of moral disapprobation” for the practice. But Hart has not shown, and I think cannot demonstrate, this necessary and independent nuisance element. See J. Rees, JOHN STUART MILLS ON LIBERTY (1985) [previous quoted phrase, at 44]. Rees provides a ‘utilitarian’ argument for dismissing claims of harm or pain when those claims cannot be separated from beliefs about the wrongfulness of that action. But cf. C.L. Ten’s review of Rees’ work in his Mill’s Defence of Liberty ms. prepared for conference on the liberal tradition; collected in K. Haakonssen (Ed.), A LIBERAL TRADITION (forthcoming, 1988), arguing that Rees’ argument cannot go through on purely utilitarian grounds (at 13).
very reduction he had wanted to deny from the outset. 206

Second, his nuisance theory strongly supports not the criminalization of multiple marriage, wherein the forging of marital bonds are seriously undertaken and are often of sacred concern, but rather the extended criminalization of adultery and fornication. The desecration of the marriage ceremony in general and of the vows of fidelity given in any particular ceremony, and the undercutting of the institution of marriage as the preferred bonding of the family-unit are all more directly the result of the latter anti-social conduct. Thus, if we take Hart seriously, we could justify and perhaps ought to re-establish these Puritan crimes long ago removed from common law criminal codes, while decriminalizing polygamy.

Now, there is one argument not advanced by Hart which might be constructed against bigamy on the basis of a Millian 'harm principle' and without reliance on legal paternalism. It is not a conclusive argument, however, for it requires the presumption that multiple marriage, specifically polygyny, 207 results in harm at least to the junior

206 For argument that Hart's position in general collapses into Devlinite principles, see T.C. Grey, THE LEGAL ENFORCEMENT OF MORALITY (1983); and E.V. Rostow, The Enforcement of Morals, [1960] CAMBRIDGE LAW JOURNAL 174. This charge of collapse is a serious one, and is further reflected in criticisms of Hart's general legal theory with respects to the conventionalism apparently embedded in his social fact thesis and ordinary language analysis of legal obligation. [See e.g. a review of Hart's work by J.T. Noonan, Jr., The Concept of Law, 7 NATURAL LAW FORUM 169 (1962).] Discussion on this point will be taken up in subsection III.3.2, infra.

207 "No one has a deeper disapprobation than I have of this Mormon institution; both for other reasons, and because, far from being in any way countenanced by the principle of liberty, it is a direct infraction of that principle, being a mere rivetting of the chains of one-half of the community, and an emancipation of the other from reciprocity of obligation towards them. Still, it must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of marriage institution ...." J.S. Mill, On Liberty [in COLLECTED WORKS, footnote 203, supra, at 290]. Because of the 'voluntary' nature of the union, Mill lets polygyny pass, though he denied legitimacy to the analogous slavery contract. I wish to suggest that he needn't have done so.
wives of the husband. But if this much is conceded, coercing A (a married man) through criminalization of polygamy not to make a proposal of marriage—with attendant, say religious, pressure to accept—to B (an unmarried female) is a way of averting A’s causing real harm to B. Conversely, employing the coercive nature of the criminal law against B so that she does not accept such proposals is not primarily paternalistic in relation to B, but is too a way of keeping A from harming B. A close analogy here is the criminal law against duelling: while arguably paternalistic in that the law keeps me from foolishly defending my honor, it principally protects me from accepting a challenge from another who would harm or kill me, while retaining my honor intact. This argument might then be advanced along the lines of Mill’s noting the occasional though necessary role of correlative enforceability of certain duties to permit effective collective action. For example, should workers seek to reduce the hours of their workday, the assurance of enforced adherence to a general rule stipulating shorter hours is required to avoid particularized breakouts: protection of a class of workers in an industry requires adherence by virtually all members of that class to perfect the general outcome both individually and collectively desired. Pari passu, protection of the class of women subject to polygynous coercion requires monogamy by all in that class.

The problem here is that even if the argument succeeds (and there is some question about the viability of the distinctions employed), its application potentially protects too

208 While the anthropological literature is mixed, some suggesting that there is even greater liberty and independence for the female under polygyny than under either monogamy or polyandry (see e.g. the two works cited, footnote 190, supra), recent psychological studies suggest that psychiatric disorders of junior wives may be traceable to the institution of polygyny even in those cultures where it is strongly and religiously entrenched. See e.g. K. Chaleby, Women of Polygamous Marriages in an Inpatient Psychiatric Service in Kuwait, 173 JOURNAL OF NERVOUS AND MENTAL DISEASE 56 (1985). But cf. the musings of a sociobiologist who is quoted as observing “that the single most dysgenic event in the history of mankind was departure from a pattern of polygamy based on leadership, ability and initiative” (as quoted in E. Mayr, Descent of Man and Sexual Selection, L’ORIGINE DELL’ UOMO (1973)], and suggestions by some political leaders [e.g. Prime Minister Lee Kuan Yew of Singapore] that their now-monogamous societies ought to return to polygamy, at least for the educated upper classes, for the benefit of the nation. See ASIAWEEK, 4 January 1987, at 18. For an argument that polygamy is a harm to the man, see the essays by David Hume cited in footnote 190, supra.


210 For a similar non-paternalistic interpretation of laws concerning duelling, and how these and other prima facie paternalistic statutes (e.g. social security taxation) can be understood to utilize a Millian harm-to-others principle as a grounding rationale, see J. Feinberg, HARM TO SELF 18-19 (1986) (quoting with approval a passage from Arneson’s essay, cited in footnote 200, supra.)
small a class, viz. Muslim and Mormon women—being the ones most likely to succumb to pressure to marry into a multiple role. Thus, we could end up with an unpalatable legal division permitting non-Mormons and non-Muslims to enter into polygamous marriages where no harm or overbearance can be demonstrated, while denying Mormons and Muslims the right so to do because of the nearly irrebuttable presumption of religious or cultural coercion. Since this result won’t do, either, if bigamy can be reasonably justified, it won’t be on any of the grounds offered above. So let’s now turn to Devlin’s principles to see if they can justify monogamy, themselves.

III.2.3. Devlin on monogamy

By way of review, recall that Devlin denies that there is any behavior—specifically, any immoral conduct—which is in principle beyond the reach of the criminal law of a society. He explains in part this reach of the law by analogizing immorality to treason: just as there is no private realm of subversive activity, so there is no private sphere of immoral conduct; both undermine the existence of society and thus both sorts of conduct may legitimately be proscribed and punished [EM, at 13-14]: “Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.” Devlin then goes on to affirm the broad principle that “society has a prima facie right to legislate against immorality as such” [EM, at 11] and that “it is not possible to set theoretical limits to the power of the State to legislate against immorality” [EM, at 12].

Now the point to bear in mind when discussing the application of such principles to

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211 EM, at 22. While many of Devlin’s critics have railed against this comparison [see e.g. H.L.A. Hart, Immorality and Treason, 62 THE LISTENER 162 (30 July 1959)], he surely has the etymological advantage: early Hebrew, for example, utilized the same root form *bgidah*—denoting ‘breach of fidelity’—to generate the cognates both for ‘adultery’ and for ‘treason’; this linguistic linkage was also known to the Greeks, in part conceptually passed into Roman law, and currently forms a portion of the conceptual core for the modern law of treason. See G.P. Fletcher, The Case for Treason, 41 MARYLAND LAW REVIEW 193 (1982); and J.K. Van Patten, Magic, Prophecy, and the Law of Treason in Reformation England, 27 AMERICAN JOURNAL OF LEGAL HISTORY 1 (1983). Likewise, the Norman word for ‘breach of faith’ between a fief and his lord under feudal law was ‘felony.’ This concept was introduced into England after the Norman conquest when “the most serious crimes came to be called felonies because they were considered to be breaches of the fealty owed by all people to the king as guardian of the peace of the realm”, while other civil and criminal wrongs were known as ‘trespasses’—from the Norman translation of the Latin term ‘sin.’ See H. Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 313-314 & 449-450 (1983) (from which the immediate quotation was taken, at 314). Thus, and in contrast to the presumption of the Wolfenden Report [specifically, its ¶61, quoted in our text at page 80, supra], crime as infidelity and sin has important etymologic and conceptual pedigree.
specific cases is that Devlin's denial is of theoretical, and not of practical, limits to legislative authority. That is, although any type of behavior might come within the purview of statutory proscription, the evaluation of whether such enactments would be justified all things considered is subject to several important consequential constraints. The first constraint under which the legislature should operate is that "Nothing should be punished by the law that does not lie beyond the limits of tolerance. It is not nearly enough to say that a majority dislike a practice; there must be a real feeling of reprobation" [EM, at 16-17]. This constraint is subsequently reformulated to state that "there must be toleration of the maximum individual freedom that is consistent with the integrity of society" [EM, at viii]. The second working principle is that "in any new matter of morals the law should be slow to act"; while the third 'elastic' constraint is that "as far as possible privacy should be respected" both in the enforcement and formation of the law [EM, at 18-19]. A final comment by Devlin, though not given as a formal principle or constraint, is that lawmakers should remember that the law is concerned with the minimum acceptable behavior demanded by society of its members, not a desirable maximum: "The criminal law is not a statement of how people ought to behave; it is a statement of what will happen to them if they do not behave." Though he has said he had no knowledge of James Fitzjames Stephen's work contra J.S. Mill at the time he first prepared his Maccabaean lecture, Devlin's constraints closely track the leading principles mentioned by Stephen in those essays. Compare them side-by-side in the following figure III-2.

How might these constraints operate in practice? Let's take an example considered both by Devlin and Stephen:

Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy. The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; it is too generally regarded as a human weakness not suitably punished by imprisonment [EM, at 22].

212 EM, at 20. Cf. St Thomas Aquinas' comment on the limits of human law:

Law is laid down for a great number of people, of which the majority have no high standard of morality. Therefore it does not forbid all vices, from which upright men can keep away, but only those grave ones which the average man can avoid, and chiefly those which do harm others and have to be stopped if human society is to be maintained, such as murder and theft and so forth.

SUMMA THEOLOGIAE, Ia2ae.96, 2. [T. Gilby trans. 1966].

213 J.F. Stephen, LIBERTY, EQUALITY, FRATERNITY (1873).
### Devlin’s constraints

<table>
<thead>
<tr>
<th>No.</th>
<th>Constraint</th>
<th>Stephen’s principles</th>
</tr>
</thead>
<tbody>
<tr>
<td>1)</td>
<td>Nothing should be punished which does not lie beyond the limits of toleration.</td>
<td>Neither legislation nor public opinion ought to be meddlesome.</td>
</tr>
<tr>
<td>2)</td>
<td>In any new matter of morals the law should be slow to act.</td>
<td>Both legislation and public opinion ... are apt to be most mischievous and cruelly unjust if they proceed upon imperfect evidence.</td>
</tr>
<tr>
<td>3)</td>
<td>Law is concerned with minimum acceptable behavior demanded by society.</td>
<td>Legislation ought in all cases to be graduated to the existing level of morals in the time and country in which it is employed.</td>
</tr>
<tr>
<td>4)</td>
<td>As far as possible privacy should be respected.</td>
<td>Legislation and public opinion ought in all cases whatever scrupulously to respect privacy.</td>
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**Figure III-2: Principles of Constraint**

Even Stephen, some 80 years earlier, noted

> It is possible that a time may come when it may appear natural and right to punish adultery, seduction, or possibly even fornication, but the prospect is, in the eyes of all reasonable people, indefinitely remote, and it may be doubted whether we are moving in that direction.\(^{215}\)

Thus, however reachable in principle, most restraints on sexual behavior must practicably come from education or social pressure to conform, not from the criminal law.

Now, what of bigamy? How does the criminalization of multiple marriage stack up

\(^{214}\)Id. at 158-160. Comparisons (1), (3) and (4) indicate quite similar concerns for both men. Comparison (2) is less clear, but in context Stephen is also worrying that imperfect evidence usually results from too speedy proceedings.

\(^{215}\)Id. at 160. For an interesting historical review of the more vengeful ‘remedies’ associated with adultery, see J.D. Weinstein, *Adultery, Law and the State: A History*, 38 HASTINGS LAW JOURNAL 195 (1986).
against the practical constraints recognized by Devlin and Stephen? Whatever the case may have been in 1873 or 1959, I think a strong case can be made out that polygamy no longer passes muster as immoral behavior seen to be inimical to the moral fabric of western common law societies. As Devlin stresses, this question is a question of fact and will be answered in different ways by different generations. In 1988 retrospect, given the much vaunted ‘Sexual Revolution’ of the 1960s, the increasing acceptance of cultural diversity since the 1970s, and the general increase in levels of tolerance—if not approval—of alternative life-styles in the 1980s, it seems odd to put the proposition that monogamy should continue to be seen as so central or basic as to require criminalization of polygamy. With divorce rates approaching and in some cases exceeding marriage rates in many locales ... extra-marital activity by both sexes increasing and frequently deemed acceptable ... mate-swapping becoming more common in upper- and middle-class society ... it seems surprising to suggest that modern permissive attitudes ['moral pluralism' if you prefer] support sustaining the current restrictive laws on marriage.216

While I concede that the point being made can nonetheless be said to be a controversial one, the minimal concession that there is an issue to debate is enough for our purposes here. For Devlin’s constraints permit criminalization only where the immoral character of the conduct is beyond reasonable doubt:

If a reasonable man believes that a practice is immoral and believes also—no matter whether the belief is right or wrong, so be it that it is honest and dispassionate—that no right-minded member of his society could think otherwise, then for the purpose of the law it is immoral [EM, at 22-23].

But if a right-minded member could think otherwise, the conduct cannot justly be

216 That such social and moral changes are already having an impact on law and its administration, notice need only be taken of the rising popularity of programs at law conferences entitled, for example, Family Law & the New Morality, which draw upon the expertise of practitioners from around the common law world to detail evolving standards in the field dealing with relationships previously deemed illegitimate (e.g. de facto spousal relations in non-common law marriage jurisdictions) or technologically impossible (e.g. heterologous IVF and surrogate mother contracts). For a sketch of the general reciprocal interactions between and evolution of law and societal moralisms, see G. Calabresi, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 77-83 (1985).
proscribed.\textsuperscript{217} And this level of ‘right-minded’ tolerance, I would opine, represents the actual status of polygamy, today. The necessary levels of indignation and disapprobation for legitimating criminalization not only seem not to exist, but the putative immorality of the conduct itself is in question. Thus, a Devlinite would be in a position where decriminalization of polygamy should follow from his own principled constraints.

III.3. PLT Principles

III.3.1. Separation of law and morals

If I am correct, that neither Hart nor Devlin can CMT-justify criminal anti-polygamy laws,\textsuperscript{218} can we find a lone set of PLT principles to sustain the enforcement of monogamy? To begin to frame an answer, we require a more precise statement of what we mean by a Hartian positivist legal theory. The beginnings of such a position laid out in the previous chapter with regards to adjudication remains much too sketchy for our purposes here; greater conceptual detail is required for fuller examination of notions of obligation. Only then can we evaluate the theory’s usefulness in determining legal obligations to obey or enforce such laws.

Now, the term ‘positivism,’ like that of ‘polygamy,’ is encumbered with an unhelpful array of meanings and a veritable plethora of doctrines—not together all conceptually consistent ones, either. Ota Weinberger observes that “It is altogether questionable whether there even exists a class of characteristics common to all positivist theories. There probably exists among these various theories, more of a ‘family resemblance’ in the

\textsuperscript{217} Demonstration that this proposition in fact follows from the quote would require an excursus on Devlin's conception of the 'reasonable man.' There is no pressing need to engage in such an elaborate project here; it suffices to note that the disclaimer clause is an extremely weak one. (Cf. Stephen's 'reasonable people' in the quotation in our text at footnote 215, supra, on adultery.) Thus, his reasonable man need not condone the activity as long as dispassionate analysis reveals that others might right-mindedly evaluate the conduct differently.

\textsuperscript{218} I do not mean to imply that no consequentialist account can therefore be given for monogamy; only that neither Hart nor Devlin have succeeded. But that a variety of such accounts might be generated (e.g. utilizing Devlin's claim that monogamy is, or should be regarded as being, 'good in itself') can alone supply little solace here. Indeed, such variety is a weakness, not a strength, of consequential theorizing. For if such accounts are imaginable, a great variety could also be advanced to support polygamy. What is needed is an agreed metatheoretical or second-order normative account, not currently extant, for choosing between these possible first-order normative accounts; otherwise the debate can only degenerate into intuition swapping.
sense of Ludwig Wittgenstein. In the first instance, of course, the emphasized reference is to legal positivism; and not to the early 19th century philosophical or social positivism of Auguste Comte and his disciples, nor the early 20th century logical positivism of the Vienna Circle, albeit there exists some modern overlap—the coincident use of the term not being wholly unconnected. But even legal positivism, as a label or term of art, is not without significant variation in its characterization. At a conference sponsored by the Rockefeller Foundation at Bellagio, Italy in 1960, no fewer than eight major alternative descriptions were offered by participants (and some of these categories were themselves composed of multiple alternative sub-themes), ranging from the simple unification of various anti-natural law positions to a formal theory positing legislative ethical relativism.

In an article predating this conference, H.L.A. Hart (one of the five senior participants at Bellagio) set forth five meanings or doctrines concerning positivism “bandied about in contemporary jurisprudence,” only three of which he ascribed to the utilitarian tradition in jurisprudence (viz. the analytical jurisprudence established by Jeremy Bentham [1748-1832] and his disciple John Austin [1790-1859]), that camp in which Hart places himself. Taking the more important themes from these two sources, the following condensed doctrinal list can be constructed:

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220 See e.g. the several connections suggested by W. Friedmann in his treatise, LEGAL THEORY 253-255 (5th ed. 1967). But cf. the more detailed historical review of the different meanings given legal positivism in K. Olivecrona, LAW AS FACT 50-62 (2nd ed. 1971), where it is also denied that ‘Rechtspositivismus’—properly understood—has any connection with philosophical positivism (at 59). He also develops there an interesting division within legal positivism between idealistic and naturalistic varieties. In brief, the former school represents late 19th/early 20th century German thought which attributed to law the element of bindingness or obligatory force in the traditional [i.e. moral] sense as a formal property. The latter variety is representative of Benthamite/Austrian [social] factual explanations of law that reduce any binding force to “mere compulsion” (at 39-41). See text and note at footnote 223, infra.


222 Positivism and the Separation of Law and Morals, 71 HARVARD LAW REVIEW 593, 601, n.25 (1958); reprinted in H.L.A. Hart, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 57, n.25 (1983) ['hereafter cited as Separation with page references to reprint only']. This five-point list reappears in the notes of Hart’s CONCEPT OF LAW [hereafter cited as CL], at 253.
III.3.1 SEPARATION OF LAW AND MORALS

1. Laws are commands of human beings backed by sanctions.

2. There is no necessary connection between law and morals.

3. Conceptual or analytical study of law is
   a. possible and worthwhile; and
   b. different from historical or sociological analyses.

4. A legal system is a closed logical system, officials of which solely utilize deductive reasoning (often labelled ‘formalism,’ ‘legalism,’ or ‘mechanical jurisprudence’).

5. Moral judgments cannot be established or defended (a species of philosophical noncognitivism).


Without taking the time to analyze this list doctrine by doctrine, let me stipulate that the core tradition to which I mean to appeal when invoking the term positivism is that subset of tenets firmly held and shared amongst those writers most central to the development of modern legal positivism in Anglo-American jurisdictions: by name I mean to include Bentham, Austin, Hans Kelsen, and Hart; by tenets shared I mean to include only (a) there is a strict separation of law and morals (i.e. there exists no conceptual or necessary connection between what the law is and what the law on some critical account ought to be), and (b) legal concepts are amenable to analytical study.

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A detailed analysis of doctrines (1)-(5) is provided in W.J. Uren, *Criteria of Legal Positivism*, 55 Archiv für Rechts- und Sozialphilosophie 183 (1969) concluding that tenets (1) & (2) constitute the “generally understood” or “typical theses” for a legal positivist position (at 227-228). For argument that tenets (4) & (6) have been attributed to, but do not actually represent doctrines of, classical or contemporary conceptions of legal positivism, see T. Broden, Jr., *The Straw Man of Legal Positivism*, 34 Notre Dame Lawyer 530 (1958/59); and W.L. Morison, *Some Myth About Positivism*, 68 Yale Law Journal 212 (1958). But cf. the claim that doctrine (6) may appropriately be ascribed to an idealistic positivist position once predominant in Germany, though not attaching to the naturalistic Anglo-American position: K. Olivecrona, footnote 220, supra, at 40. If Olivecrona is correct, Hart’s harsh criticism and rejection of Gustav Radbruch and his post-war works repudiating positivism for a natural law position are quite unfair, with Hart being the one demonstrating “something more disturbing than naivety” [Separation, at 72-78]. Also see Lon L. Fuller’s defense of Radbruch in his essay, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harvard Law Review 630, 655-657 (1958).
III.3.1 SEPARATION OF LAW AND MORALS

Beyond this trim set there is little agreement. 224

Even as regards this short list, argument might be advanced that the adhering group is over-represented, though in light of the interpretation developed below for the separation tenet, it remains fair to keep our list intact.226 Neither will I take the time and space here to dicker over the incorporation of a social-fact thesis within the latter tenet.227 But the former proposition, that there exists a strict separation between law and morals, bears investigating: just what does this separation thesis entail? To begin, let's examine what relationships this thesis is taken not to deny.

224 Kelsen, for example, is sometimes interpreted <correctly I think —see the essay Law and Morality in his Essays in Legal and Moral Philosophy 83 (O. Weinberger ed.; P. Heath trans. 1972)> as utilizing doctrine (5) [noncognitivism] from our original list, which doctrine Bentham and Austin would deny as they hold (in modern parlance) cognitivist accounts of the right and the good; while Hart rejects the imperative or will theory of law [a variation on doctrine (1)] though it is a central feature in the jurisprudence of Bentham & Austin, and [at least on most accounts] Kelsen.

225 For argument that Bentham might properly be dropped from this group of adherents to these tenets, see G.J. Postema, Bentham and the Common Law Tradition (1986): “the evidence is overwhelming that, despite [Hobbes' and Bentham's] insistence that the criteria for identification of laws be purged of all moral or evaluative conditions, they never sought to defend an account of the nature of law by appeal solely to morally neutral social facts, or a priori conceptual or linguistic analysis” [at 328; original emphasis]. Whatever the merits of Postema’s case, it is not at all clear that the evidence is so overwhelming as to rule out alternative accounts. See following note on Austin.

226 A case similar to Postema’s for dropping Bentham from our list might likewise be advanced on Austin’s behalf, though the evidence is once again less than overwhelming:

I mean by ‘the science of ethics’... the science of law and morality as they respectively must be if they conform to this measure or test. That department of the science of ethics, which is concerned especially with positive law as it ought to be, is styled the science of legislation.... Now, though the science of legislation (or of positive law as it ought to be) is not the science of jurisprudence (or of positive law as it is), still the sciences are connected by numerous and indissoluble ties.

J. Austin, 1 Lectures on Jurisprudence 85 (R. Campbell ed., 4th ed 1879; original emphasis). For development of just such an organicist reading of Austin, see R.N. Moles, Definition & Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition (1987) [esp. chapters 1 and 2], where it is argued “The separation [of law and morals] is solely for intellectual purposes to allow the orderly assimilation of information. For Austin, ‘law’, ‘morality’ and ‘ethics’ were not separate ‘things’, but separate perspectives on the same thing, that is ‘human activity’” (at 15). Nonetheless, in both cases the problematic nature of identifying adherence correctly turns on a fuller account of the tenet in question. As developed infra, coherence is better sustained when both men are taken as ‘adherents’ of separation than not.

227 But see the critique offered in M. Krygier, The Concept of Law and Social Theory, 2 Oxford Journal of Legal Studies 155 (1982). Fuller analysis of this doctrine will also be taken up in the next chapter.
First, conceptual separation should not be taken to deny that some overlap in fact exists between the spheres of law and morals. Physical assault resulting in death, for example, can be a case for moral condemnation as well as legal punishment. Likewise, honoring one’s promises is often prescriptively covered both by legal and moral norms. Indeed, this overlap can be explained in part by the necessarily shared vocabulary involved: “talk of rights and duties, obligation and responsibility, justice and justification” pervade both spheres. But such coincidence does not of itself necessarily equate or conceptually link the purposes and contents of these spheres’ respective rules. There can just as surely also exist cases appropriate to one (say, the legal rule concerning which side of the road automobiles are to travel, or the moral norm covering a sibling’s promise to share candy at the theatre) which do not coincide with a concern in the other sphere.

Second, and along a similar line, the thesis does not deny the existence of contingent historical connections, connections which are plainly demonstrable, both that the development of a society’s law has been influenced by a society’s morals, and that a society’s morals have been influenced by that society’s law. Examples which come most readily to mind include gradations of punishment being linked to moral concepts of responsibility within the criminal law (morals influencing legal developments) and evolving moral attitudes towards race-based and gender-based discrimination (law influencing moral development). A variation on this second point not to be overlooked is that the thesis should not be taken to deny a practical implementation necessity. That is, that the law ‘necessarily’ must impose and/or utilize some set of moral rules or framework (e.g. a Millian liberal view of societal ordering) to fulfill its function as a

228 D. Lyons, ETHICS AND THE RULE OF LAW 68 (1984). While Hart would concede that such vocabulary is in fact shared, he might well balk at the term “necessarily” here. Though much of his CL talk is either ambiguous or seems clearly to position notions of moral and legal obligation as species of a single genus — a conception of obligation shared by Bentham and J.S. Mill, his own pre- and post-CL work; see, his Legal and Moral Obligation, in A.I. Melden (Ed.), ESSAYS IN MORAL PHILOSOPHY 82 (1958) [hereafter cited as LMO], and ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY (1982) [hereafter cited as EB], has been devoted to explicating and defending an account conceptually distinguishing the one form of obligation from the other. See, e.g. EB, at 161 & 267. Yet, even there the argument is importantly equivocal for he once again, as in CL, introduces the moral operation of promising as a positive example in his analysis [EB, at 255]. Cf. text and note at footnote 242, infra.

229 Various contingent connections are readily conceded by Hart in Separation, at 54; LLM, at 1-2; and in CL, at 199-200.
III.3.1 SEPARATION OF LAW AND MORALS

Such a concession need not be embarrassing to the positivist proponent, for this sort of ‘necessity’ ought not be confused with the conceptual or logical necessity embedded in the Hartian separation claim. Nonetheless, some caution must be observed lest these various concessions veil a substantive point:

Strictly speaking, of course, the assertion that “law and morality influence each other” presupposes the positivist view that there are two, logically distinct things to be so related. The causal thesis, then, ... which positivists can assert without begging the question, is that positive law stands in this relation to morality.231

Third, the doctrine is not to be understood to support the proposition that the law ‘as it is’ is above moral criticism. Indeed, positivist proponents of the separation thesis indicate that a distinct advantage of their tenet is that it insures evaluative separation of the questions, ‘Is this law?’ and ‘Ought I to obey?’; questions which may be conflated within an account which conceptually links law to morals.232 Although this last claim of superiority is a dubious one for even a naturalistic position,233 the initial point that our positivists seek to preserve the power in any moral critique of law is both sound and fair.

So much for what the doctrine should not be taken to mean. What is asserted by those who hold the separation thesis are “two simple things:"

230EB, at 161. Also see J. Raz, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979; 1983) for a comparable, if slightly different, claim: If true, that “There is a necessary connection between law and popular morality (i.e. the morality endorsed and practised by the population)” is fully compatible with positivism (at 39).


232Hart makes this claim explicitly in CL, at 203-207; Separation, at 72-78; and LLM, at 3-4. See also N. MacCormick, H.L.A. HART 149-162 (1981). Kelsen likewise urged this analysis in several works. See e.g. his PURE THEORY OF LAW 66-69 [M. Knight trans. 1967] [hereafter cited as Pure TL]; and GENERAL THEORY OF LAW AND STATE 392-395 [A. Wedberg trans. 1949] [hereafter cited as GTLS].

233See the analyses proffered in D. Beyleveld and R. Brownsword, The Practical Difference Between Natural-Law Theory and Legal Positivism, 5 OXFORD JOURNAL OF LEGAL STUDIES 1 (1985) [where it is argued that any claim of practical advantage cannot be made out without begging central questions], and P. Soper, Choosing a Legal Theory on Moral Grounds, 4 SOCIAL PHILOSOPHY & POLICY 31 (1986) [where it is persuasively argued that no claim of practical advantage can be made out either for positivism or natural law accounts].
first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law [Separation, at 55].

Examples often cited to support the ordinary language conception embedded in the first point include the system of Nazi race laws instituted in Germany during the 1930s and the contemporary apartheid regime in South Africa: such laws may indeed be iniquitous, but plainly, it is argued, they are still laws.

We might look closer to home for an example of the second, converse claim. Few would disagree that one morally ought to effect a simple rescue, e.g. wading into shallow water to save a drowning child even if doing so should muddy your new gabardine slacks or ruin your dearly purchased Gucci suedes, but there exists no such general duty to rescue at common law\textsuperscript{234} and even statutory authority is rare. Thus, while “neither Bentham nor his followers deny that by explicit legal provisions moral principles might be brought into a legal system” [Separation, at 54], the determination that those moral principles are as a matter of fact reflective of society’s mores does not foreclose further questioning whether their inclusion in that society’s legal system is itself justified. In short, the core claim of the separation thesis is that there is no necessary or conceptual connection between a rule’s existence as law, per some positivistic account of formal validity (e.g. on a morals-neutral rule of recognition), and that rule’s content.

With this characterization of a Hartian PLT, let’s return to the question at hand: provided a set of PLT principles, what can we say about the enforcement of anti-polygamy statutes? Let me attempt to refine this question for our analysis.

III.3.2. Validity & obligation

Our original enquiry concerned discovering or generating an account which would ground the legal enforcement of monogamy. Section 2 of this chapter was devoted to demonstrating that there have been advanced no issue-specific moral grounds for so doing, and that there arguably are even some moral grounds for resisting such enforcement. Our concern here is to discover or generate an account of PLT legal grounds, as distinct from CMT moral grounds, which would support the enforcement of bigamy statutes in the absence of moral arguments specially grounding such enforcement.

\textsuperscript{234}For detailed argument that the law should come to recognize such a limited positive duty towards others, see J. Feinberg, HARM TO OTHERS 126-186 (1984).
More narrowly, and irrespective of a citizen's general moral or legal obligation to obey the law, I wish to consider whether an official such as a judge, faced with a morally ill-founded statute, has a definable legal obligation to recognize and administer that rule and to impose that rule's sanction against a polygamist.

What does it mean to say that anyone has a legal obligation? The positivist traditions to which we are here referring implicitly accept or explicitly assert the notion, usually with little or no argument, that legal validity entails legal obligation. It is not a simple semantic entailment—an entailment which might be reflective of some positivistic theories of law—such that one's having a legal obligation just means there exists a valid law. Instead, a law's [formal] validity is understood to be the necessary and sufficient condition for grounding or establishing legal obligation: one has a legal duty to conform to all and only those rules or directives which themselves conform to the appropriate rule of recognition. This proposition appears to be widely accepted, and is represented even amongst those modern writers who deny that legal validity entails a general [prima facie] moral obligation to obey the law. At this point then we might explicitly add a tenet to our short Hartian PLT list which constitutes a variation on tenet (6) noted above, viz. (6') legal validity entails legal obligation.

But for at least one of our named positivists, this is not quite sufficient for analyzing the concept of obligation in general or the concept of legal obligation in particular. Although he often helps himself to tenet (6'), Hart also provides independent arguments for our understanding the notion of obligation. And this independent analysis does not,

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255Cf. a legal voluntarist command theory of law stipulating that to say a given rule or directive is law just means the rule or directive is the sanction-backed command of the sovereign. For a recent review of Bentham's and Austin's legal theory with particular reference to notions of legal obligation, see H.L. Pohlman, JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE (1986), notably ch.3 on Law, Sovereignty, and Legal Obligations at 48-75.

it should be observed, support the entailment tenet (6') elsewhere proffered. 237

Section 2 of chapter V in Hart’s seminal work, The Concept of Law, 238 comprises nine pages devoted to ‘The Idea of Obligation’ within which he distinguishes ‘being obliged’ from ‘having an obligation.’ It will be argued that applying these distinctions as Hart there draws them in order to create conceptual space for distinguishing, for example, ‘being morally obliged’ from ‘having a moral obligation,’ (1) requires us further to delineate ‘being legally obliged’ from ‘having a legal obligation’ [a move Hart never in fact makes]; and more, that (2) these distinctions when applied to our PLT conduce not to the formation of legal obligations but only in one’s being legally obliged. The demonstration can then be advanced that officials such as judges do not necessarily have any legal obligation to enforce a valid law simpliciter, though they can be shown to be legally obliged to do so. That is,

(7) legal validity entails being legally obliged,

but more is required to sustain a finding of legal obligation. Thus, it can be shown that the legal enforcement of monogamy is not legally binding within our positivist legal theory, however prudent enforcement otherwise might be. Utilizing Hart’s later language to rephrase our claim: Being legally obliged can not provide a peremptory or content-independent reason either for legal action or legal evaluation. 239

When is one said to be obliged but not obligated? Hart puts the familiar example of a gunman demanding money from an innocent victim. That situation “is certainly one” wherein the victim is ‘obliged.’ “It is, however, equally certain that we should misdescribe the situation if we said ... [the victim] ‘had an obligation’ or a ‘duty’ to hand

237The discussion following is indebted to the analyses provided in R. Hill, Legal Validity and Legal Obligation, 80 Yale Law Journal 47 (1970) (who fully appreciates the foundational nature of the arguments offered contra Hart); and N. MacCormick, Legal Obligation and the Imperative Fallacy, in A.W.B. Simpson (Ed.), Oxford Essays in Jurisprudence 100 (1973) (who surprisingly misses the critical power vis-à-vis Hart of the arguments offered contra Kelsen). Also see R. Beehler, The Concept of Law and the Obligation to Obey, 23 American Journal of Jurisprudence 120 (1978); and his sequel, Societies, Populations, and Law, 36 University of Toronto Law Journal 1 (1986) for discussion of a citizenry’s problematic legal obligation to obey given a Hartian conception of obligation.

238CL, at 79-88.

239See EB, at 18 and 252-255.
over the money.\textsuperscript{240} The distinguishing characteristic of ‘being obliged’ we are told is psychological: “the statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done” \textsuperscript{[CL, at 81]. That the victim is said to be obliged is to say that the motivation for handing over his wallet to the gunman is his rational belief that comparative greater harm will ensue disobedience.

On the other hand, an obligation is said to arise from the application of a social rule. But not just any rule will suffice. Rules of grammar, for example, are social rules which apply to ordinary speech, but it “would be misleading and not merely stylistically odd” to say one is under an obligation not to say “you was” \textsuperscript{[CL, at 84]. The primary characteristic attributed by Hart to rules of obligation is that such rules “are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great” \textsuperscript{[CL, at 84]. He goes on to explain, “What is important is that the insistence on importance or \textit{seriousness} of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations” \textsuperscript{[original emphasis].

Two additional factors are then appended to distinguish rules of obligation from other rules and from situations which only oblige: first, such rules “are believed to be necessary to the maintenance of social life or some highly prized feature of it”; and second, the conduct called for frequently conflicts with the obligor’s self-interest \textsuperscript{[CL, at 85]. Left out of this account, though arguably implicit, is a factor put by Hart in a previous essay on this topic. In his \textit{Legal and Moral Obligation},\textsuperscript{241} he notes that these minimum or primary and secondary characteristics attach only to those rules which are in fact habitually or generally obeyed \textsuperscript{[LMO, at 89-90]. For it is the empirically grounded social \textit{fact} of rule patterned behavior which undergirds the existence of a social \textit{practice} to which Hart’s characteristics can attach: “a statement of fact and not an ‘assumption of validity’ is presupposed in any statement that someone has a legal [or

\textsuperscript{240}CL, at 80. \textit{Cf.} Kelsen’s frequent reference to the problem of distinguishing the income tax official from the gangster . . . the state from a gang of robbers.

\textsuperscript{241}First referenced in footnote 228, \textit{supra}. 
moral__ obligation." In brief, Hart advances a social fact thesis of obligation, not just of law.

Now, the ordinary language analysis offered by Hart is problematic; the common usage to which he refers and upon which he relies is much fuzzier than he allows. Consider, for example, a sign posted in all public transport vehicles in Canberra, Australia: “For safety reasons drivers are not obliged to lift strollers or luggage on or off Action buses” [emphasis added], reflecting common usage as against Hart’s insistence on the expected appropriate use of ‘obligated’ here. Neither is such usage idiosyncratic of bureaucratic signmakers in a once-British colony. English-speaking academics have used the two terms as synonyms for many years: “Philosophers have sometimes asked a question ... about promises: ‘why are you (ever) obligated to keep (any of) your promises (whatsoever); why do promises oblige?’.” Consequently, common nonconforming usage can disturb the settled-ness of the intuitions to which Hart attempts to appeal. For even were one to agree with Hart that ‘being obliged’ is primarily linked to coercion and psychological motivation, and ‘having an obligation’ is primarily linked to social practice, one could still recognize that both notions are conceptually, and not just stylistically, connected in a response such as “Much obliged,” which I might utter subsequent to your doing me a good turn. That is, the strong social practice of reciprocating favors itself constitutes ‘coercion’ to reciprocate which renders the response not odd but perfectly

242 LMO, at 91. Cf. CL, at 143 on the social practice of promise-keeping and the possibility of this obligation’s withering away for support of the interpolation here.

243 This important point has often been overlooked by commentators who confuse Hart’s analysis of obligation with anthropological fieldwork, thereby interpreting his thesis as simply a descriptive theory which provides no direct account concerning justification or motivation for conforming to a rule said to be ‘binding.’ See e.g. the interpretations proffered in B. Hoffmaster, Professor Hart on Legal Obligation, 11 GEORGIA LAW REVIEW 1303 (1977); and M. Martin, THE LEGAL PHILOSOPHY OF H.L.A. HART: A CRITICAL APPRAISAL (1987). But the character of bindingness, explicated by means of an analysis of obligation, is to be understood—as Hart himself, alongside critics such as Dworkin, understands the project—in normative terms, not simple description conditions.

244 Drawn from Hanna Pitkin, Obligation and Consent —II, 60 AMERICAN POLITICAL SCIENCE REVIEW 39, 47 (1966). Various examples of this usage recur throughout her essay—leaving little doubt that these terms are to be understood synonymously; while similar specimens regularly appear in the writings of political scientists, philosophers, and lawyers from both sides of the Atlantic both prior and subsequent to Hart’s proffered analyses.
understandable. But we need not pursue these points here. For purposes of our critique we can follow the sound, core intuitions to which Hart appeals for differentiating these two terms. Those principal claims are summarized in the figure III-3, below.

What then can we say concerning the distinction between being legally obliged and having a legal obligation? One approach might be to utilize Hart’s distinction between external and internal viewpoints. The language of the former, being obliged, would then be captured by a Hartian external point of view: one is in the habit of obeying the law from self-interest, fear of sanction, or even from mere social imitation. Conversely, the language of the latter, being obligated, would be captured by a Hartian internal point of view: one recognizes the social practice institutionalized in law as an instantiation of a rule, which rule is taken to provide or have grounds in good reason for guiding behavior.

This sort of talk is even suggested by Hart in several passages, and one can be easily lured into positing a similar distinction between ‘being morally obliged’ and ‘having a moral obligation’: the former captures an individual’s coming under the social coercion of a community’s positive morality (e.g. group pressure to observe unshared moral rules stipulating strict gender roles); while the latter captures an individual’s moral stance per some [shared] critical morality. But this possible differentiation doesn’t on its face actually capture the distinction required, however well it might capture the psychology of particular citizens. For just as surely Hart recognizes that one can have a [legal or moral] obligation irrespective of one’s acknowledgement of that obligation: consider the well-worn principle, ignorantia juris non excusat. In addition, that one knows of and even accepts a pattern of behavior as obligatory is neither a necessary nor sufficient condition for actually having an obligation: consider on the one hand that a parent is understood to have [an] obligation(s), both legal and moral in character, toward his child though he may neither know nor accept his actions in terms other than love; while on the other hand, an individual’s knowledge and acceptance of the perceived general social practice of attending the cinema at least once a month as obligatory does not entail an obligation to attend twelve film events per year. So it simply won’t do to draw a legal distinction using the psychological criterion properly attaching to only one of the two language types involved, scil. the psychology of being obliged.

Further, that an individual (e.g. an anarchist) might, per the coercion + psychological criteria of being obliged, reject the authority of the legal system justifiably to sanction

245 Cf. ‘being beholden’ to someone. Similar critical points are also to be found in A. White, RIGHTS (1984) [with particular reference to chapter 4, Obligation at 33-53]; and in J.C. Smith, LEGAL OBLIGATION 50-55 (1976).
III.3.2 VALIDITY & OBLIGATION

Being obliged/Being constrained:\textsuperscript{246}

1. external coercion +

2. psychological status of agent [focus on beliefs and motivations]

Being obligated/Being bound:

1. insistent general demand for conformity +

2. rule is deemed necessary to social life +

3. conforming conduct [typically] requires sacrifice

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\textbf{Figure III-3: Obligings & Obligations}

pre- or proscribed behavior yet obey from fear of threatened penalties for nonconformance, and therefore properly invoke the language of being obliged, does not

\textsuperscript{246}To avoid any confusion which might arise due to the use of these associated terms, it might be suggested that substitute expressions be employed to better focus on distinguishing factors. It is tempting to follow Bentham’s lead in such situations by coining new terms built up from appropriate Greek or Latin roots. We might then substitute ‘synechened’ or ‘cogeored’ for ‘obliged’; and ‘desined’ or ‘obstringored’ for ‘obligated’ [founded on their respective roots, denoting in the former case ‘being constrained by threat or use of force’; and in the latter case ‘being bound, tied round or encompassed’]. However, this seems too artificial an approach and will be resisted; more common English forms would likely better serve our purposes and cause less confusion than deploying affected constructions. Of course, using common English can but raise once again notions of fuzziness due to ordinary usage and thereby jeopardize the clarity of the substitutes. Thus, there seems little to be gained by employing variant terminology here. Should the reader nonetheless be suspicious that subsequent argument may turn on the fuzzy usage noted above, one can make the following substitutions and the argument will go through unchanged: for ‘being obliged’ read ‘being constrained’; for ‘being obligated’ read ‘being bound’, etc. These are reasonably good substitutes: they do capture the claims made by Hart and likewise track the distinctions buried in Kelsen’s subjective meaning/objective validity terminology. Still, it is not clear that these terms offer any real advance. They are suggestive of distinctions we wish to highlight, but like the original pair are also linked etymologically and in common usage which tends to blur or confuse their proper boundaries of reference.
without more settle the query as to whether obligation to obey co-exists.247 The differentiation required must be found in the presence or absence of the necessary and sufficient criteria of obligation previously outlined by Hart.248 Thus, to say that one is legally obliged is to say that one is compelled to obey or face the sanction for disobedience to the law in the absence of some or all necessary criteria establishing legal obligation; and that one is legally obligated is to say that, irrespective of one’s beliefs and motives vis-à-vis the law, all criteria of obligation have been satisfied.

What then can we say concerning the social practice of monogamy and the enforcement of anti-polygamy statutes at law? Do the rules create legal obligations, or only result in one’s being legally obliged? Since this question is one of “fact and not an ‘assumption of validity’,”249 we should now have recourse to any empirical arguments put forward regarding the perceived [i.e. social] moral status of polygamy to determine an answer here. Without in fact iterating the arguments already raised, let me more simply put the point that the failed consequentialist moral theoretic, along with the plausible counter-CMT, arguments illustrated in section 2 of this chapter constitute evidence for the absence of the first two of Hart’s necessary conditions establishing legal obligation: (1*)

247 Cf. the position of Kelsen’s communist who “may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which he considers as the means of ruthless exploitation.” H. Kelsen, Professor Stone and the Pure Theory of Law, 11 STANFORD LAW REVIEW 1128, 1144 (1965).

248 For a critique of these criteria as themselves being neither necessary nor sufficient to create obligations, see R. Bernstein, Professor Hart on Rules of Obligation, 73 MIND 565 (1964). But this critique errs, I think, in ignoring Hart’s social fact thesis concerning obligation, and thus lacks a good deal of critical power.

249 See footnote 242 and accompanying text, supra. Without explanation, Hart curiously seems to assert a contradictory position in a later essay:

To say that a man has a legal obligation ... is rather to assess his acting or not acting in that way from the point of view adopted by at least the Courts of the legal system who accept the law as a standard for the guidance and evaluation, of conduct, determining what is permissible by way of demands and pressure for conformity. Such statements are not historical or factual statements describing the past, present or future actions, attitudes or beliefs of either subjects or officials of the legal system, but statements of what individuals legally must or must not do.... [EB, at 144].

Yet, it should be observed that these different claims can be read consistently if one stresses that the social fact is a “presupposition” of the statement while the assessment simpliciter is a normative one. That this reading is to be preferred is evidenced in Hart’s continued reference to social facts, e.g. the fact of general judicial acceptance of a system’s rule of recognition, in other portions of the same work. More on this point, infra.
at present there exists only problematic evidence that 'the general demand for conformity is insistent' and some good evidence that monogamy is as well described by Hartian convergence behavior: i.e. a pattern of actions 'as a rule,' rather than conformity 'to a rule'; and (2*) even more problematic is the modern evidence for monogamy being 'believed necessary to the maintenance of social life.' Thus, at least from the citizen's viewpoint, the legal institutionalization of monogamy seemingly can give rise only to being legally obliged to marry, if one chooses to do so at all of course, no more than one individual of the opposite sex—at least covering any single temporal slice of life.

What now of the position of the judge? Is he legally obligated, or just legally obliged, to recognize and enforce a bigamy statute? The answer would appear to depend upon which of the two disparate accounts of obligation put forward by Hart one chooses to resolve the issue. On the one hand, following Hart's account of the two minimum necessary and sufficient conditions undergirding the existence of a legal system which obligates per tenet (6'), as long as the rule of monogamy is generally obeyed—for whatever reasons advanced, be it internally or externally motivated, the only condition which needs be satisfied is that officials of the system must effectively accept the secondary rules (i.e. the legal system's rules of recognition, change and adjudication) "as common public standards of official behaviour" [CL, at 113]. Thus, if our judge is one of a community of officials effectively accepting the secondary rules of the legal system, he is obligated, and not just obliged, to recognize and enforce every valid law, including anti-polygamy statutes, arising within the system. Such legal obligation would in fact arise in every instance and irrespective of the law's content.

On the other hand, following Hart's account of the general notion of obligation outlined in some detail above, there is no more reason to hold judges to have a legal obligation than citizens: if the latter are merely obliged, so are the former; the indices remain the same. Indeed, on a Kelsenian positivistic account, it might be argued that it is just the judges who are being legally obliged all along, since the essence of law is taken to be a directive addressed to judges to apply sanctions for non-conformance:

250 Points (1*) and (2*) corresponding to obligation factors 1 & 2 enumerated in figure III-3, supra. On both points, cf. the observations of an Australian clinical psychologist and social critic, R. Conway, in his LAND OF THE LONG WEEKEND (1978):

[F]ewer Australians now lead single lives than at any time since statistics have been recorded. Far from dying out, marriage in all forms from 'white weddings' to de facto 'shack-ups' has become almost a blind social compulsion. Unfortunately it is less likely to be a well-thought-out commitment. There is an all-pervading urge in our Australian society for some form of conjugal life, but less respect for life-long monogamy, whether as an ideal or as a useful domestic arrangement [at 35, emphasis supplied].
A criminal code might contain the sentence: Theft is punished by imprisonment. The meaning of this sentence is not, as the wording seems to indicate, a statement about an actual event; instead, the meaning is a norm: it is a command or an authorization [for judges], to punish theft by imprisonment. 251

And this is as it should be: the logic of legal obligation would otherwise yield the anomaly of a jurist’s legal obligation to enforce as a legal obligation a non-obligating statute. Now, this does not mean that some independent moral account can’t be proffered to differentiate officials from citizens; e.g. notions of social contract, promising (given oaths of service), or fair play may generate a general moral obligation for officials to follow and therefore enforce the law even when no such explicit account can be given for ordinary (i.e. non-naturalized) citizens. 252 But such is not an account of legal obligation per se.

Yet, the question’s resolution does not end here; it is not a simple matter of choice between two independent, alternative explanations: one pointing to legal obligation, the other to being legally obliged. This is because the criterion of ‘effective acceptance’ in the

251 Pure TL, at 7. See also GTLS, esp. at 29-49 & 123-136. Cf. A. Ross, ON LAW AND JUSTICE (1958) where it is argued that legal norms are primarily addressed to the courts, not citizens. If the rule contains no “directive to the courts it can be regarded only as a moral-ideological pronouncement without legal relevance. Conversely, if it is established that a provision does contain a directive to the courts, then there is no need to give the private individual any further instruction as to his conduct” (at 33). And here contrast Bentham’s ‘punitive’ law:

To say to the judge, Cause to be hanged whoever in due form of law is convicted of stealing, is, though not a direct, yet as intelligible a way of intimating to men in general that they must not steal, as to say to them directly, Do not steal: and one sees how much more likely to be efficacious. It should seem then, that, wherever a simply imperative law is to have a punitive one appended to it, the former might be spared altogether: in which case ... there should be no occasion in the whole body of law for any other than punitive, or in other words than penal, laws.

AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION. ¶¶8b-9a in Concluding Note (1789) [J.H. Burns and H.L.A. Hart (Eds.), COLLECTED WORKS at 303 (1970)] (where he distinguishes a simple imperative law creating an offense from a punitive law commanding punishment, though by necessary implication the latter involves the former).

252 Similar diagnosis is made by Postema: “Hart ... fails to give us an account of how the facts of judicial practice actually generate genuine official duties. His account is seriously incomplete.” G.J. Postema, Coordination and Convention at the Foundations of Law, 11 JOURNAL OF LEGAL STUDIES 165, 171 (1982). But his subsequent reconstruction of Hart’s rule of recognition to overcome that failure [parts 4E & 5A, at 196-200] does not generate an account of legal obligation, either. Rather, notions of fair play with reference to coordination conventions are introduced to yield the desired results — notions yielding judicial duties understood to be “species of moral duty” (at 199).
first account of legal obligation mentioned above is ultimately parasitic on the notion of obligation given in the second.

The notion of ‘effective acceptance’ we are told means that officials take-up an internal point of view [CL, at 114]. But just what comprises that internal perspective? As Hart himself puts the query, “What then is it for judges to accept or endorse such rules of recognition and so derivatively to accept or endorse the laws which such rules require them to apply?” [EB, at 156]. Unfortunately, Hart provides little detailed discussion in CL, and often equivocates, or at least fails to provide more perspicuous terminology, when contrasting external with internal perspectives and their links to [respective?] external and internal statements. This pattern of ambiguity has led several of Hart’s critics\textsuperscript{253} to claim that his reliance on an internal viewpoint to defeat a charge of simple conventionalism is problematic. Akin to the collapse due his talk of public nuisance previously canvassed,\textsuperscript{254} there is here on the one hand an apparent collapse of obligation into the bare existence of an obliging [conventional] sanction – a collapse which defeats his rejection of Benthamite/Austinian command+sanction theories of law;\textsuperscript{255} or on the other hand an obligation which is explicable only in terms of a minimal critical morality shared by officials. And this latter route either reduces to an official conventionalism,\textsuperscript{256}

\footnotesize{\textsuperscript{253}See e.g. the writings of Bernstein, Grey, Krygier, Noonan, and Rostow referenced in footnotes 206, 227, and 248, supra.}

\footnotesize{\textsuperscript{254}See footnote 206, supra, and accompanying text.}

\footnotesize{\textsuperscript{255}This criticism is levelled in J.C. Smith, \textit{LEGAL OBLIGATION} 32-33 (1976). \textit{See also} N. Lacey, \textit{Obligations, Sanctions, and Obedience}, in N. MacCormick and P. Birks (Eds.), \textit{THE LEGAL MIND: ESSAYS FOR TONY HONORE} 219 (1986), where the observation is made that Hart’s account “appears in itself to be a modified form of sanction theory” (at 221).}

\footnotesize{\textsuperscript{256}As noted by Richard Tur, “Since ‘acceptance’, for Hart, involves a critical, hostile attitude, his concept of law comes very close to being the morality of the legal officials of the society or even the morality of the ‘ruling class’.” R. Tur, \textit{Paternalism and the Criminal Law}, \textit{2 JOURNAL OF APPLIED PHILOSOPHY} 173, 185 (1985).}
which itself collapses into a Kelsenian will-sansction theory, or extends to embrace an account of what the law ought to be—an extension which defeats his rejection of natural law-based theories.

Hart attempts to counter these concerns by providing a fuller account of an internal point of view in two essays, *Legal Duty and Obligation* and *Commands and Authoritative Reasons*. Following in part distinctions first elaborated by Joseph Raz, Hart distinguishes external statements *about* law or a legal system (e.g. a historical statement “that Congress enacted a particular statute”: EB, at 145) and internal statements *of* law from within a legal system (e.g. a normative statement of legal duty). But further, and most importantly, internal statements are themselves subdivided into two types or categories: internal *committed* statements, and internal *detached* statements. The latter are statements “made from the point of view of one who accepts” the system of rules as conduct-guiding but who personally rejects, or at least does not share acceptance of, that system. Two illustrations here are “the Christian who says to his Jewish friend about to eat a dish of pork ‘You ought to not eat that’,” and

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257 A collapse encouraged by Hart’s discussion in EB, at 159-160 & 256-258, where he invokes a non-cognitive theory of duty and notions of normative command. Of some interest is that just this variety of collapse is attributed to all bourgeois legal philosophy in E.B. Pashukanis, *Law and Marxism: A General Theory* (1929; B. Einhorn trans.; C. Arthur ed. 1978):

If one is absolutely consistent, one must say—as Binder does in his *Legal Norm and Legal Obligation*—that a legal obligation (*rechtliche Verpflichtung*) has nothing in common with ‘duty’ (*Pflicht*), but exists juridically only as ‘liability’ (*Haftung*); ‘to be liable’ (*verpflichtet*) means nothing but “to answer with one’s property (and in criminal law with one’s person as well); the liability persists in, and consists of, the trial and the enforcement of its outcome” [footnote to Binder’s 1912 edition] (at 163) .... Legal obligation can find no independent validity ... (at 165).

258 EB, at 127 & 245 (chapters VI & X). A part of the first essay appeared in Italian in 1966; the second essay is new material.

259 See e.g. the short essay *Legal Validity* from Raz’s collection cited in footnote 230, supra, at 146.

260 Although he once again never explicitly connects the terms, one is left to understand that external viewpoints yield external statements, while an internal point of view yields internal statements. It is not entirely clear how satisfactory these connections may be, but the point will not be pursued at present.

261 Assuming of course that that Christian does not follow the Torah’s dietary laws, as do some Christian groups.
the anarchist who speaks of legal duty. The former, committed, statements are those made by individuals "who themselves accept the relevant principles as guides to conduct and standards of evaluation" [EB, at 154]. Thus, for judges to make internal committed statements of legal obligations ... to take up an internal point of view, simply requires acceptance of the system’s rule of recognition [and, derivatively, all so identified rules] as an “authoritative legal reason” for evaluating his own, and others’, conduct [EB, at 160]. In slightly different phraseology, the accepted rules provide reasons which are “peremptory or deliberation-excluding and content-independent” [EB, at 255].

For all that, the question of obligation is not yet settled. As Hart recognizes, “the notion of the acceptance of some consideration as an authoritative legal reason” may not stand alone [EB, at 265]. One might require, as Raz suggests, that one look to the personal reasons or ulterior motivations of such acceptance to attempt deriving a necessary, if weak, connection between law and reasons for action, which in central-case technique terms would be moral reasons. Nonetheless, Hart remains adamant that such a move is not needful. Indeed, he has never tired of insisting that individuals within any given system may commit themselves or obey for many varied reasons, or for no reason whatsoever. Thus, he argues, it must be analytically unhelpful to ask whether judges believe the law is morally legitimate or justified because it will always be the case that some will and some won’t. In similar fashion, Lacey argues

all that really matters ... is the fact that certain individuals have taken a decision or adopted an attitude which puts them in a special relationship with the rules of a particular legal order: this means that those rules generate reasons for action for them, independently of their moral status or the threat of sanction, by the very reason of their pedigree plus the agent’s adoptive attitude.

But these moves miss the point by one remove. The appropriate query is not whether a judge believes the legal system is morally legitimate or justified all things considered. The notion of acceptance puts into question the reason(s) for initial commitment, i.e. whether and how that acceptance is justified so that reasons for action can be

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262 For development of central or ‘focal’ cases as the appropriate paradigm for understanding the concept of law, see J. Finnis, NATURAL LAW AND NATURAL RIGHTS 11-18 (1980). But note that this emphasis is not wholly incompatible with a positivist’s initial position. Hart himself, recall, emphasizes the role of those who take up an internal point of view rather than Holmes’ ‘bad man’ viewpoint to criticize the notion of habitual obedience in CL. This tact is further elaborated by N. MacCormick in his LEGAL REASONING AND LEGAL THEORY (1978).

263 N. Lacey, footnote 255, supra, at 226.
generated.\footnote{264} And such acceptance from an internal point of view equates with that very viewpoint embedded in the concept of social practice which informs Hart’s general idea of obligation and which salvages his criteria there from a most simplistic moral conventionalism.\footnote{265} There, it is, in sum, a \textit{non-value-free} judgment that the social practice under consideration is worthy of approval ... that the rule is esteemed a proper critical standard for group behavior. Here, it is a non-value-free reason advanced to justify commitment to the system. Thus, not just any reason whatsoever will do.

Consider the position of a judge in South Africa. He might respond to the query regarding commitment: “Any legal order is better than chaos. Though I do not believe the system’s rules are clearly morally justified, any rules are better than no rules for the sake of all concerned; their overthrow can only lead to breakdown and bloodshed. I work, then, from the inside for reform rather than abolition.” This line of argument is justificatory in character and provides a moral reason for the judge’s commitment. It might be more or less sound ... it may or may not succeed all things considered, but it is the right sort of reason he advances. Conversely, we would rightly reject out-of-hand a response that ran: “I’m a judge because the position is one of high status and it pays well. As a white Afrikaaner, I give little thought to the general operation of the system and the effects of its laws, but I care deeply about my standard of living.” Such a response might be sociologically or psychologically explanatory, but it is not morally

\footnote{264}{Thus what Lacey in particular seems to conflate is the basis for existence of legal obligation with internalist reasons to obey or use a system’s rules to construct a decision of the system. This conflation creates a severe problem for understanding reasons for action for official J to do or order φ to citizen P even if both J and P take an adoptive attitude. A line by Soper captures the judge’s position well: “The fundamental problem for the official is not why he should obey the law but why he should enforce it.” P. Soper, \textit{A THEORY OF LAW} 41 (1984).}

\footnote{265}{\textit{Cf.} here the notion of simple conventionalism from the previous discussion of PCAs, at page 61, \textit{supra}, alongside Flathman’s observation that

A can properly be said to have guided B’s conduct by calling attention to a rule only if he thinks that there are good reasons for accepting the rule as a basis of conduct. B can claim to have been guided by the rule that A cited only if he (B) thinks there are good reasons for accepting the rule as a basis of conduct.}

justificatory and thus is not an internal viewpoint reason.  

It would be tempting, but an error, to endeavor getting around this more robust notion of acceptance by appealing to acceptance of rules in a game as an analogue, such as commitment to FIDE chess rules, which does not require moral commitment. Judging, after all, is not playing a game. In the latter, no one's life, liberty or property is necessarily on the line; in the former, one takes up a role wherein doing things with and/or to real persons and their goods constitutes the essence of one's decisions:

Unlike game players and club members, an official in a legal system must play by rules that apply to nonmembers and nonplayers. Those who have not consented or joined may nonetheless be punished, fined, deprived of goods, life, and liberty—all because the rules the judge agreed to play require these results. [And] the judge knows that these are the consequences of his decision to become a judge.

When one exercises practical authority over people, surely good reasons for accepting a system's rules as content-independent reasons for action must be, in central-case terms,

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266Cf. a similar query and some possible answers respecting lawyers put by Anthony Kronman:

My question does not concern the moral justifiability of what lawyers do, but the reasons a person might have for choosing the life of a practicing lawyer in the first place. What is it about the life of a lawyer that justifies the very large commitment which the decision to pursue it entails? ... The life of a tyrant, as Socrates observed, may be immensely attractive, but since it necessarily involves wrongdoing, one can never have a reason to choose it in preference to a life of moral rectitude. If the life of a lawyer were like a tyrant's—if it, too, inevitably entangled one in a web of wrongdoing—it would be difficult to see what could be said on its behalf.

A. Kronman, Living in the Law, 54 University of Chicago Law Review 835, 836-837 (1987) (footnotes omitted). The invocation of Socrates here and the note dropped to Plato's record in the Gorgias dialogue between Socrates and Polus seem a bit out of place: that one never has reason to choose being a tyrant, Socrates argues, results from the very unattractiveness of the miserable, unhappy state such a choice would entail for the chooser, and thus one should rather suffer wrong than do it. Still, the juxtaposition of lawyer/tyrant is a helpful one and as well suggests a similar judge/tyrant query for our text.

267Thus, Hart's averting to 'technically confined' speech acts of judges fails [EB, at 266]. Such talk is no kind of internally committed statement.

268P. Soper, footnote 264, supra, at 42. Though Soper there emphasizes the notion of fairness towards non-consenters, the problem is no less acute for judges deciding the fate of consenting members: Socrates' death sentence surely was not justified on the grounds of his acquiescence or commitment to Athenian procedural justice. In the Crito, for example, the arguments put in Socrates' mouth by Plato attempt deeper moral/political reasons for him to drink the hemlock rather than escape and go into exile.
moral reasons. That is, in any legal system there must be some core group of persons, including officials such as judges, who do in fact constitute central-case individuals, being those who accept/commit for moral reasons. All other types of commitments are parasitic upon this paradigm; without it the others could not subsist. This does not mean that a coercive order maintained only for the benefit of an egoistic and egotistic oligarchy could not exist. But on even Hartian terms that order would not [clearly] be a legal order, however temporally effective in shaping societal behavior.269 This result also coheres with, while differing only terminologically from, Kelsen's conclusion that such an order is a legal order but is not a normative order in that no objective bindingness [a factor in Kelsen's notion of 'validity'] can properly be ascribed: there is no Grundnorm to be posited by the juridical scientist.270

Thus, to modify slightly if importantly Raz's eventual claim, judges must believe, or at least pretend to believe, their commitment is justifiable, whatever else may be said of their beliefs attending the justifiability of the system all things considered, on moral grounds, for a legal system to obligate and not just oblige.271 But this necessary move with regards to commitment is not legitimately available to a Hartian PLT theorist, for it makes a legal concept, scil. legal obligation, turn on the explication of an underlying critical moral account of social practice, which is a conceptual connection denied by the strict separation tenet. No PLT can have it both ways. In short, we cannot get from legal validity to legal obligation within PLT as defined. If any theory is to succeed here, it must be one which is prepared to modify or eliminate the separation tenet to permit some necessary connection between a critical moral account of what the law ought to be and the law's actual contents.

Notice that this result can easily be generalized to obtain even when the law under

269 *Cf.* the analysis of Hart's CL position with regards to officials' internal viewpoints by Michael Martin in his recent critique: after noting that at least officials of a system must take up an internal point of view, he concludes, "On Hart's view, then, if officials are simply following the rules, there would be no legal system." THE LEGAL PHILOSOPHY OF H.L.A. HART: A CRITICAL APPRAISAL 18 (1987) [original emphasis].

270 *See* H. Kelsen, footnote 247, *supra*, at 1144-1146. *See also* the passages therein footnoted from his REINE RECHTSLEHRE (2nd ed. 1960); GENERAL THEORY OF LAW AND STATE (1945); and his essay, *On the Basic Norm*, 47 CALIFORNIA LAW REVIEW 107 (1959).

271 Raz would have it that judges normally must believe, or pretend to believe, the system is morally justifiable in order to take their statements as internally committed ones. I agree with Hart that that formulation is far too strong; but such dismissal does not touch the reformulation as put in the text.
review is, on some CMT or other moral theoretic account, well-grounded. Consider the rule concerning murder. Assuming with Hart that any society must have some rule(s) restraining personal use of violence as a self-help measure to order relations between members [CL, at 190], and assuming that a preferred social rule formulation can be shown to be well-grounded on some moral theoretic account, the notion of legal obligation is no closer to resolution than in our case of a putatively non-well-grounded bigamy statute: on separation tenet grounds, moral obligation no more entails legal obligation than vice versa. In either case, some notion of moral justifiability tagged to commitment must be invoked to develop legal obligations out of legal obligings. Now, this does not mean that a successful theory will demonstrate social institution or legal rule justification tout court (e.g. that monogamy is fully justified, with bigamy laws the proper critical standard protecting marriage relations). Rather, a criterion of success is that the legal theory fully incorporate and explicate the role of participants' beliefs and internal critical moral evaluations regarding the construction of lawful behavior. 272 In the next, concluding chapter we turn to the reconstruction of a Hartian positivist legal theory which charts just such a course into natural law waters, and provide an evaluation of its plausibility and success.

272 Cf. the following remark by Postema:

this does not imply that a theory of the nature of law must show that the beliefs and attitudes of self-identified participants in the legal practice are in fact justified .... It only requires that legal theorists frame their accounts of the nature of law in terms that take such participant beliefs into account and make them intelligible.

G.J. Postema, footnote 225, supra, at 335 [original emphasis; footnote omitted].
Chapter IV.
Minimum Content of Natural Law

""There is an unavoidable necessity of a minimum necessity of a minimum natural law." — François Gény

IV.1. A Problematic Case

Although the previous two chapters have forged relatively strong logical bonds between the notions of legality and morality, we are still quite some distance from demonstrating logically necessary substantive connections. To this point, we have succeeded in showing that moral PCAs and moral commitment are devices or concepts to which appeal must be made to generate replete accounts for a modern legal theory encompassing adjudication and obligation; and these amendments suggest important movements for a Hartian position. Indeed, they bring it within the general vision of Rudolf Stammler’s modern natural law position of a formalized “natural law with variable content.”

Still, no argument has yet been advanced to show that PCAs or particular legal rules must have certain content. That is, there has been no argument tying more robust notions of justice to our understanding the character of law as traditional natural law positions would promote.

In this concluding chapter, our argument will be extended to attempt deriving substantive minimum content for a Hartian PLT on the basis of Hart’s having recognized

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273 This dictum is attributed to Gény by S.N. Dhyani in his monograph, LAW-MORALITY AND JUSTICE: INDIAN DEVELOPMENTS 11 (1984). I have not been able to trace its specific source, but the sentiment expressed jells well with the arguments advanced in his two major works. See F. Gény, 2 SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF: NOUVELLE CONTRIBUTION À LA CRITIQUE DE LA MÉTHODE JURIDIQUE (1921) [bearing the epigraph — "irreducible natural law"]; and his MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE (2nd ed. 1932), esp. §§160-163.

a minimum content of natural law. It will be shown that the position which can be established consistent with his sketch of "simple truisms ... disclosing] the core of good sense in the doctrine of Natural Law"\textsuperscript{275} yields a connection between legality and morality which challenges Hart’s designating such minimum content merely contingent. That is, it is not the case that these so-called truisms are a matter of natural necessity alone, given the nature of man in the world today. Rather, they can be seen to comprise a species of logically necessary connections which defeat the PLT separation thesis on substantive grounds. In terms of Jules Coleman’s ‘positive positivism’ position, argument will demonstrate that no positivistic ‘separability thesis’ [or ‘separation tenet’ as christened in the previous chapter] can survive our analysis since every conceivable legal system must have not only a legally-binding-moral-principles clause embedded in the relevant rule[s] of recognition,\textsuperscript{276} but a substantive-moral-principles clause as well.

Before considering the details of that argument, let’s once more turn to the problems presented by a specific legal case and its judicial resolution in order to highlight points for the position to be sketched. The case reviewed below is the celebrated \textit{Regina v. Dudley and Stephens}.

\textbf{IV.1. Regina v. Dudley and Stephens}

On the Monday afternoon tide of 19 May 1884, the sailing yacht \textit{Mignonette} set out from the village of Itchen Ferry, Hampshire, England bound for Sydney, New South Wales, Australia. On board were Thomas Riley Dudley (age 31, the captain), Edwin Stephens (36, mate), Edmund James Brooks (38, seaman), and Richard Thomas Parker (17, boy). The ship was reasonably well provisioned for the anticipated 15,000 mile/4 month journey, at the end of which lay delivery of the yacht to a successful Sydney lawyer and politician, John Henry Want, who commissioned the voyage; and the start of new lives in a new country for the men taking her Down Under. But as seems wont during such lengthy ocean voyages, tragedy struck. Forty-eight days into their journey, after enduring the blows of a heavy storm for many hours, the ship was swamped and began breaking up in the late afternoon of 5 July. Only with great effort were the men able to launch her lifeboat and gather a few survival items before the \textit{Mignonette} speedily sank some 1600 miles northwest of the Cape of Good Hope.

\textsuperscript{275}H.L.A. Hart, \textit{The Concept of Law} 194 (1961) [hereafter cited as CL].

They had no fresh water in the boat, and very little food. During the first three days they subsisted on two 1lb. tins of turnips. Days 4-12 found some nourishment in the blood and meat of a small turtle captured as it swam by the boat; but then followed eight days without any food whatsoever, the last five being also without any fresh rain water so that they had begun to drink their own urine to keep themselves from perishing of dehydration.

On 23 or 24 July, Dudley spoke of the need to draw lots in order that one of them might die to nourish and so save the others. Brooks vigorously dissented. Stephens reluctantly agreed, though it was suggested that they let one more night pass before they take such drastic measures. Parker, wasted from drinking large amounts of sea water and nearly comatose, lay in the bottom of the boat. The next day, no sails in sight, Brooks still refusing to participate, Stephens agreed with Dudley that they had waited long enough... and that Parker—already so near death and without wife or children to support—should die so that they might survive. Praying to God for forgiveness, Dudley used his knife at Parker's throat, killing the lad quickly. Drinking what blood they could catch, eating some internal organs and chewing on fatty flesh, all three men survived four or five more days. Then, on 29 July, the Moctezuma, a German sailing vessel returning to Hamburg from South America, spotted their boat and picked up the three castaways, putting them ashore at Falmouth, Cornwall on 6 September.

In keeping with maritime custom, Dudley recounted the entire episode—from wreck to rescue— with perfect candor for Captain P.H. Simonsen (of the Moctezuma), to local

277 A brief aside may be appropriate here. The drawing of lots and sacrificing one (or a few) for the many were widely accepted principles for survival on the high seas. Though bloody details were often only elliptically or euphemistically embodied in their contemporary nautical ballads, 19th century European and American seamen understood well that drastic measures, including cannibalism, might be required to meet common peril. As noted by Justice Baldwin in an earlier American decision: dissent apparently existed concerning proper principles to apply when a craft is overloaded and in danger of foundering, but “There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of the others, the selection is by lot.” United States v. Holmes, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383). Thus, Dudley's proposal should not be interpreted as the raving of a man beaten by the elements, but the reflective determination of a sailor acquainted with the norms of his profession.

maritime officials in Falmouth, and in his official deposition to the Board of Trade (the
government office in charge of merchant shipping and licensing of crew). Though
contrary to almost universal opinion favoring the men at that time, warrants were
grudgingly issued for their arrest on the charge of murder. Of signal interest was the
surprised reaction of the men when taken into custody. As Simpson takes great pains to
establish in his rehearsal of the story

All three were quite astonished at being arrested, Tom Dudley in particular.
There is no reason to doubt that this astonishment was entirely genuine. . . .

[Quoting from a contemporary news item in the Standard:] The
most remarkable feature, in some respects, of the whole case is the
extraordinary candour of the three men when they were landed in an
English port. Without, apparently, the slightest misgivings as to the
manner in which their tale would be received, or the faintest sense of
having done anything the law could punish, they told their story, in all
its revolting detail, to the Collector of Customs at Falmouth, and
afterwards embodied it in statutory declarations.

Clearly some fundamental barrier of incomprehension existed between the
captain and crew of the Mignonette, men of the sea; and Sergeant James
Laverty, the local representative of the common law of England.279

The custom of the sea finally had been beached on the sands of landlubber homicide.

That the government of the day wished the men quickly tried and convicted as
eamples to the seafaring community is clear. The Home Office in particular was
anxious that the law not be seen to countenance such behavior in this or any future case,
whether by way of justification or excuse, and that the severest sentence possible be
passed to stem the tide of public—especially seaport—sentiment rising in favor of the
defendants. Though Sir William Harcourt, home secretary at that time, did pity the
men (and so later supported the exercise of sovereign clemency on their behalf), he was
bent on their conviction and the passing of capital sentences for murder. That the courts
shared the government’s concern to the extent that various judicial officers contrived to
put the men on show even while contravening established rules of jurisdiction and

279 Simpson, footnote 278, supra, at 10-11; see also id. at 70-72, where reference is made to
several draft letters of “explanation, not confessions” composed by Dudley while on board the
Moctezuma.
procedure is more controversial, though not without substantial evidence. In the event, a special verdict having been elicited with regards to the acts and intentions of Dudley and Stephens after trial by jury before Baron Huddleston in Exeter on 7 November 1884, an expanded five-judge Assize court met in London on 4 December to consider the verdict, hear counsel's arguments and decide the case. On 9 December, Lord Coleridge delivered the judgment of the court: Dudley and Stephens were pronounced guilty of "wilful murder" and sentenced to death. This sentence was then commuted by the Crown on 12 December to six months' imprisonment, not at hard labor.

IV.1.2. Survival & law

Though several of the political and legal moves in the case are worthy of attention, they pass beyond the purview of this chapter. Of primary significance for our examination of the case here is the court's distinct rejection of the defense of necessity, known in early doctrinal writings as *se defendendo* to justify or excuse Parker's life being taken for the sake of the others. The judges would, in fact, brook no argument from Arthur Collins, Q.C., in his defense of Dudley and Stephens that any notion of necessity could overcome the charge of murder. After dismissing various objections put by Collins for the prisoners, the Court noted

The contention that [the killing] could be anything [but murder] was, to the

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The staged resort to a special verdict at the initial trial, the belated doctoring of the wording of that verdict for the second hearing, and the unprecedented structuring of the second tribunal are but three of the legal shenanigans which guaranteed murder convictions. These and other irregularities at bar are noted in Simpson's close study of the case.

Though Brooks also survived by drinking some of Parker's blood and eating of the body, he became the chief prosecution witness against the other two men. Eyewitness testimony from a non-defendant was necessary for successful prosecution, but Brooks' exemption from the murder charge was also quite reasonable based upon his uncontested refusal to assent to the boy's being killed. As for Stephens, it remained unclear whether he ever did anything other than consent to Dudley's action. While nothing more is noticed in the special verdict, apparently there was testimony that Stephens actively participated by holding Parker's legs at the time of death. Thus, as an accomplice to murder, Stephens becomes vicariously liable for Dudley's act.

The enlarged bench would now feature Lord Coleridge, C.J.; Grove and Denman, JJ.; and Pollock and Huddleston, BB.

For discussion that this doctrine of excuse frequently has been, though ought not to be, identified with self-defense justifications, see G. Fletcher, *RETHINKING CRIMINAL LAW* 257, 352f., and 866ff. (1978).
minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy.\textsuperscript{284}

Collins does cite several authorities in his attempt to establish the defense under multiple formulations. At times he speaks of the ‘pressure of necessity’ ... ‘compulsion by necessity’ ... ‘inevitable necessity’ ... ‘unavoidable necessity’ ... or even ‘extreme necessity’ while he relates, for example, the “case often put by casuists” and found in Bacon reckoning the struggles of two shipwrecked men for use of a single plank floating in the waters which can support only one of them —the conclusion being that necessity excuses either man for forcing the other away to drown.\textsuperscript{285} Collins likewise makes reference to Hale’s PLEAS OF THE CROWN wherein “the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf [sic], that in a case of extreme necessity, either of hunger or clothing; ‘theft is not theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same’.”\textsuperscript{286} Interestingly, he also cites the American decision in Holmes\textsuperscript{287} for support of the proposition that necessity can excuse throwing overboard excess weight, people specially, to maintain a craft’s stability for the sake of other survivors. Collins here seems to have relied only upon J.F. Stephen’s brief of Holmes found in the latter’s DIGEST, for he never quotes from the opinion itself. That reliance is unfortunate, for though Lord Coleridge would

\begin{footnotesize}
\begin{enumerate}
\item[284]1884 14 Q.B.D. at 281 (Coleridge, L.C.J.).
\item[285]Id. at 277.
\item[286]Id. at 283; see also id. at 278. Supporting material can be found in H. Grotius, THE LAW OF WAR AND PEACE, II.ii.6-9 [De Jure Belli Ac Pacis Libri Tres (1646)] (“if a man under stress of such necessity takes from the property of another what is necessary to preserve his own life, he does not commit theft.” II.ii.6(4). F.W. Kelsey trans. 1925); and S. Pufendorf, ON THE LAW OF NATURE AND NATIONS, II.vi [De Jure Naturae Et Gentium Libri Octo (1688)] (“I should not feel, therefore, that a man has made himself guilty of the crime of theft if when he has ... fallen into extreme want of food necessary to maintain life, or of clothing to protect his body from the bite of cold ... he should make away with them by violence or by stealth....” II.vi.5. C.H. & W.A. Oldfather trans. 1933). Discussion of the ‘plank struggle’ case can also be found at II.vi.4, and in S. Pufendorf, THE ELEMENTS OF UNIVERSAL JURISPRUDENCE, II.iv.6 [Elementorum Jurisprudentiae Universalis Libri Duo (1672)]. As regards this latter case, Pufendorf approves of the conclusion in our text in both works noted here. But cf. Grotius, who denies that there is any right of necessity in one man if the other, under an equal necessity, is already in possession of the plank. He then quotes Lactantius for support: “He is not foolish who has not, even for his own safety, pushed a shipwrecked man from his plank ...; for he has kept himself from the inflicting of an injury, which would be a sin; and to avoid such a sin is wisdom” (at II.ii.8).
\item[287]United States v. Holmes, footnote 277, supra.
\end{enumerate}
\end{footnotesize}
just as likely still have dismissed such an authority as unsatisfactory for an English court, language gleaned from the Holmes opinion might have helped Collins refine his argument and perhaps prevail over the prejudices of the judges and disentangle the confusions joined to the issues involved.

The facts of that case concern an entirely different sort of marine disaster than the situation faced by Dudley and his crew. There, an American ship, the William Brown, went down after striking an iceberg some 250 miles southeast of Newfoundland on a winter’s journey from Liverpool to Philadelphia. Of 82 people on board (17 crew and 65 emigrant passengers), only 51 could be accommodated in the two life boats, leaving 31 passengers on board to go down with the ship. Only 10 persons (captain, second mate, 7 crew and 1 passenger) could be reasonably fit into the smaller jolly-boat. The remainder (first mate, 8 seaman and 32 passengers) filled, indeed overloaded, the long-boat. There was no danger of starvation for either group; each boat was stocked with sufficient food and water for one week adrift (longer if properly rationed). And, being inside the busy northern sea lanes, there was good chance that they eventually would be picked up, though too long exposure to the severe cold could present a very real survival problem of hypothermia. But the long-boat, due to its excess lading, was in continual danger of being swamped from its riding so low in the water, or of striking one of the many blocks of ice in the waters and so sink as did the ship.

The following evening, during a violent rainstorm, the long-boat’s mate exclaimed, “This [bailing] work won’t do. Help me, God. Men, go to work.” When the crew ignored this order, the mate repeated a short while later, “Men, you must go to work, or we shall all perish.” He then directed the crew “not to part man and wife, and not to throw over any women.” Seaman Holmes and others of the crew then proceeded to throw overboard 14 male passengers. Less than twelve hours later, the weather having cleared early next morning, the remaining crew and passengers were spotted and picked up by a

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289 United States v. Holmes, footnote 277, supra, at 361. That the mate meant and the crew understood the command as one requiring the sacrifice of some for safety of the rest was never in question. Even before the two boats parted, the mate bluntly told the captain that it would probably be necessary to cast lots for throwing over some of his load. The captain responded, “I know what you’ll have to do. Don’t speak of that now. Let it be the last resort.” Id.
passing ship.\textsuperscript{290}

In defense of Holmes' actions at trial, the law of necessity was passionately pleaded as full justification:

Counsel say that lots are the law of the ocean. Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terreur [sic], and of confusion? ... The crew either were in their ordinary and original state of subordination to their officers, or they were in a state of nature. If in the former state, they are excusable in law, for having obeyed the order of the mate, -an order twice imperatively given. ... But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. ... We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority, -the best authority. Whoever opposes it must be wrong, for he opposes human nature. ... The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this court, to the liberation of this prisoner.\textsuperscript{291}

In response to this stirring appeal by defense counsel, the judge made the following significant concession in his charge to the jury:

It is one thing to give a favourable interpretation to evidence in order to mitigate an offence. It is a different thing, when we are asked, not to extenuate, but to justify, the act. ... Where, indeed, a case does arise, embraced by this "law of necessity," the penal laws pass over such a case in silence; for law is made to meet but the ordinary exigencies of life. ... And I again state that when this great "law of necessity" does apply, and is not improperly exercised, the

\textsuperscript{290}Though some argument was presented to the jury that the act was post hoc clearly unnecessary and therefore murderous, the standard to which Holmes was actually held involved his duty at the time of his act according to the beliefs a reasonable man would hold under the circumstances. Thus, unable to know of their imminent rescue, he was not to be judged according to any absolute duty (i.e. what he should have done as evaluated retrospectively), but on the basis of whether his act was putatively right (i.e. proper according to the information he did have and/or could be held responsible to consider) at the time.

\textsuperscript{291}26 F. Cas. at 365-366 (Attorney Armstrong for the defendant).
taking of life is devested [sic] of unlawfulness.\textsuperscript{292}

What is most striking about this language is the picture drawn of a situation or set of circumstances wherein municipal positive laws of theft and homicide do not apply.\textsuperscript{293} And that they do not have any force or effect does not turn on an evaluation that necessity somehow overrides them, or that necessity creates a unique exception which common law judges may read into their application. Instead, the laws are not deemed applicable because the existence of laws presumes common society and societal institutions for the laws' administration, a defeasible presumption which in such extreme

\textsuperscript{292}Id. at 366 (Justice Baldwin). Stating that the casting of lots would have been an entirely acceptable expedient under the circumstances had the "supernumerary sailors" (i.e. those whose skill and experience were not needed to man the boat) been included in the draw, Justice Baldwin goes on to note, "When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission." Id. at 367. Cf. the case put by Pufendorf in his \textit{Elementorum} (1672):

If, however, in shipwreck, for example, more persons should leap into a boat than it can carry, in such wise, that, if the rest wish to be saved, one or more must necessarily be thrown out; assuming that all enjoy equal right here, those who are thrown out will have to be chosen by lot, and if any one refuses to have the lot cast, he can be thrown overboard without further delay as one who is seeking the ruin of all.

S. Pufendorf, footnote 286, supra, at II.iv.6 [W.A. Oldfather trans. 1931]. But see his later \textit{De Jure Naturae} (1688) chapter on necessity, where these straightforward propositions become tentative questions: "... shall not lots be cast to decide who shall be ejected? and may a person who refuses to abide by the lot be thrown overboard ...? But we reserve our decision for the time being on such highly unusual examples." S. Pufendorf, footnote 286, supra, at II.vi.3 [C.H. & W.A. Oldfather trans. 1933].

\textsuperscript{293}Notwithstanding this important concession, the jury ultimately found the defendant guilty of manslaughter, presumably because the judge also charged them to consider in their deliberations the general transport or common carrier rule that owners and employees (here, captain and crew) remain under special obligation to passengers, even to giving their lives for the safety of passengers in emergencies. In a not-so-veiled reference to the 'plank struggle' case of the casuists mentioned in our text and note at footnote 286, supra, Justice Baldwin opined: "while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even 'the law of necessity' justifies not the sailor who takes it from him." 26 F. Cas. at 367. The court then sentenced Holmes to six months' solitary confinement at hard labor. Id. at 369. The original sentence also included a fine of $20 (?) which was later remitted. A pardon was sought, but refused because the court did not join the application which went to President Tyler.
cases may in fact be voided. In the words of Justice Baldwin quoted above, "Where, indeed, a case does arise, embraced by this 'law of necessity,' the penal laws pass over such a case in silence; for law is made to meet but the ordinary exigencies of life." In brief, the ordinary circumstances of life that make possible the existence of society and of a society's legal system ... the circumstances of justice ... are lacking; and because they are lacking, law is not possible:

Laws exist to regulate social arrangements in normal conditions, not in wholly abnormal conditions when society breaks down.

In desperate conditions, such as those confronting Dudley and Stephens, men are reduced by circumstances to a state in which it is incongruous to think of laws applying at all. They are in a [scil. Hobbesian] state of nature, where there are no legal rights, duties, or crimes.295

If this analysis rings true, exactly which conditions are lacking in Dudley and Stephens? Put somewhat differently, what conditions might be specified as possible and

294 Cf. the similar strain of thought running through Pufendorf's De Jure Naturae (1688):

And so necessity does not cause a law here and now to be violated directly ... but it is presumed from the benevolent mind of the legislator, and from the consideration of human nature, that a case of necessity is not included under a law which has been conceived with a general scope. ... But it should be observed, in connexion with those laws which cover the mutual duties of men, that there are certain precepts of natural law which presuppose some human deed or institution, that, as any one clearly recognizes upon a consideration of its end, should not be extended to a case of necessity; and therefore the same exception also is in the law.

S. Pufendorf, footnote 286, supra, at II.i.2 [C.H. & W.A. Oldfather trans. 1932]. In the case of the non-applicability of theft laws, Grotius adduces as the reason "a benign reservation in favour of the primitive right" to use common property, a right which "revives" in limited form even after distribution of property to individuals when necessary for self-preservation. H. Grotius, footnote 286, supra, at II.i.6(2 & 4) [F.W. Kelsey trans. 1925].

295 Simpson, footnote 278, supra, at 231. For the suitability of this Hobbesian gloss, see T. Hobbes, LEVIATHAN: OR THE MATTER, FORME AND POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVIL (1651), esp. chapter XIII: "To this war of every man, against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice" [at 85 in M. Oakeshott ed. 1946].
IV.1.2 Necessary to generate society and legal system? What conditions constitute the circumstances of justice? It is to the examination of these queries we now turn.

IV.2. The Circumstances of Justice

IV.2.1. Hume's criteria

For David Hume, justice is an artificial virtue "which arises from the circumstances and necessities of mankind." That is to say, the virtue of justice does not in any direct sense spring from the natural passions composing man's nature; rather, it arises with the artifice of conventions established to stabilize the possession of material objects (thus also generating the notion of property). This is the first step in stabilizing society itself and so permitting the many personal and public advantages which living in society confers. Since variant circumstances and necessities will have a differential impact on man's skills, ingenuity and opportunities as a crafter of practices, "the rules of equity or justice depend entirely on the particular state and condition in which men are placed, and owe their origin and existence to that utility, which results to the public from their strict and regular observance." These states and conditions are both internal and external in nature: they, respectively, have regard to human nature—the natural passions and affections comprising our "natural temper"; and the conditions of the world around us—the natural supply of material goods available to meet our needs and desires along with environmental factors such as climate comprising our "outward

296 Notions of possibility and necessity are grounded in the following intuitions: (1)Law is possible just in case a specified set of conditions holds in that world; (2)If law is necessary [in the sense that law is required to achieve some purpose such as social order] then law must be possible, i.e. of the specified set of conditions making law possible, a minimal subset necessarily holds in that world [a variant of the Kantian stipulation/intuition that 'ought' implies 'can']; (3)It is not the case both that law can be necessary and a minimal subset of possibility conditions are not possible in that world. I believe these are sufficiently weak to satisfy. Formalization and modal proofs will not be offered here; they are possible, but not necessary.


IV.2.1 HUME’S CRITERIA

Our particular states-and-conditions/circumstances-and-necessities identified by Hume are systematically set out in neither the TREATISE nor the ENQUIRY. Thus, we are never presented with anything like a comprehensive list for our review, but must glean from those pages the various contingencies to which Hume wishes to draw our attention. This leads to some quite interesting, if also quite divergent, lists in contemporary literature. Without meaning to become embroiled in that debate, figure IV-1 furnishes a tally of those states and conditions mentioned by Hume collated from both sources.

Condition (1) is introduced by Hume to open section III.ii.2 of the TREATISE, showing man’s state to be more miserable than that of other animals whose needs and capacities are better aligned, but the point never reappears in his argument. Likewise, condition (2) is noted as “the first and original principle of human society” in the TREATISE; yet, saving its invocation in both works as a standard instance of generosity in order to overcome the widely-received too-pessimistic picture of man being a wholly selfish brute, it also drops from view. Condition (4) makes a short-lived explicit appearance alongside condition (1) for the sake of exhibiting society as a remedy for each inconvenience. Although it could ostensibly serve, especially in the ENQUIRY, as implicit ground for the regular assertion that notions of property and justice serve utility, such reference is murky at best. Condition (7) presents a bit of a problem, not only because it makes a single appearance in his later work, but because the textual fragment in which it is embedded requires a substantial gloss. In this portion of the ENQUIRY, Hume puts the case of a species of rational creatures living amongst men that are

of such inferior strength, both of mind and body, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the


300 Rawls, for example, describes a set of six (perhaps eight, depending how one counts) circumstances, not all of which are traceable to Hume, but which “summary adds nothing essential to [Hume’s] much fuller discussion.” Rawls, footnote 299, supra, at 127-128. Hubin discovers four conditions in Hume, again alas not all with clear textual support, and notes, “Whether he is aware of it or not, Rawls adds to Hume’s list.” See D.C. Hubin, The Scope of Justice, 9 PHILOSOPHY & PUBLIC AFFAIRS 3, 20 (1979). Hubin arguably has done so, as well.
Internal conditions:

1. numberless wants and necessities [TREATISE, at 484]

2. natural ties between the sexes and between parents and offspring [TREATISE, at 486; ENQUIRY, at 185]

3. selfishness/limited generosity [TREATISE, at 486-7 & 494; ENQUIRY, at 185]

External conditions:

4. three inconveniences due to slender means for relieving necessities: a) individual force too small to execute considerable work; b) individual becomes jack-of-all-trades but master of none; and c) the least failure leads to ruin and misery [TREATISE, at 485]

5. insecurity of possessing material objects to meet wants and necessities [TREATISE, at 488 & 494; ENQUIRY, at 191]

6. moderate scarcity: neither too abundant nor too limited supply of material objects to meet wants and necessities [TREATISE, at 488 & 494; ENQUIRY, at 183-4 & 186]

Uncategorized condition:

7. rough equality in strength of mind and body between men [ENQUIRY, at 190: not an explicit condition, but eisegetically reasonable in context]

Figure IV-1: Hume's Conditions

effects of their resentment; ... Our intercourse with them could not be called society, which supposes a degree of equality; but absolute command on the one side, and servile obedience on the other.

We are hereby led to suppose that Hume's supposition of a rough equality in strength of mind and body between men does describe man in society. Just what that rough equality entails is nowhere explained. A typical modern gloss makes the following points: no individual is invulnerable in his person or possessions; no one's activities can dominate all others' plans; no one can securely supply his needs and desires without cooperative effort. Other extended interpolations read more like quotations from Hobbes' mid-seventeenth century LEVIATHAN:
the difference between man, and man, is not so considerable .... For as to strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others, that are in the same danger with himself. And as to the faculties of the mind ... I find yet a greater equality amongst men, than that of strength. For prudence, is but experience: which equal time, equally bestows on all men, in those things they equally apply themselves unto. ... From this equality of ability, ariseth equality of hope in the attaining of our ends.301

For all that, whatever echo of Hobbes' formulation might rightly be attributed to Hume's thinking one century later, he makes no further mention of the point in his derivation of the virtue of justice.

What Hume in fact consistently stresses is the conjunction of conditions (3), (5) and (6) as representative of our actual circumstances of justice:

I have already observ'd, that justice takes its rise from human conventions; and that these are intended as a remedy to some inconveniences, which proceed from the concurrence of certain qualities of the human mind with the situation of external objects. The qualities of the mind are selfishness and limited generosity; And the situation of external objects is their easy change, join'd to their scarcity in comparison of the wants and desires of men [TREATISE, at 494 (original emphasis)].

Here then is a proposition, which, I think, may be regarded as certain, that 'tis only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin [TREATISE, at 495 (original emphasis)].

It is the peculiar matrix of these conditions which generates both the necessity for and possibility of cooperative efforts and the stabilization of society for personal and public good. Comparing this particular conjunction with other possible states of affairs, he goes on to conclude that a significant change in any one of these conditions renders the notion of justice useless. Whether the changes are for the good, as when one compares the present state of the world with the poets' golden age of Saturn - external objects available in such abundance that every want and desire can be fulfilled without depriving

301 T. Hobbes, footnote 295, supra, chapter XIII [at 80-81 in M. Oakeshott ed. 1946]. Cf. these formulations: "individuals are roughly similar in physical and mental powers; or at any rate, their capacities are comparable in that no one can dominate the rest. They are vulnerable to attack, and all are subject to having their plans blocked by the united force of others" from Rawls, footnote 299, supra, at 126-127; and "Even the most powerful is not invulnerable to attacks by the weakest; or, if the weakest alone cannot threaten the strongest, he can at least do so in association with others" in Hubin, footnote 300, supra, at 7.
any other and/or the generosity of man is unlimited; or whether the changes be for the worse, as when one compares the present state with a fall into a pessimistic philosopher’s state of nature —conditions wherein there is such scarcity of necessaries the majority can but perish and/or selfishness is complete; the result is the same: “any considerable alteration of temper and circumstances destroys equally justice and injustice” [TREATISE, at 496]. And again: “Reverse, in any considerable circumstance, the condition of men: Produce extreme abundance or extreme necessity: Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally useless, you thereby totally destroy its essence, and suspend its obligation upon mankind” [ENQUIRY, at 188 (original emphasis)].

This destruction of justice becomes the expected, indeed infallible, consequence upon altering our natural background conditions, again irrespective of the conditions being bettered or worsened: “Where mutual regards and forbearance serve no manner of purpose, they would never direct the conduct of any reasonable man” [ENQUIRY, at 191]. We would then also have to expect that no institutions of justice for fixing or guiding patterns of behavior could develop, there being no preliminary conventions arising out of man’s attempts to stabilize society. And where there exists no social rule-governed activities, whether due to such activities being otiose or infeasible, there can be neither social rule-guided nor rule-created actions or obligations.302 In short, there could be no legal system. Society would either be impossible to sustain, or would naturally take root without artifice props or glues.303 Thus, Hume draws a picture of a set of contingent conditions which logically undergird the concepts and institutions of justice and law.

302 For interesting development of the distinction between rule-governed and rule-guided activities in a different context and to different purpose, see A. Gardner, AN ARTIFICIAL INTELLIGENCE APPROACH TO LEGAL REASONING (1987) [development of an expert computer system for contract law].

303 Cf. Rawls’ observation in a slightly different context: “In an association of saints agreeing on a common ideal, if such a community could exist, disputes about justice would not occur.” Rawls, footnote 299, supra, at 129. This is not to say that coordination rules or conventions may not be required. For safety and convenience, even saints need to agree on which side of the road to travel. But such rules operate in wholly different fashion from determinations of rights and obligations when interests conflict.
At this juncture, a scant holdover worry from the close of our first section may come to the fore. A concern may exist over linking notions of circumstances of *justice*, even in a restricted Humean sense, with the concepts of *law* and *legal system*. The connection may be clear in Hume, but ought we follow him? More importantly for our project, may it not act as a hidden premise in subsequent argument when linking natural law notions of substantive justice to a Hartian legal theory? That concern is understandable, though I think misplaced. As to the former query, it is both fair and proper to follow Hume's usage without misgiving in this context. His naturalistic formulation of justice in terms of utility fits quite comfortably with the Hartian position heretofore developed. Furthermore, Stammler's doctrine of "natural law with variable content" can easily embrace Hume's explanation that "Tho' the rules of justice be artificial, they are not arbitrary. Nor is the expression improper to call them Laws of Nature; if by natural we understand what is common to any species" [TREATISE, at 484], without connoting more traditional substantive content. Thus, we make no claim to any connection not already established.

As for the latter 'smuggling' question, the short answer is 'closely read the rest of this chapter to see whether any sleight of hand is attempted.' (There isn't.) A somewhat longer and perhaps more satisfying response for the time being might take the following form. Hart utilizes Hume's discussion of the circumstances of justice to advance his own case for the "core of good sense" which might rightly be attributed to traditional natural law doctrines. In the course of that argument, Hart too marks the easy, plausible link between background conditions and the rise of rules of obligation and legal institutions. Recalling that Hart sees his work in part "as an essay in descriptive sociology" [CL, at vi], this linkage should not be surprising or worrisome. Thus, it does not become a means for surreptitiously slipping our conclusion amongst the premises of the argument developed below. It is a means of calling attention to the fact that the terms are connected at least in the senses determined in the previous two chapters of this essay.

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304 This thesis represents the 'logical presuppositional interpretation' of Hume in Hubin's terminology. See Hubin, footnote 300, supra, at 8-10. He also floats four other possible interpretations of Hume and argues that all five fail properly to capture the scope of justice. The difficulty in following Hubin's strategy is its too strong reliance on swapping intuitions to construct justice's acceptable scope and thereby defeat Hume's thesis. Appeals grounded on what "seems to be" or "but surely ..." or "I, at least, ..." fail to carry the argument forward in satisfactory manner. Id. at 4 & 10. The upshot is that Hume survives Hubin's attack, particularly on this first very plausible reading of logical necessity.
and that further investigation may prove fruitful. To fill out and fortify this brief
response, let's turn in the next subsection to consideration of Hart's own position in
greater detail.

IV.2.2. Hart's adaptation of Hume

Unlike Hume, Hart does furnish an inventory of specific conditions, or "simple truisms"
concerning human nature and our world, for our perusal. And unlike some other
compilations, a share of the credit for surveying these conditions is explicitly accorded to
Hobbes as well as Hume. A summary is set out in figure IV-2, below.

The first condition recalls the obvious Hobbesian point that every man is susceptible to
bodily attack by his fellow man. Nor is anyone invulnerable to the injury or death which
can thus result. Having stated that truism, however, Hart goes on to make a much
stronger point about the contingent nature of that vulnerability:

Yet though this is a truism it is not a necessary truth; for things might have
been, and might one day be, otherwise. There are species of animals whose
physical structure (including exoskeletons or a carapace) renders them virtually
immune from attack by other members of their species and animals who have
no organs enabling them to attack. If men were to lose their vulnerability to
each other there would vanish one obvious reason for the most characteristic
 provision of law and morals: Thou shalt not kill.

Thus, any rules concerning tolerable and intolerable levels of violent behavior are
intimately linked to, while being only contingently required by our actual, physical
vulnerability. The second condition, likewise recalling principally Hobbes' observation
that differences between persons both in body and mind are not so great as to permit any
individual to dominate all others, "is a fact of quite major importance for the

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305 In his notes, Hart remarks that his "empirical version of natural law is based on" both men's
works [CL, at 254]. Specific reference is then given to Hobbes' LEVIATHAN, chapters XIV & XV;
and Hume's TREATISE, III.ii.2 & 4-7. Somewhat oddly, no mention is made of what I take to be
an important chapter in Hobbes for the purpose of constructing such a list of conditions and from
which we have had occasion to quote, viz. chapter XIII. Less important, though still curious, is
Hart's exclusion of Hume's ENQUIRY.

307 CL, at 190 (original emphasis). See also Hart's earlier characterization of this point:
"suppose that men were to become invulnerable to attack by each other, were clad perhaps like
giant land crabs with an impenetrable carapace ...." in Positivism and the Separation of Law and
Morals, 71 HARVARD LAW REVIEW 593, 623 (1958); reprinted in his ESSAYS IN JURISPRUDENCE
AND PHILOSOPHY 49, 80 (1983) [hereafter cited as Separation with page references to reprint
only].
Conditions and Corresponding Rules:

1. human vulnerability → rules restricting use of violence [CL, at 190]

2. approximate equality → rules of mutual forbearance and compromise [CL, at 190-191]

3. limited altruism → rules of mutual forbearance and control of aggression [CL, at 191-192]

4. limited resources → rules instituting property, division of labor and cooperation [CL, at 192-193]

5. limited understanding and strength of will → rules stipulating sanctions for breach of other rules [CL, at 193-194]

Figure IV-2: Hart's Simple Truisms

understanding of different forms of law and morality .... This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the base of both legal and moral obligation" [CL, at 190-191]. Limited altruism, the third condition for both Hart and Hume (reading Hart's phrase as analogous to Hume's limited generosity), supplements this notion of the necessity of legal and moral rules and also calls attention to the condition's establishing

306 Several of these points are adumbrated in Hart's earlier reply to Jonathan Cohen's discussion and criticism of his inaugural lecture, Definition and Theory in Jurisprudence. In response to Cohen's putting three necessary criteria for a rule to be a legal rule, Hart supplies a list of eleven non-necessary standard or normal case criteria incorporating Cohen's three points and to which he appends the following footnote:

There are, of course, several additions to this list that could plausibly be made, e.g., it may be said that the criminal laws of a legal system must contain certain minimum vetoes against the use of personal violence and that either the criminal or civil laws or both must provide for a minimum form of property or possession in the sense of a right to exclude others from material objects at certain times for certain purposes.

He likewise adds a brief discussion on notions of approximate equality and limited altruism in subsequent text. Both essays can be found in Symposium: Theory and Definition in Jurisprudence, 29 [SUPP.] ARISTOTELIAN SOCIETY: PROBLEMS IN PSYCHOTHERAPY AND JURISPRUDENCE (1955). Cohen's piece begins at 213; Hart's reply begins at 259, with passages noted at 252-253. Similar allusions to points 1 and 4 appear in section V of Hart's essay, Separation, at 78-82.
their very possibility. For if humans were “devils prepared to destroy, reckless of the cost to themselves” such rules would not be possible; conversely, if all were angels, restrictions would be unnecessary [CL, at 192]. Thus, that man is not angelic makes some sort of rules necessary for social stability; that man is not wholly devilish permits a set of such rules to be promulgated and successful.

The fourth condition, reading akin to Hume’s condition (6), naturally gives rise to some form of property relations and devices (such as promising) for supporting cooperation. Again, like Hume, Hart suggests that an institution of property incorporating static rules of division and minimal forbearances along with more dynamic rules covering transfer and exchange relations would not develop under conditions of limitless abundance [CL, at 192]. Unfortunately he never indicates whether sufficient scarcity can exist so as to defeat ab initio any rules arising. It is not clear that he would disagree with that proposition, though one might reasonably hesitate to commit him to Hume’s majority rule. That is, while Hume can be read to suggest that scarcity must be so extreme as to put the survival of a majority in jeopardy before conventions are to be deemed useless or impossible, that is neither the only reading nor the only reasonable intuition possible concerning resource levels. So while there is surely some minima which must be adopted on Hart’s account if any rules devised are to play a role in guiding social behavior, we are not yet in a position to determine an appropriate threshold. [We shall return to this point in the next section.] The fifth and final Hartian truism mixes insights from Hume and Hobbes concerning a) man’s propensity to overestimate the value of fulfilling short-term interests and thereby be willing to sacrifice long-term benefits, along with b) the temptation to engage in free-riding,308 to derive the need for rules to create sanctions as a guarantee for general voluntary submission to all the other rules of the society [CL, at 193].

Hart observes at each turn that “it might have been otherwise”: homo sapiens could be invulnerable; some individuals could be exceptionally well-equipped in mind and/or body and so capable of complete domination of others; man could dispositionally be devilish or angelic; resources could be unbounded; and sanctions might prove impossible to implement. Each of the truisms outlined happen to hold in this world, but it needn’t have been the case; they merely describe contingent features of the world man does engage. Thus, it is proper to speak of the “natural necessity” [CL, at 195] of sanctions,

308 For an intriguing analysis of and some solutions to the free-rider problem in game theoretic terms, see P. Pettit, Free Riding and Foul Dealing, 83 JOURNAL OF PHILOSOPHY 361 (1986).
rules governing property, etc. As such "they disclose the core of good sense in the doctrine of Natural Law. ... and explain why the definition of the basic forms of these in purely formal terms, without reference to any specific content or social needs, has proved so inadequate" [CL, at 194], albeit they lack any logically necessary status. They constitute then an empirical or sociological conception of natural law. Now, I don't wish to dispute the assertion that conditions might have been different. I concede
that there seems no logical necessity in their holding true in all possible worlds. But the conceptual necessity which we are investigating is not that of the world's conditions. Our legal theoretic dispute concerning conceptual linkages between legality and morality turns in part upon the scope of logical necessity for law and legal system under the conditions which do obtain in the world which we inhabit. To put the point in somewhat different terms, to deal with this problem of scope we need antecedently to determine how (i.e. under what specifications) law and legal system are possible. That it is possible is a given datum of this world, and assessment of that datum has in part been provided by Hume and Hart as set out above. Yet, to query 'how' also indicates that we need to determine whether law is also possible if such conditions were substantially altered. If law is not a logical possibility under significantly divergent conditions, as Hume seems to have concluded, we then shall have to hand the makings of Hartian substantive natural law rules which necessarily flow out from a set of conditions defining the scope of the possibility for law—a set representative of those actual conditions of man and the world.

311 Nonetheless, the problem posed here is not simply one of modal logic and the criteria for differentiating 'merely conceivable' from 'actually possible' worlds as might have been suggested in the previous footnote. Physicists and philosophers of cosmology have begun painting a quantum mechanical picture of a finely-tuned universe in which the four elementary forces (strong and weak nuclear forces, gravitation, and electromagnetism) and certain evolutionary processes must take on an extremely narrow range of coordinate values for there to be a cosmos to observe at all, and for that universe to produce intelligent creatures who can observe it. Accordingly, claims that some strange worlds are 'possible' may be in error, as they may in fact be logically-physically impossible. For survey of these points, see G.V. Coyne and M. Heller (Eds.), NEWTON AND THE NEW DIRECTION IN SCIENCE passim (forthcoming, 1988), with particular reference to the essay contributed by J. Leslie, The Prerequisites of Life in Our Universe. Be that as it may, for the sake of subsequent argument I shall set to one side any unease and pass over the problems in depicting these alternative worlds, however odd they may appear.
he inhabits. In short, we will have derived a set of reasons for establishing an orthodox natural law position.

IV.3. Conditions for Law

The notion of reasons just introduced is a pivotal feature of subsequent discussion. Our argument should not be seen to turn on a description of any actual causal chain such that a legal theorist can map, say the sociological evolution of, any contents of a particular legal or moral code in a society which did or does exist. Instead, following Hart, we mean to insist on the justificatory nature of conditions which ground systems of legality and morality:

It is important to stress the distinctively rational connexion between natural facts and the content of legal and moral rules in this approach, because it is both possible and important to inquire into quite different forms of connexion between natural facts and legal or moral rules. e.g. unless young children are fed and nurtured in certain ways within the family, no system of laws or code of morals can be established. Connexions of this sort between natural conditions and systems of rules are not mediated by reasons; for they do not relate the existence of certain rules to the conscious aims or purpose of those whose rules they are. Being fed in infancy in a certain way may well be shown to be a necessary condition or even a cause [in sociological or psychological terms] of a population developing or maintaining a moral or legal code, but it is not a reason for doing so [CL, at 189-190].

John Eatman fairly captures this notion of contingent truisms acting as reasons in a hypothetical case:

312 The strategy followed in the remainder of this essay is similar to the argument proffered by Beyleveld and Brownsword in their stimulating article, Law as a Moral Judgment vs. Law as the Rules of the Powerful, 28 AMERICAN JOURNAL OF JURISPRUDENCE 79 (1983). The major difference is that they claim to have sketched a "real definition" of law and legal enterprise as a transcendental conception of morally legitimate power; no such transcendental deduction is attempted below. In fact, the label 'transcendental' may not be appropriate for the task. While sympathetic to their position that "The legal enterprise can only be explained in terms of a particular model which defines it. The model is a constellation of conditions and interests which we may refer to as 'the human social conditions under a problem of social order'" [Id. at 98]; Kantian a priori conceptual schemes which ground the possibility of experience play no role there. They do attempt a quasi-transcendental argument in form by attempting to demonstrate that any practical discourse presupposes a moral point of view by adapting Alan Gewirth's derivation of objective moral principles to the project of law [cf. A. Gewirth, REASON AND MORALITY (1978)]. But this is not in the end a transcendental argument concerning the possibility of experience or legitimacy of claims to knowledge. See A.C. Grayling, THE REFUTATION OF SCEPTICISM (1985), esp. chapter 4, for general discussion of transcendental arguments in philosophic argument. For an earlier attempt to grapple with the problem of a real definition of law, see B.B. King, The Basic Concept of Professor Hart's Jurisprudence: The Norm Out of the Bottle, 1963 CAMBRIDGE LAW JOURNAL 270.
Imagine that a law against theft is challenged by a given individual. "Why should I desire that such a law, with attendant sanctions, exist?," he might ask. In reply, we could point out to him that he himself is vulnerable to attack (truism 1) and that, on occasion, another person or group of persons may be willing (truisms 3 and 4) and able (truism 2) to take his property, in which case his ability to survive may be in jeopardy (truism 4). The existence of effective sanctions provides a motive for obedience likely to override any particular benefit one might obtain through violation of the rule (truism 5), and thus provides some guarantee that his adherence to the rule will be reciprocated.

It could be, of course, that human nature and/or environmental demands will change, in which case one or more of these reasons may not be operative. ... Yet, so long as these contingent facts do hold, this "minimum content of natural law" is always justifiable to every member of a society.313

Employing this sense of reasons, then, let us turn to an analysis of the conditions identified by Hart and the rules which are said to follow from their holding in his world.

IV.3.1. Vulnerability & violence

Is vulnerability a necessary condition for the development of law? Would we lose all reasons for rules restricting interpersonal violence if man were a species not liable physically to suffer from external attacks by others of his kind? Hart does not directly answer either of these questions, but he does give this contingent characteristic high profile in his discussion of natural necessities. For if man were invulnerable ceteris constantis, he argues, in addition to the loss of [at least some] reasons for rules restricting violent behavior the need for sanctions outlined by the fifth condition (limited understanding and strength of will) could not be satisfied. The result is that one standard or core feature of law (viz. sanctions) and one elemental purpose (scil. providing some guarantee for rules' observance by others) could not arise.

As previously noted, Hume makes little room for, and provides but nil discussion of, this condition of vulnerability in his outline of the circumstances of justice. While Hart does hedge his counterexamples of invulnerability by concluding there is a loss of only one obvious reason for rules restricting use of violence, perhaps Hume was correct simply to assume the condition of physical vulnerability without making explicit argument for institutions of justice which turns on its presence. As Lucas remarks with regards to a broader understanding which is required for notions such as vulnerability,

313 J. Eatman, LAW AND LEGAL OBLIGATION: A STUDY IN THE LEGAL THEORIES OF H.L.A. HART, JOSEPH RAZ, AND RONALD DWORKIN 69-70 (PhD Dissertation, Tulane University; 1981) [parenthetical identification of truism 1-4 in original; bracketed notation to truism 5 supplied].
To have a set of values—that is, to care for something—is, for any being not totally omnipotent, to be vulnerable. And therefore anyone who ever wants to do anything in a public external world, as well as anyone who ever wants the co-operation of anybody else... is vulnerable. Even tortoises [footnote here to the CL passage reproduced in our text at page 131, above] are vulnerable in this way, and could be subject to a form of coercion. Although a recalcitrant tortoise could not be killed or made to suffer pain by other tortoises, it could be prevented from doing anything. Anything it did, a group of other tortoises could undo: or they might stand in a circle round it, and in effect imprison it. This is not a contingent fact about tortoise life, but a necessary consequence of there being a common, public, external world in which individuals can do things.314

Thus, while physical invulnerability may preclude the necessity of rules restricting violence tending to bodily harm or death, it in no way diminishes the social requirement for rules restricting the use of coercive force which would otherwise inhibit an agent’s activities. What is then seen as importantly vulnerable is one’s interests, not one’s body per se. So physical invulnerability of itself will not defeat the realization of sanctions in order to sustain the general purpose of adherence to rules as Hart supposed; nor even need it eliminate the need to control through social norms violent interferences, although notions of physical harm or death obviously would not appear in their construction.

Could law or conventions of justice develop amongst a group of individuals holding invulnerable interests? Presumably not. Such a world could not be inhabited by two or more totally omnipotent beings in Lucas’ sense—that is a logical impossibility. So such a world would have to contain two or more less-than-omnipotent beings whose interests could never clash. This would seem to dictate that their interest invulnerability results either because a)distances between these beings’ spheres of operation keeps them and/or their interests’ fulfillment sufficiently spatially separated, or b)though spatially near their interests do not engage a common external forum. These alternatives exhaust the possibilities whether these beings are mortal or immortal.315 So in neither world is there

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314 J.R. Lucas, footnote 299, supra, at 4 (original emphasis).

315 Recall that the possible worlds in view are defined by conditions of interest invulnerability ceteris constantis, i.e. all other conditions remain the same. Thus, excluded worlds are those wherein interests don’t clash because the beings are so physically different that all their interests, e.g. in resources, are non-competitive; that such abundance exists so as easily to meet a Lockean proviso of ‘enough and as good’ remaining to potential competitors; etc. In the case of benign beings, akin to Rawls’ community of saints, one might be able to conjure a few coordination conventions—though in that world it would appear that one is smuggling in the cardinal notion of interest convergence to diffuse possible conflicts along with some subtle tinkering as regards the condition of limited generosity.
reason for law. Interest vulnerability remains one of the prerequisites for social rules to arise and develop.

IV.3.2. Equality & forbearance

Is approximate equality a necessary condition for the development of law? Would we lose all reasons for rules of mutual forbearance and compromise if some individuals were so exceptionally well-equipped in mind and/or body as to be able to dominate without fear of reprisal? Hart does declare that the natural fact of approximate equality “makes obvious the necessity” for law [CL, at 191]. But does that natural fact merely make the necessity obvious, or does that fact also render a system of forbearances necessary in rerum natura?

Hume presumably would answer both queries in the affirmative, for the notion of relative equality is essential to his conception of society. This interpretation permits the proper stress to be laid upon his hypothetical of an inferior species living amongst men in a condition of “servile obedience,” while forestalling debates concerning actual versus putative inferiority. Hart, too, appears to follow Hume’s position when he assumes that significant dissimilarities ceteris constantis invites the exceptional being’s dominance. That is to say, such an individual has good reason to exercise whatever advantage is available, and no reason to do otherwise. One need not here imagine Biblical Nephilim alongside ordinary mortals or a Swiftian Gulliver amongst Lilliputians to recognize the point. As Hart suggests, we can look to collectives such as modern nation-states in the international political system for examples of extreme inequalities in powers which readily translate into significant disparities in relations.

Nonetheless, the point is a slippery one. On the one hand, substantial inequalities in body and mind implicate some sort of physical invulnerability (the clearer reading of the point both in Hart and Hume). On the other hand, they might translate into some form of interest invulnerability (a possible but less clear reading in either account). But either reduction perforce returns us to our discussion of vulnerability in the previous subsection.

316 ENQUIRY, at 190. Noticed in our text at page 127, supra.

317 See e.g. Genesis 6:4; and Numbers 13:33 —giants of violence.

318 See the first part of Jonathan Swift, GULLIVER’S TRAVELS |originally published as TRAVELS INTO SEVERAL REMOTE NATIONS OF THE WORLD: IN FOUR PARTS —By Lemuel Gulliver, 1726; 2d ed. 1727.
If the fundamental point is a physical one in nature, then such inequality does not in fact preclude a system of forbearances and compromise arising since physical invulnerability does not of itself safeguard one's interests. Indeed, we find Hart conceding that, for all the significant inequalities existing between nation-states in the contemporary world, international law remains possible—even if marked by some differences in structure [CL, at 191 & 208-231]. If the alternative point is adopted, that the agent's interests are invulnerable, then we do find a world without law or the possibility of its developing; as noted in discussion above, agents in that world would lack reason for establishing any system of rules for guiding behavior. Thus, under either interpretation what remains essential to law development is interest vulnerability. To that extent, the truism of approximate equality adds nothing new to our tally circumscribing the possibility of social order in any world where law is possible.

IV.3.3. Altruism & aggression

Is limited altruism a necessary condition for the development of law? Would we lose all reasons for rules of mutual forbearance and control of aggression if individuals exhibited either utter selfishness or unlimited generosity? Once more, Hart’s analysis echoes that earlier provided by Hume. Further, each agrees that both queries deserve positive replies.

Men are not devils dominated by a wish to exterminate each other .... But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearances both necessary and possible. With angels, never tempted to harm others, rules requiring forbearances would not be necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible. As things are, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled.319

319CL, at 191-192. Cf. Hume's comment on reversing this condition: "Implant in the human breast perfect moderation and humanity, or perfect rapaciousness and malice: By rendering justice totally useless, you thereby totally destroy its essence ..." [ENQUIRY, at 188 (original emphasis)]. In neither account should selfishness/devilishness be confused with simple egoism, the latter being a normative account which prescribes that one ought to pursue [rational] maximization only of one's self-interest. To reassert a traditional distinction here, beings with the former dispositions ought to be understood as egotists, rather than egoists. Consider, for example, the power of the charge 'hypocrite' as applied either to a Kantian ethicist who acts egotistically or the egoist who is sacrificially beneficent when beyond the confines of his university office. For valuable contemporary discussion wherein the word 'wickedness' is supplied for traditional egotism, see S.I. Benn, Wickedness, 95 ETHICS 795 (1985).
While it appears obvious enough that the "perfect rapaciousness and malice" of a demonic humanity would foreclose the development of any rules moderating aggression (reasons for moderation or forbearance would simply find no foothold in that world of unchecked passions), it is not similarly clear that an angelic humanity's unlimited altruistic dispositions; or a bit weaker, simply being oblivious to temptations to harm or take advantage of another, prejudices the possibility or necessity of norms regarding mutual forbearances for circumscribing social behavior. Recalling that the condition of limited understanding and strength of will is being held constant here, the notion that irrespective of the best of intentions an act may result in harm, whether to bodies or interests, due to negligence or misjudgment of the facts would still find conceptual work to perform. Thus, we should expect even this society to establish some social codes for guiding interactions and providing for remedies, e.g. a universal tax-supported insurance scheme for compensation, when harm ensues. Yet again, the fact that interests are vulnerable supplies a reason for social controls under conditions of all but complete devilish inclinations.

IV.3.4. Resources & property

Are limited resources a necessary condition for the development of social rules? Would we lose all reasons for a system of rules instituting property, some division of labor, and cooperation if material resources were either extremely scarce or unlimited? Hume was clearly of the opinion that substantial changes in resources, whether for the better or the worse, results in the destruction of justice: a set of social norms either will not arise or, if some set of rules are for some time in place, will disappear with the transformation in circumstances [TREATISE, at 496; ENQUIRY, at 188]. In like vein, Hart carefully notes that "It is merely a contingent fact that human beings need food, clothes, and shelter; that these do not exist at hand in limitless abundance; but are scarce, have to be grown or won from nature, or have to be constructed by human toil" [CL, at 192]. Thus the need for an institution of property, promising, etc. Additionally, he observes that if there were unlimited resources these institutions would not evolve. In this too he follows Hume. But, as previously outlined, he never directly addresses the issue of extreme scarcity. How might we expect his argument to develop in response to that possible world?

320 For associated argument that a motivational assumption of perfect altruism does not, indeed cannot, resolve the prisoners' dilemma in game theory, see P. Pettit, The Prisoner's Dilemma and Social Theory: An Overview of Some Issues, 20 POLITICS 1, 2-3 (May 1985).
Six years prior to the release of his *The Concept of Law*, Hart published a provocative essay concerning moral and natural rights. He argued there that "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free." In a footnote explaining the terms to be used for understanding the notion of freedom, he draws several important distinctions and makes an interesting observation:

*Coercion* includes, besides preventing a person from doing what he chooses, making his choice less eligible by threats; *restraint* includes any action designed to make the exercise of choice impossible and so includes killing or enslaving a person. But neither coercion nor restraint includes *competition*. ... all men may have, consistently with the obligation to forbear from coercion, the *liberty* to satisfy if they can such at least of their desires as are not designed to coerce or injure others, even though in fact, owing to scarcity, one man's satisfaction causes another's frustration. In conditions of extreme scarcity this distinction between competition and coercion will not be worth drawing; natural rights are only of importance "where peace is possible" (Locke).

Attend to that last sentence. On a reasonable reading, the concluding proposition on offer is that under conditions of extreme scarcity coercion becomes assimilated to competition —significantly, not vice versa— so as to extinguish any natural right not to be coerced. While it may not be entirely fair to attribute to Hart adherence to a proposition dropped in a note some years past—and that in an essay he has since repudiated—it does cohere with the form and substance of the argument so far explicitly put by him on resource availability; and is certainly consistent with Hume's conclusion of the matter, a not unimportant tracking given their other like positions.

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322 *Id.* at 175 n.2 (original emphasis).

323 Unfortunately, it is not easy to discern whether 'restraint' should be understood to have been reduced to a form of coercion, and consequently also be taken up into competition in *extremis*, since that term is never analytically employed again in the essay. Not only does the notion of restraint introduced in the quotation appear to operate as a category within the broader conception of coercion provided, but further talk of freedom is always described in terms of the absence of coercion, alone. Thus, while argument can be advanced that the natural right to be free from restraint survives extreme scarcity, a fair reading could also be made that all such distinctions wither away where peace is not possible.

324 See Hart's introductory comments to the collection of seventeen articles appearing in his *Essays in Jurisprudence and Philosophy* (1983): "I have not included [this essay on natural rights] here, since its main argument seems to me to be mistaken and my errors not sufficiently illuminating to justify re-printing now" (at 17).
But are these observations correct? Could law or conventions of justice develop amongst a group of individuals with access to unbounded primary material goods? or conversely, with access only to such deficient supplies that basic needs cannot all be satisfied? With regards to a possible world containing unlimited resources, it might be helpful to evaluate the proposition that law would there be unnecessary in light of our introduction of the notion of interest vulnerability. To thereby rephrase the point at issue, would the natural fact of unbounded primary material goods turn vulnerable interests into invulnerable ones? Asking the question in that way helps make clearer its rhetorical force, for under conditions ceteris constantis there is little reason to suppose that the mere presence of some additional quantum of goods over and above the levels with which we are familiar would suffice to render interests unassailable. This is not to say that some limited, though important, interests would not receive substantial protection. Wide access to good food and clean water, for example, unhindered by any lack in supply and the ‘curse’ of work to obtain them could easily engender the elimination of norms from any set of rules dealing with distribution of these basic resources. But would this abundance necessarily eliminate the notions of property and theft ... of mine and thine? of the need for conventions of promising? and of division of labor? Proper answers to such questions would be in the affirmative only if by setting the level of resources we mean to decide the concomitant nonexistence of industry ... the absence of any mixing of an individual’s creative manipulation of the natural resources so readily available. Only under that additional corollary does abundance destroy justice. Else, an individual’s interests in relation to some particular product of nature, especially if that good has become more valuable relative to that individual just because it has been picked out and/or creatively handled, are no less vulnerable, however many other such primary goods are available for appropriation, than under a condition of moderate scarcity. Accordingly, social conventions would be required to manage appropriation, manipulation, exchange, etc. of even ever-abundant resources.

Turning to conditions of extreme lack of primary material goods, one could find it more tempting to deny the possibility of law. The notion that individuals in this possible world do not find themselves engaging any problem of constructing social order is an appealing one when basic survival for one might only be won at the expense of another’s. We can

325 This seems to be the purport of Hume’s possible world wherein clothing and ornamentations will neither be required nor desired, raw foods wholly suffice, and “Music, poetry, and contemplation form [man’s] sole business: conversation, mirth, and friendship his sole amusement” [ENQUIRY, at 183]. Yet, however conceivable this world, it is not the level of resources alone which has changed; Hume here imports several significant alterations in man’s physical and psychological make-up, as well.
uncover the ground of such intuitive appeals by asking whether there could be rules regarding resource allocations\textsuperscript{326} which these beings have reason to construct and conform to. The simple reply seems to be, “No, there is no reason here; only survival. And that means no holds barred in the struggle to live.” Perhaps so. Certainly the common examples customarily trotted out at this juncture in the argument—life-and-death stories based on horrendous conditions visited upon a land and its people during or immediately after a ravaging war, recurring famine in drought-stricken lands like Ethiopia, and disasters faced by seamen such as Dudley & Stephens and Holmes—causes one to pause and reflect. The intuition that under such extreme scarcity social ordering is at least insensible if not impossible ... that rules can play no role here ... that conventions can serve no function is a powerful one.

Yet, the difficulty one might have with such scenarios is that they involve individuals who had been living under conditions of social order, who now face exigent circumstances, but who carry with them the already developed notions of fairness and equity. Consequently, their question is not whether those notions can be developed\textit{ tout d’un coup}, but whether it makes sense to apply them in some fashion or other to their circumstances (e.g. whether the drawing of lots is rightly required before arranging that someone sacrifices for others’ benefit). It is then difficult to see why the proper response is so obviously a negative one. On the other hand, while it could be the case that beings finding themselves in this short-supplied world\textit{ ab initio} would never in fact develop conventions or institutions of justice, there seems no logical barrier to the possibility of their developing. What is crucial in any of these accounts is what is to count as the ground for reason; what factors go into the determination of which interests are deemed to belong in the calculations of social order. This is no longer a matter only of what goods are to be found in the external realm; it now includes an internal viewpoint factor of purpose. [We return to this point of purpose for fuller development in subsection IV.4.1, below.]

\textsuperscript{326} The term is here used broadly to cover conventions establishing rules for exercising powers of appropriation, gift giving, promising, exchange, and so forth. It is not meant to denote centralized decision-making with regards to distribution.
IV.3.5. Understanding & sanctions

Are limited understanding and strength of will necessary for the institutional development of law? Would we lose all reason for voluntary submission to a system of rules if sanctions were impossible or superfluous? These questions are, of course, rather different in nature from the queries in preceding subsections. We do not focus here on the possibility of law without sanctions. That debate, surrounding the adequacy of the early Benthamite/Austinian positivistic concept of law being the sanction-backed command of the sovereign, was addressed and settled in the negative by Hart in chapters II–IV of CL. The conclusion there, as may be recalled, is that sanctions are not required for there to be law; instead, law must independently exist for there to be sanctions properly so called. 327 Thus, the existence of rules for sanctions must be seen to serve some broader purpose than law’s initial development. And so it is, in the guise of a ‘guarantee’ for grounding obedience.

The [natural facts already discussed] that make rules respecting persons, property, and promises necessary in social life are simple and their mutual benefits are obvious. Most men are capable of seeing them and of sacrificing the immediate short-term interests which conformity to such rules demands. ... On the other hand, neither understanding of long-term interest, nor the strength or goodness of will ... are shared by all men alike. All are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many succumb to the temptation. ... ‘Sanctions’ are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not [CL, at 193 (original emphasis)].

Notice that the natural fact of limited understanding plays an extremely limited role here. Those unable to perceive and reason from such simple facts, necessary rules and obvious benefits to motivate adherence must be few indeed. The core of the problem as Hart sees it resides in the essential weakness or incorrigibility of the human will. 328 The role of sanctions as a guarantee is then double-edged: on the one hand, the knowledge that a sanction will be applied for [attempting] disobedience or free-riding gives one a

327 This resolution is in turn utilized to criticize any Kelsenian emphasis on law simply being a directive to officials to apply sanctions. See CL, at 35–36.

328 Known as the problem of akrasia in contemporary philosophical literature (the term being a transliteration of Ionic Greek for ‘incontinence’ as found in the works of Plato and Aristotle). For an overview of the recent debate on how akrasia is possible and a proposal for fitting incontinent action and belief into a quasi-Aristotelian theory of human conduct, see A.R. Mele, IRRATIONALITY: AN ESSAY ON AKRASIA, SELF-DECEPTION, AND SELF-CONTROL (1987).
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direct, self-interested reason to obey, whatever additional motivations one may have; on the other hand, the knowledge that others are aware their disobedient or free-riding actions will be sanctioned and that they have direct, self-interested reason to submit likewise gives one a reason voluntarily to incur the cost of obedience to gain the long-term benefits that devolve from more-likely-than-not general cooperation. Thus, institutionalization of the set of social rules made effective through sanctions becomes possible.

What if individuals possessed wills which were incorrigible in the now obsolete sense of that term, viz. so strong and good as to be beyond improvement? Could this possible natural fact, combined with sufficient education so as to assure that self-evident benefits of cooperation were universally apprehended, defeat the institutional development of law since formulating sanctions to guarantee obedience by all would be unnecessary? Once again, to phrase the question in this manner helps uncover the obvious response, “Of course not.” In fact, it is not clear that sanctions would even here operate entirely without purpose. They may not need to be instituted to guarantee good faith adherence; yet, as suggested in our discussion of altruism in subsection IV.3.3 above, even the best intentioned actors can err. Only omniscience as a corollary here would suffice to overcome negligent or unintended harms. Thus, sanctions could act to forewarn agents of problematic activities and to ground establishment of a scheme for reparations should interests ever be harmed. Law and its institutional development accordingly is assured.

What of individuals wholly devoid of understanding or strength of will to resist temptation? what becomes of law in that possible world? Interestingly enough, this query poses a challenge to the first arising of social order, not merely its institutional

329 See definition number three in the OXFORD ENGLISH DICTIONARY (1971) for an example of this rare, early seventeenth century usage. Parallel use is attached to the term in the phrase ‘incorrigible sense statements’ —being statements of which one may be certain, or alternatively about which one cannot be in error. See C.D. Rollins’ entry on Certainty, 2 ENCYCLOPEDIA OF PHILOSOPHY 67, 69 (1967). But I am not aware that there is any knowing etymological link here.

330 It is interesting to observe that limited knowledge is not one of the natural facts to which Hart appeals as a truism at the core of natural law’s good sense, though it does have a place in his discussion of whether legislation can ever be ‘unambiguous’ [CL, at 125]. It could surely serve as a corollary reason to obey, given limited understanding, when long-term benefits are not the obvious result of adherence to the rules. In other words, when one acknowledges one’s own limited understanding, others’ general obedience in the light of their understanding of long-term mutual good may here serve as a reason for motivating one’s adherence to reap what one may not immediately see. Cf. the discussion of fallible judgment and imperfect information provided in Lucas, footnote 299, supra, at 6-10 and 123-133.
development. On the one hand, creatures who were incapable of evaluating any cooperative enterprise as mutually beneficial could never know they have reason to develop any conventions at all. In short, law would not be possible for them, however advantageous or reasonable the enterprise. On the other hand, creatures who were quite fully aware of the value in conventional behavior, but who also could never resist free-riding or breaching the conventions initially adduced, may have reason to desire law although be forever unable to attain it.

Could sanctions work here to save these beings from their overly weak dispositions? The answer depends in part on how one understands their weakness of will. If like a demonic humanity they dispositionally could not project future gains to offset short-term interests, the conception of sanctions to salvage cooperative behavior would be beyond them. For like possible future gains which become losses in the breach, future losses from sanctions could not be adduced to remedy current motivation to disobedience. In this case, law itself seems beyond the pale of realization. If weakness of will is not of this last variety, but partakes of the more familiar problem of powerful motivation to maximize short-term pay-offs (whether because calculations balancing short- against long-term interests are so very corrigible, or due to the determination that optimal strategies of the ‘rational’ maximizer are usually to ‘defect’ in each play of the game), then this possible world portrays an ungarnished Hobbesian one. There is reason for law; this reason is known; the reason is widely shared. Law becomes possible once agreement is reached that sanctions will be centralied under a ruling authority and to whom all will submit. In short, law is possible just because institutionalized, never before.

IV.3.6. Summary survey

Our review and analysis of Hume’s and Hart’s conditions and their accompanying rules is now complete. Where have we arrived? Let’s put the results in some better order.

(1) Vulnerability & violence – What makes law both possible and necessary is interest vulnerability, not susceptibility to physical harm simpliciter. It provides grounds for reason for social rules to arise and develop.

(2) Equality & forbearance – Though approximate equality is a natural fact describing this world’s human inhabitants, it is not a feature which of itself renders law either possible or necessary. On one reading the notion reduces to point (1), above; on the other reading it renders law impossible.
(3) Altruism & aggression – Law is impossible only were humanity to exhibit “perfect rapaciousness and malice.” No reasons would get a foothold there. But law becomes both possible and necessary whenever a concern for others’ welfare rises above this hellish level, and extends unto the most extensive benevolent disposition possible. This latter point holds good as long as interest vulnerability holds as well.

(4) Resources & property – Law is both possible and necessary under any level of resource distribution and allocation. Though conceding that in a possible world of extreme necessity law might not in fact develop, the core notion of reason for law must here implicate the concept of interests to determine whether even those beings can have reason to develop conventions of justice.

(5) Understanding & sanctions – These conditions do not directly address the issue of the possibility of law, but its institutionalization. Law is institutionally impossible only in a world where the condition of low-level understanding or weakness of will makes law itself impossible. Law is institutionally possible wherever these thresholds are exceeded.

In sum, the conditions for law converge on beings who (a) share interest vulnerability, (b) exhibit minimal concern for others, and (c) exercise minimal cognitive and conative capacities. In whatever possible world individuals so constituted co-exist, law is both possible and necessary. Tamper with any single condition here, and law becomes impossible.

Corresponding rules could be expected to cover the same range as outlined by Hart: restrictions on interpersonal violence/aggression; institution of reciprocal forbearances, property relations, and promising; and [evolutionary] institutionalization of those conventions. In fact, the results would closely resemble Roscoe Pound’s seldom-cited “jural postulates” of civilized society. Though those statements are embedded in his conception of social interests operating as guides to adjudicative engineering and utilize an undefined notion of civilized society, they do capture several of the main themes in this section’s discussion. The five postulates (plus one corollary) are reproduced below for

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331 More likely an allusion to contemporary English-speaking or Western European countries than an invocation of technical usage borrowed from international legal doctrine, e.g., by calling up the notion of jus cogens as understood and developed by the Permanent Court of International Justice under the League of Nations. For review of the evolution of this technical usage and how it might usefully be so read in this context, see G.W. Gong, *The Standard of 'Civilization' in International Society* (1984).
Jural Postulate I. In civilized society men must be able to assume that others will commit no intentional aggressions upon them.

Corollary of Jural Postulate I. One who intentionally does anything which on its face is injurious to another must repair the resulting damage unless he can (1) justify his act under some social or public interest, or (2) assert a privilege because of a countervailing individual interest of his own which there is a social or public interest in securing.

Jural Postulate II. In civilized society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated for their own use, what they have created by their own labor, and what they have acquired under the existing social and economic order.

Jural Postulate III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence (a) will make good reasonable expectations which their promises or other conduct reasonably create; (b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto; (c) will restore specifically or by equivalent what comes to them by mistake or unanticipated situation whereby they receive, at another’s expense, what they could not reasonably have expected to receive under the actual circumstances.

Jural Postulate IV. In civilized society men must be able to assume that others will act reasonably and prudently so as not, by want of due care under the circumstances, to impose upon them an unreasonable risk of injury.

Jural Postulate V. In civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and having a natural tendency to cross the boundaries of their proper use, will restrain them or keep them within their proper bounds. Hence one is liable in tort for (I) intentional aggression upon the personality or substance of another; (II) negligent interference with person or property; (III) unintended non-negligent interference with the person or property of another.

Of these postulates, special regard should be given I, II, and III(a). Were one to

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substitute ‘In any social order’ for ‘In civilized society,’ these formulations would comport well with the main points raised in our discussion above concerning the possibility and necessity of rules to cover aggressive behaviors, resource allocations, and promising due to interest vulnerability. In addition, V(II) and V(III) raise the issues of negligence and unintended harm canvassed in our discussion of unlimited altruism. Although the remaining formulae are meant to reach more complex legal systems, the motivations behind good faith, reparations, and moral expectations touch the sorts of individual and social interests which might define in part some of the vulnerable interests identified as conditions for law. To this problem of sorting through interests underlying law and their possible content we now turn.

IV.4. Contents of Natural Law

IV.4.1. Interests & survival

The results reached in our analysis so far are intriguing. Not only are the conditions for law ultimately identified simpler in detail and comprise a more compact list than initially offered by Hume and Hart, but they call to our attention the central role of interests in an account of law. Our attention is also drawn to the singular content of interests or aims actually recognized in Hart’s account of contingent truisms and leads us to look more closely at what he takes to be the settled “simple contingent fact that most men most of the time wish to continue in existence” [CL, at 187]. Succinctly, Hart makes the explicit assumption that we are committed to survival, and deploys this interest to perform all the analytical work in generating reasons for law.

For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in whole structures of our thought and language, in terms of which we describe the world and each other. ... We are committed to it as something presupposed by the terms of the discussion; for our concern is with social arrangements for continued existence, not with those of a suicide club [CL, at 188].

Just as important, though left undeveloped in this recital, is Hart’s appeal to the aim of survival as the only interest universally identifiable; that is, not only can survival do all the motivational work required, it is the only draught horse uncontentiously
Now, that the notion of survival operates as a prominent reason in the development of law was recognized in the formulation of traditional natural law accounts. In reply to a question regarding the number of precepts contained in natural law, Aquinas comments that man shares with all substances "an appetite to preserve [his] own natural being. Natural law here plays a corresponding part, and is engaged at this stage to maintain and defend the elementary requirements of human life."\textsuperscript{334} To this extent, the commitment to survival is deeply shared. But is the presumption of singularity a fair one? Hart has garnered a good deal of criticism for making this claim. Some critiques go astray because of their failure to pay attention to the role of reasons in Hart's account: thus, noticing that Freudian psychological theories identify several universal—if typically unconscious—aims beyond survival is neither denied by Hart nor is it problematic for his analysis. Such 'aims' may operate as causes in some scientific account of man's behavior, but they are not reasons in the sense previously discussed and here required. But besides these sorts of responses, alongside the polemical chafing at his invocation of we who are so committed, the substantive rejoinder concerns whether survival has a "simple and undifferentiated character. Whose survival is meant —the individual's or society's?\textsuperscript{335}

If only the individual is in view, then these truisms may betray a narrow political philosophic individualism—a contestable position—and are therefore suspect. Even permitting them to be read as composing a simpler methodological individualism, "One does not need to indulge in Hegelian metaphysics to suggest that the forms of social organization in which individuals find themselves cannot simply be jettisoned or ignored either by their members or their observers. In this sense, one must account for what is

\textsuperscript{333}Cf. Hart's remark from an earlier essay:

Of course we must be careful not to exaggerate the differences among human beings, but it seems to me that above this minimum [content owing to natural necessity for survival] the purposes men have for living in society are too conflicting and varying to make possible much extension of the argument that some fuller overlap of legal rules and moral standards is 'necessary' in this sense [Separation, at 81].

Just such extension is, of course, the purpose of our argument in this section.

\textsuperscript{334}SUMMA THEOLOGIAE, 1a2ae.94, 2. [T. Gilby trans. 1966]. This represents the first of three stages assigned to precepts of natural law.

\textsuperscript{335}J.T. Noonan, Jr., The Concept of Law (Book Review), 7 NATURAL LAW FORUM 169, 175 (1962). Noonan is also one of those taking umbrage at Hart's use of the first-person plural pronoun at this point in CL's discussion of survival.
required for societies to survive," not individuals alone. As Hume specifically mentions, and Hart would surely acknowledge though it goes unremarked, an individualistic focus is an artificial one just in that man universally discovers himself in society, even if the range of that social order does not exceed a primitive form of extended family. It is the recognition of this natural fact concerning man's social nature which provides the focus for another natural law stage of precept development. Passing from what man shares with all substances to what is held in common with other animals, Aquinas continues his discussion by summoning universal animal inclinations: "correspondingly those matters are said to be of natural law which nature teaches all animals, for instance the coupling of male and female, the bringing up of the young, and so forth." For self-conscious beings, of course, the implications here are understood to be more profound than mere satisfaction of a sociobiological drive, however adequate the psychophysiological function may be deemed as an explanation on some neo-Darwinian model of species evolution.

In relation to this last point and its implications for social order, consider the role of social conventions circumscribing intimate relations, e.g. marriage delineations and incest taboos. Though differing to some extent from one society to another, no society exists without them. Given the natural facts of limited altruism and the desire for forging intimate relationships, it should be no surprise that there is reason for some development of family law as integral to societal order as those restricting interpersonal aggression. Likewise, given the natural facts of limited understanding and strength of will along with the natural desire to sustain personal and/or group values as means enhancing stability of intimate and social relationships, it should also be no surprise that there will be reason for some elaboration of customary norms and rites (e.g. institution of rituals or formal education) to ensure continuity between generations and survival of a society therein grounded. As Grotius explains, this maintenance of the social order, being consonant

336M. Krygier, THE CONCEPT OF LAW and Social Theory, 2 OXFORD JOURNAL OF LEGAL STUDIES 155, 180 (1982) (original emphasis). Related criticism is also offered by Rolf Sartorius: "Hart's notion of natural necessity is presented in terms of what there are good reasons for given survival as an aim. But surely room must be made for loftier human pursuits than mere survival (of either the individual or the species)." R. Sartorius, Positivism and the Foundations of Legal Authority, in R. Gavison (Ed.), ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 43, 61 (1987) (original emphasis).

337SUMMA THEOLOGIAE, 1a2ae.96, 2. [T. Gilby trans. 1966]. This represents the second of three stages concerning the precepts of natural law.
with man’s nature and intelligence. is the source of law properly so called.338

Now, the examples given above and the project accepted here are not designed to determine and work through those interests which might only timorously be deemed universal in fact. As Hart concedes, even the keen interest in or aim of survival for an individual is not universal in any necessary sense, logical or natural. Perhaps “most men most of the time” do desire to survive, but such desires by no means hold sway or reign supreme for all persons in any society, and are often individually and socially deemed inappropriate in many important circumstances. Consequently, to claim that survival always operates as more than a hypothetical judgment in an argument for generating a reason to act under practical judgment is patently false. More correctly, commitment to survival is the key to translating the hypothetical judgment ‘If I wish to survive then I (instrumentally) have reason to x’ into the practical imperative ‘Since I do desire to survive, I ought to x.’ As Hart recognized in his 1958 essay on Positivism and the Separation of Law and Morals, “in asking what content a legal system must have we take this question to be worth asking only if we who consider it cherish the humble aim of survival in close proximity to our fellows” [Separation, at 80]. A more fruitful approach, then, that we might draw out of Hart’s CL discussion would be to ascertain those interests which are “reflected in whole structures of our thought and language, in terms of which we describe the world and each other”; those interests we are committed to “as something presupposed by the terms of the discussion.” Those are the interests grounding practical judgments concerning reasons for law. An heuristic device for teasing out interests such as these is not best located in a priori argument regarding human nature. Let us not ask, ‘what aims are universal?’ Rather, let me suggest an alternative approach. Let us ask, ‘what questions seem universally reflected in thought and language?’ One can then surely follow both Hart and Aquinas in saying that the question ‘what should I/we do to survive?’ indeed reflects a basic interest. Embedded in every code extant is a group or set of basic rules governing, e.g. interpersonal aggressive, behaviors which come under social control for the sake of individual and/or group survival. Such conventions are reflective of (and may later come to constitute in part) whole structures of thought and language for grounding practical judgments and actions.

But is this question and the interest it reveals the only pair discernible? I think not. There is at least one other question universally asked and reflected in human thought

and language, a question whose answer is reflected in some form or other in every social, moral and legal code known: ‘Am I my brother’s keeper?’ alternatively, ‘For which persons and to what extent am I to be caring?’ Answered in various ways, but always asked, this sort of query leads to a group or set of basic rules delimiting conventions of commitment reflective of (and likewise may come to constitute in part) other seminal structures of thought and language for grounding practical judgments and actions, as well. This query brings us face-to-face with interests such as those noted above in intimate relationships, social stability, and so forth. In brief, we confront reciprocity interests between individuals-in-society. There may well be other identifiable questions and interests beyond these two. If so, the picture would become progressively complex, and so would those interests’ associated social conventions as they reflect that social complexity. But let it be stressed once again, the feature of which special note should be taken is that any such interests require an internal viewpoint commitment actually to generate reasons for law when mixed with appropriate natural facts. On this account, there is a threshold (alternatively, there are boundaries) as to what can count as reason for law and what can thus count as law itself.

339 From Genesis 4:9.

340 Somewhat more expansively, the question has also been put as ‘who is my neighbor?’ in Luke 10:29. Cf. the work reflected in the essays from E. Kamenka and A.E.S. Tay (Eds.), LAW AND SOCIAL CONTROL (1980), particularly the two essays contributed by the editors which take up and develop the notions of gemeinschaft (social control questions common to communal/organic societies) and gesellschaft (social control questions common to more individualistic societies, especially when based upon exchange relationships) and their overlap in social development.

341 That such reciprocity interests in accountability for actions and mutual concern for others exist forms the core of the ‘transcendental’ argument proposed by Beyleveld and Brownsword in the essay cited in footnote 312, supra. For theoretical development of similar reciprocity interests in international society; e.g. interests resulting in conventions encompassing pacta sunt servanda, equality, collective responsibility, and self-determination, see D.W. Skubik, Two Models for a Rawlsian Theory of International Law and Justice, 14 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 231, 244-248 & 258-263 (1986). For actual reflection of such interests and corresponding conventions in contemporary international law, cf. the modern development of jus cogens —being those rules widely agreed as fundamental to or necessary for international relations. In the words of the Vienna Convention, jus cogens norms are “peremptory” and “from which no derogation is permitted.” Vienna Convention on the Law of Treaties, 23 May 1969 [in force 27 Jan 1980], art.53. 1155 UNITED NATIONS TREATY SERIES 331, 344 (1980) [I-18232]. They can be expressed in treaty or received in custom as necessary to protect the public interest of the society of States or to maintain the standards of public morality recognized by them. See generally I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 512-515 (3d ed. 1979) and the works therein cited.
IV.4.2. Interests & norms

The concluding position that an internalized commitment is required to generate reasons is strikingly similar to Kelsen’s pure theory concerning the necessity of presupposing a basic norm to create objective validity for a legal system. His position has often been misunderstood to require a *grundnorm* presupposition for there to be a legal system, but it is one of the [perhaps few] points upon which Kelsen is reasonably clear:

The function of the basic norm is not to make it possible to consider a coercive order which is by and large effective as law, for —according to the definition presented by the Pure Theory of Law— a legal order is a coercive order by and large effective; the function of the basic norm is to make it possible to consider this coercive order an an objectively valid order.

The interesting question for us here is, ‘make it possible for whom?’

At times, the basic norm seems to be the presupposition of a nation’s citizenry. That is to say, irrespective of whether they are actually conscious of that norm, that their acts are considered by them as legal acts presupposes a hierarchy of norms, for which there must be a basic norm:

Hence it is not the science of law which presupposes the basic norm. The science of law ... only ascertains the fact: that if men consider a coercive order established by acts of will of human beings and by and large effective as an objectively valid order, they, in their juristic thinking, presuppose the basic

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342 This seems to be the (mis)interpretation advanced by Julius Stone in several of his writings, principally in chapter 3 of his *Legal System and Lawyers’ Reasonings* 98-136 (1964), where he handles in rather rough manner Kelsen’s pure theory of law. For a vigorous response, see Kelsen’s *Reply to Professor Stone*, 17 Stanford Law Review 1128 (1965).

343 H. Kelsen, footnote 342, supra, at 1144 (original emphasis). There is a passage in Kelsen’s *Pure Theory of Law* (2d ed. M. Knight trans. 1967) [hereafter cited as Pure TL] which could be misleading. In speaking of the interpretation of acts as legal acts, he indicates that conforming behavior being guided by the subjective meaning of the act must be recognized as its objective meaning (at 47). But this is not a reference to the validity or objective character of the legal order and its constitution.
norm as the meaning of an act of will. 344

In another essay, Kelsen speaks directly in the first-person plural, but from the point of view of an agent internal to the normative order as well as a positivist jurist engaged in externalized description. In differentiating the objective validity of a command by a tax official from the mere subjective validity of a command by a robber, he states that

we do not consider the subjective meaning of the command of the gangster—as we consider the subjective meaning of the legal command of a revenue officer—as its objective meaning because we do not presuppose in the former case—as we presuppose in the latter case—a basic norm. A Communist may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which he considers as the means of ruthless exploitation. For he does not presuppose—as do those who interpret the coercive order in question as an objectively valid normative order—the basic norm.345

Thus, Kelsen's jurist can only proceed theoretically by making space for the internalized commitments of a legal system's participants. Without this theoretical notion of commitment, the legal scientist is at a loss to distinguish a robber band's commands from a State's legal commands—both would otherwise simply be seen to be more-or-less effective coercive orders. If those orders are to be distinguished, there must be theoretical recognition of the normative nature of the one and the lack of any corresponding normative character in the other.

344 H. Kelsen, On the Pure Theory of Law, 1 ISRAEL LAW REVIEW 1, 6 (1966) (original emphasis). Philip Pettit quotes from this same passage to establish a definite reading for the attribution of the basic norm's presupposition in Kelsen's work contra criticisms raised by Jes Bjarup. See J. Bjarup, Kelsen's Theory of Law and Philosophy of Justice; and P. Pettit, Kelsen on Justice: A Charitable Reading, in R. Tur and W. Twining (Eds.), ESSAYS ON KELSEN 275 & 305 (1986). Pace Pettit, his reading is perhaps too charitable. Kelsen can be read as fixed on this point with consistency only at the cost of jettisoning large tracts of other work. Even within this 1966 essay, it can be argued that Kelsen is worrying the distinction between the philosophy of law (dealing with the politics of justice) and the science of law (covering the positing of law and the coercive order's validity), the latter bearing the form and concern of his general theory of purity. If this interpretation is accurate, we are still left with a Kelsenian jurist presupposing the presupposition of a grundnorm to establish objective validity. More on this point, infra.

345 H. Kelsen, footnote 342, supra, at 1144 (emphasis supplied). Similar language appears in the same context in an earlier work:

The act whose meaning is the constitution has not only the subjective but also the objective meaning of "ought," that is to say, the character of a binding norm, if—in case it is the historically first constitution—we presuppose in our juristic thinking that we ought to behave as the constitution prescribes" [Pure TL, at 8 (emphasis supplied)].
True, it seems the theorist need not evaluate the commitments as right or wrong, good or bad. That citizens are so committed suffices to supply the necessary element for deriving objective validity of the legal order. But this picture quickly becomes more complicated. For at other times the basic norm seems to be the presupposition of the legal scientist himself—a tool created so as best to understand the behavior of a nation’s citizenry; thus its hypothetical character: “To make manifest this presupposition is an essential function of legal science. This presupposition is the ultimate (but in its character conditional and therefore hypothetical) reason for the validity of the legal order”[Pure TL, at 46]. A bit more clearly, the presupposition is said to be a “juristic hypothesis,” and the “ultimate hypothesis of positivism.”346 Kelsen likewise places this presupposition at the foundation of sociological theory: “Commands ‘in the name of the State’ are such as are issued in accordance with an order whose validity the sociologist must presuppose when he distinguishes between commands which are acts of State and commands which do not have this character. ... Even the sociologist recognizes the difference between a State and a robber gang” [GTLS, at 186-187]. The scientist is not thereby thought necessarily to be committed to the norm he posits to explain others’ behavior as conforming to some objective validity; it is possible to remain morally uncommitted:

True, legal norms, as prescriptions of what ought to be, constitute values; yet the function of the science of law is not the evaluation of its subject but its value-free description. The legal scientist does not identify himself with any value, not even with the legal value he describes [Pure TL, at 68].

Thus, positing a social order’s basic norm does not require the legal scientist to internalize the norm in order to speak of objective validity. But for all that, the presupposition of a basic norm to achieve descriptive objective validity does require an internalized commitment to normative order. As Kelsen himself has conceded,

With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. ... The basic norm has here been described as the essential presupposition of any positivistic legal cognition. If one wishes to regard it as an element of a natural-law doctrine ... very little objection can be raised; just as little, in fact, as against calling the categories of Kant’s transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible [GTLS, at 437].

In short, the positivist jurist must be committed to order to recognize order: if the jurist has not this morality, positing a basic norm for deriving objective validity (what natural lawyers and positivists alike know as the binding or obligatory nature of law) is impossible; legality being the mere generally-effective coercive order of the gunman. This recognition of commitment to interests shared hence includes commitment to establishment and maintenance of normative order. That latter commitment will then operate as the driving force of law. Like Lon Fuller’s notion of law being a purposive activity, we must understand the contents of law to arise out of this recognition of humanity’s shared interests and corresponding purposes. In Hartian-cum-Kelsenian positivist terms, then, a system’s rules’ contents which derogate from this overarching purpose and do not reflect, arise out of, or serve shared interests and purposes fails to constitute a normative order for which citizens or jurists can presuppose a grundnorm for deriving objective validity. Consequently, bindingness fails to evolve and social order is threatened. In particular, individuals or groups regularly experiencing harm, e.g. being denied basic reciprocity rights in relation to their vulnerable interests, can, like Kelsen’s Communist outsider, only recognize an otherwise effective coercive order. And on Hartian terms alone, the latter order is not for them even a legal order. To recite the catch-phrase, which is now seen to pack a substantive punch, unjust law is thus no law at all.

In consequence of this analysis, we discover our Hartian legal theory has ultimately unfolded in accord with an orthodox natural law account of law and legal system. We find here all the components necessary for developing various substantive-moral-principles clauses in any Hartian rule(s) of recognition. Nor is it any sufficient rejoinder that these clauses may vary from time to time and place to place (being the sorts of variations easily and explicitly accommodated in, for example, Aquinas’ natural law theory). The point is that for there to be law and legal system, there must exist just this type of clause within any grundnorm or rule of recognition. Although we will not presently engage in the more extended project of proposing and developing specific

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347 For Fuller, “law is the enterprise of subjecting human conduct to the governance of rules.” L.L. Fuller, THE MORALITY OF LAW 106 (Rev. ed. 1969). Further, a legal system is “the product of a sustained purposive effort.” Id. Cf. Aquinas’ noting that “Law is a kind of direction or measure for human activity through which a person is led to do something or held back.” SUMMA THEOLOGIAE, 1a2ae.90, 1 [T. Gilby trans. 1966].

348 Hart acknowledges that Kelsen’s basic norm is functionally equivalent to his rule of recognition in CL, at 228. Likewise, that Kelsen’s notion of validity is to be understood as the problem of bindingness can be seen in CL, at 230.
clauses for contemporary society, our initial goal has been attained: the Hartian positivistic separation thesis is now entirely vitiated. Saving adherence to theistic revelation (a claim to knowledge which both Grotius and Aquinas acknowledged as unnecessary to their systems), there is no longer any chasm to be bridged between traditional natural law accounts as provided by medieval theorists such as Grotius and Aquinas, their modern expositions such as those provided by A.P. D’Entrèves and John Finnis, and a Hartian theory of law. For Hartian law is natural law.

A.3. Right Answers?

Does every dispute submitted for adjudication have a unique resolution which can be said to be the ‘right answer’ in that case? Alternatively, do judicial authorities ever need to exercise a ‘strong’ discretion to resolve a hard case just because no right answer exists? Put simply, do hard cases always have right answers?

In the contemporary jurisprudential debates on judicial constitutionalism, in which Robert Bork has stood virtually alone as an academic and lower-court judge espousing that judges do not have discretion because right answers do exist even in hard cases, D’Entreves demurs his acceptance of these accounts and his disavowal of versions of no-right-answers theories. To develop this defense, he turns from abstract justice involving ordinary language analysis and criticism of judicial opaqueness to legal justice involving legal substance and fair play.

349 See e.g. D’Entrèves’ short treatise entitled Natural Law: An Introduction to Legal Philosophy (1951); and J. Finnis, Natural Law and Natural Rights (1980).
Appendix A

Hard Cases and No-Right-Answer Answers

A.1. Right Answers?

Does every dispute submitted for adjudication have a unique resolution which can be said to be the 'right answer' in that case? Alternatively, do judicial officials ever need to exercise a 'strong' discretion to resolve a hard case just because no right answer exists? Put simply, do hard cases always have right answers?

In the contemporary jurisprudential debate on judicial decision-making, Ronald Dworkin has stood virtually alone as an academic and lawyer asserting time and again that judges do not have to have discretion because right answers do exist even in hard cases.350 In a recent work, Is There Really No Right Answer in Hard Cases?, Dworkin defends his right-answer thesis against his construction and formalization of two versions of no-right-answer theses. To develop this defense, he turns from previous tactics involving ordinary language analysis and critiques of judicial opinions to logical constructions and evidences of ordinary lawyers' adversarial discourse.

350 See e.g. the series of essays and reply to critics collected in R. Dworkin, TAKING RIGHTS SERIOUSLY (1978) [hereafter cited as TRS], with particular reference to essays nos.2-4 & 13: The Model of Rules I & II; Hard Cases; and Can Rights be Controversial? This strong right answer thesis should be distinguished from various weaker theses exhibited in the legal theoretic writings of authors otherwise sympathetic to Dworkin's ordinary language and case law analyses. Cf. R. Sartorius, Social Policy and Judicial Legislation, 8 AMERICAN PHILOSOPHICAL QUARTERLY 151 (April 1971) [judges should always reason as if there is a right answer, even when one does not exist (at 158-159)]; G. Fletcher, Some Unwise Reflections About Discretion, 47 LAW AND CONTEMPORARY PROBLEMS 269 (Autumn 1984) ["we need not decide whether there is a 'truth' about the law—a right answer, as Dworkin claims" in order to attribute a commitment to justification (at 285)]; and P. Weiler, Two Models of Judicial Decision-Making, 46 CANADIAN BAR REVIEW 406 (1968) [there may be a "reasoned way of justifying one solution as more probable than another" but the "creative work" of judging does not produce "demonstrably the right answer" (at 436)].

351 From R. Dworkin, A MATTER OF PRINCIPLE 119 (1985) [with accompanying notes at 405f.]. This chapter is a revised version of his article, No Right Answer? in 53 NEW YORK UNIVERSITY LAW REVIEW 1 (April 1978); which is itself a revised and expanded version of his essay No Right Answer? in P.M.S. Hacker and J. Raz [Eds.], LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 58 (1977). All page references provided below are to the latest version/source.
Argument following attempts to show that

(a) Dworkin has misconstrued the meaning and force of his own construction of the bivalence thesis of dispositive concepts;

(b) he has misconceived his two no-right-answer [nra] theses, for there is in fact only one significant nra thesis embedded in the essay;

(c) because of these misconstructions, Dworkin has improperly formalized and explicated their arguments; and thus,

(d) he has failed to address successfully the conceptual challenges raised against his right-answer thesis. He cannot so simply dismiss nra answers on logical or linguistic grounds, leaving his right-answer thesis the only viable option.

Consequently, let it be clear that what follows is not an attempt directly to refute Dworkin's right-answer claims. Rather, the point is to demonstrate the inappropriate moves in his argument when employing logical formulae both to construct and to refute nra alternatives.

A.2. Bivalence thesis of dispositive concepts

Dworkin begins his analysis with a characterization of

the 'bivalence thesis' about dispositive concepts: that is, that in every case either the positive claim, that the case falls under a dispositive concept, or the opposite claim, that it does not, must be true even when it is controversial which is true (at 120).

Thus, according to Dworkin, following ordinary lawyers' discourse it can be said that (i) an exchange of promises either does, or does not, come under the dispositive concept of contract; (ii) damage-causing action either does, or does not, come under the dispositive concept of tort; (iii) specified conduct either does, or does not, come under the dispositive concept of crime; etc. Bivalence might then be formalized

\[ \forall x: (x \in \mathcal{L}) \lor \sim(x \in \mathcal{L}) \]

where for every 'exchange of promises' either [it is true that] the exchange is an element within the legal set 'contract' or [it is true that] it is not the case that the exchange is an element within the legal set 'contract' (and so forth -- making respective substitutions) with the understanding that this disjunction is not only obviously to be read exclusively (i.e. one disjunct or the other can be true, and not both: \((\alpha \lor \beta) \land \sim(\alpha \land \beta)\), when \(\beta \equiv \sim\alpha\)), but exhaustively as well (i.e. the two disjuncts are not simply contraries, but
contradictories: \((\alpha \lor \sim \alpha)\) is necessarily true).\(^{352}\)

But Dworkin then proceeds to make a stronger claim about the duty of a judge subsequent to the judge’s determining whether, say, an exchange of promises does/does not come under contract:

If it does, then judges have at least a *prima facie* duty to enforce these promises if so requested within their jurisdiction; but if it does not, then they have at least a *prima facie* duty not to do so on contractual grounds (at 120).

This is mistaken. And it is an important mistake regarding a proper explication of the legal and logical relations underlying bivalence.

Let \(P_1\) represent the function ‘the judge has a *prima facie* duty \([pfd]\) to enforce’ and let \(P_2\) stand for the function ‘the judge has a pfd not to enforce’. Thus

\[(2) \exists x: (x \in L) \land P_1(x)\]

which can be read— for some exchange of promises found to come under contract, the judge has a *pfd* to enforce that exchange.\(^{353}\) Similarly

\[(3) \exists x: \sim(x \in L) \land \sim P_1(x)\]

which can be read— for some exchange of promises where it is not the case that it is found to come under contract, it is not the case that the judge has a *pfd* to enforce that exchange. But (3) is not truth-functionally equivalent to

\[(4) \exists x: \sim(x \in L) \land P_2(x)\]

where the judge has a *pfd* not to enforce the exchange, since \(P_2\) is not the simple negation

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\(^{352}\) Dworkin makes this formal point at 121-122. *Cf.* Michael Dummett’s explication of four semantic principles and their corresponding logical laws in relation to his understanding and use of the terms ‘principle of bivalence’; ‘principle of *tertium non datur*’ and ‘law of excluded middle’: (i) the principle of bivalence, that every statement is either true or false, corresponds to the law of excluded middle; (ii) the principle of exclusion corresponds to the law of contradiction; (iii) the principle of stability corresponds to the law of double negation; and (iv) the principle of *tertium non datur* corresponds to the law of excluded third. M. Dummett, TRUTH AND OTHER ENIGMAS xix (1978). Thus, our formalization (1) corresponds to (i); the exclusivity reading corresponds to (ii); while Dworkin’s rendering of his necessary-truth proposition is a functional combination of (iii) with (iv).

\(^{353}\) The stronger implication \(P_1(x)\) because \((x \in L)\) is often implicit, sometimes explicit, in legal discourse. But the weaker form here used in (2)-(4) suffices to illustrate our point.
of \( \mathcal{D}_1 \); it is a distinguishable duty.\textsuperscript{254} Consider the functional difference from the judge's viewpoint: that he lacks a pfd to enforce in (3) still leaves the question of enforcement open; while his pfd not to enforce in (4) prima facie disposes of the question of enforcement, though that disposition is defeasible on balance or all things considered. Conversely, consider the tactical difference from the other side of the bench—from the litigants' viewpoint: (3) calls for reasoned argument from both sides before the disposition of the case goes either way; while (4) requires a negative disposition unless the party for whom that disposition is adverse legally carries its burden of proof to overcome the judge's pfd of non-enforcement.

Now, \( \sim \mathcal{D}_1 \) might be rendered functionally equivalent to \( \mathcal{D}_2 \) in a particular legal system. It is certainly conceivable that judicial decision-making might be subject to the rule "lack of a pfd to enforce" dictates that the judge 'has a pfd not to enforce.'\textsuperscript{355} But such notions of duty and interpretative bindingness must be part of a deeper, or at least parochial, theory of law and, as in part argued in chapter II of this thesis, cannot be assumed in theoretic discussion.\textsuperscript{356} Thus, contrary to Dworkin's interpretation (at 120), while one can argue per the bivalence thesis simpliciter that every case in which the dispositive concept applies has an answer, it is not open to declare that every case in which the issue of whether the dispositive concept applies has even a prima facie answer, much less a right answer. As observed by Tony Honoré:

A system can be complete in a strong or weak sense. In the strong sense it is complete if it has rules which prescribe the answer to every problem that may occur, so that all the law is wholly predictable. We could make a legal system complete in this sense by inventing far-fetched rules: that every action which a rule does not forbid is permitted, that every transaction which is not validated by a rule is invalid, and so on. Armed with implausible gap-filling rules of this sort, we should have a complete but inflexible system. ... If in the real world legal systems are complete, their completeness does not depend on the claim that the solution to every problem can be known in advance. It resides rather in

\textsuperscript{254} An anonymous reader for the CANADIAN JOURNAL OF LAW AND JURISPRUDENCE commented that this non-equivalence in deontic logic is so basic as to be pedantic. So it is. The point of introducing it here is just that Dworkin has ignored it in his analysis.

\textsuperscript{355} \textit{Cf.} Dworkin's own remarks regarding a general theory of statutory interpretation which might include a rule of just this type, beginning at 129.

\textsuperscript{356} \textit{For} a strong claim that some such closure rules are analytic from within at least one deeper theory of law, see J. Raz, Legal Reasons, Sources and Gaps, ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE: 11 BEIHETE NEUE FOLGE 197, 215 (1979) [revised and reprinted in his THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 53, 77 (1979; 1983).
the fact that the system has the resources to provide a solution to every problem.\textsuperscript{357}

A.3. No-right-answer theses

After constructing and setting forth his interpretation of the bivalence thesis, Dworkin moves to distinguish two no-right-answer [nra] theses.\textsuperscript{358} Both theses are said to reject the bivalence thesis as developed, but for significantly different reasons. Yet, it can be shown that these two theses [NRA$_1$ and NRA$_2$], properly understood, collapse into one another; and the resulting nra thesis is quite compatible with the bivalence thesis as set out in section A.2, above. What is confuted is Dworkin's extended interpretation of duty given his analysis of two-disjunct exhaustiveness.

A.3.1. NRA$_1$

According to Dworkin, the first version denies that the two-disjunct bivalence thesis is exhaustive. That is, NRA$_1$ holds the two disjuncts, \((x \in \mathcal{L}) \) and \(\sim(x \in \mathcal{L})\), to be contraries rather than contradictories. Thus, NRA$_1$ must hold a sort of trivalence thesis of the form \((p \lor \sim p \lor r)\), where \('r'\) is a third possible position to hold given the facts of the case presented for judgment (at 122). He analogizes this analysis to the query "Is Tom a young man or an old man?" (at 121 and 123). Since 'old' is merely the contrary, and not the contradictory, of 'young' the question might be answered "Tom is neither; he is middle-aged."

Turning the analogy back to law, Dworkin argues that this first nra version must then posit a three-variable response to, say, contractual validity: the contract is valid [i.e. the exchange of promises in question comes under the dispositive concept of contract]; the contract is not valid [i.e. the exchange of promises in question does not come under the dispositive concept of contract]; or, the contract is inchoate [i.e. the contract is neither valid nor invalid] (at 123). Since concepts such as 'inchoate contract' are not to be found in lawyers' ordinary discourse or practice (at 126), he argues that a supporter of NRA$_1$ is hard pressed to make a case against the exhaustive character of his bivalence thesis.

\textsuperscript{357}{T. Honoré, \textit{Making Law Bind: Essays Legal and Philosophical} 29 (1987).}

\textsuperscript{358}These theses should be distinguished from the rather different summaries of nra claims canvassed in \textit{TRS}, at 331-332. There, Dworkin allows that one nra claim might hold: in the rare case within even a developed legal system it is possible for no litigant to have a right to a particular decision when no prior rights exist; thus, there may be no right answer in any strong sense. But this concession has little to do with the nra positions sketched here, where the non-existence of prior rights is not at issue.
But these moves are much too quick, and are quite misleading. While a supporter of NRA \(_1\) will surely deny Dworkin's assertion that the two-disjunct bivalence thesis is exhaustive as regards duty, the actual character of the posited third disjunct here is obscured by his introducing an incongruous third category for 'r', and his ignoring important types of legal discourse and the effect of shifting perspectives.

Let \(\Delta\) represent 'it is clear that', and let \(p\) represent 'the promise(s) at bar do(es) come under contract'. Thus, \(\Delta p\) represents 'it is clear that the promise(s) at bar do(es) come under contract' [i.e. 'it is clear that \((x \in L)\)']. Similarly, \(\Delta \sim p\) represents 'it is clear that it is not the case that the promise(s) at bar do(es) come under contract' [i.e. 'it is clear that \(\sim (x \in L)\)']. A supporter of NRA \(_1\) will then assert that there may exist a third category 'Np' where \(\sim (\Delta p \lor \Delta \sim p)\), which represents 'it is not the case either that it is clear that the promise(s) at bar do(es) come under contract or that it is clear that it is not the case that the promise(s) at bar do(es) come under contract' [i.e. \((\Delta p \lor \Delta \sim p)\) is significantly indeterminate ante-judgment]. Thus, to the query "Does \(x\) constitute a promise or exchange of promises coming under contract?" a supporter of NRA \(_1\) may respond \((\Delta p \lor \Delta \sim p \lor Np)\).\(^{359}\)

Does this situation ever obtain? Consider the plight of an attorney who is attempting to advise his client with reference to a unilateral promise which on the one hand appears to come within the ambit of the conceptual category quasi-contract [not 'inchoate'], but which on the other hand is not itself dispositive of legal obligation under currently developed doctrines of contract. That the attorney qualifies any advice "it generally appears that ..., but it should be kept in mind that ...." need be neither simply a legal realist's warning that no standards bind an arbiter on the point; nor a rights-based concern that though there may be a right answer, judges, being fallible, sometimes get it wrong. Rather, such regular advice is a function of the lawyer's recognition and acceptance of the position as counsellor and advocate whose office does not include the authority to dispose of contentious issues or cases.

Should it be feared that this way of putting the point is somehow question begging, we need not rest the case only here. Consider, too, given ordinary legal discourse and practice, that \(Np\) is otherwise quite common. Is this not in fact the very reason for much,
A.3.1

if not most litigation? Setting aside those few bad faith cases wherein the defending litigant entertains no doubts regarding the validity of a contract, the illegality of his breach and the certainty of a monetary judgment against him—but nonetheless forces the other party into court to delay collection—is not most every good faith case proceeding to trial and judgment a function of the inability of either party to persuade the other of the clarity of its respective (dispositive) position? And is not then the prime task of the judge to resolve \( \neg p \) into \( p \) or \( \neg p \) for purposes of judgment? Granted, the resolution of this disjunction and the subsequent judgment by the judge based upon some selected and justified categorization is a result of the judge's evaluative determination of the law and facts of the case. Neither is it denied that the theory of adjudication this evaluative determination entails is the subject of extensive debate (a debate which cannot be settled here). But it should suffice to note there are no logical or practical incongruities in this NRA \(_1\) position as Dworkin supposes to have constructed.

A.3.2. NRA \(_2\)

According to Dworkin, the second version also denies that the two-disjunct bivalence thesis is exhaustive. Yet, "[i]t does not suppose that there is any third possibility," but simply denies "that one of the two available possibilities always holds, because it may not be true that either does" (at 121). Following the formalization of the bivalence thesis, we may write that NRA \(_2\) holds

\[
Vx: (x \in C) \lor \neg(x \in C) \lor \neg((x \in C) \lor \neg(x \in C))
\]

While formulating \textit{arguendo} a substantive position grounded upon the concept of vagueness which might support NRA \(_2\) Dworkin makes the following observation:

\[360\] Criminal law as founded and practiced in common law jurisdictions is, of course, excepted here: the prosecutor in all cases must overcome the initial presumption of innocence in favor of the criminal defendant with evidence of guilt beyond reasonable doubt; no defendant has a good faith duty imposed by law to plead guilty. But it is a normative exception which proves the rule.

\[361\] Note that this need for resolution is not to be confused with any subsequent controversy which may surround a 'right answer' once a dispositive category is identified. Rather, the prior resolution is whether the dispositive category(-ies) put by the parties is(are) the appropriate one(s). Thus, a Dworkinian argument that any second stage controversy can exist without impugning a right-answer thesis, correct as it may be, is no support for the further claim of any logical incongruity within the nra position here sketched.

\[362\] See e.g. J. Wróblewski, \textit{Legal Language and Legal Interpretation}, 4 LAW AND PHILOSOPHY 239 (1985), for a set of formalizations (similar to some of those offered here) covering 'hard', 'soft' and 'fuzzy' language; and a standardized form for justified interpretative decisions when some semantic or other form of fuzziness exists requiring normative evaluation to reach judgment.
if "φ" is a vague term, then there will be sentences of the form "x is φ" that are true, others that are false, and still others that are neither true nor false. (This is different from the claim, which would be made by someone supporting the first version of the thesis [NRA₁], that in some cases "x is φ" and "x is not φ" are both false.) [at 129-130]

Now this is a curious observation. For unless he means to put the assertion "x is φ" is neither true nor false" in the at-judgment mouth of the judge, what could it be taken to assert in the mouth of the litigants and their lawyers if not pre-judgment Np? That is, at time t₁ preceding the judge's declaration of judgment

(6) $t_1: [\text{NRA}_2] \sim((x \in \mathcal{L}) \lor \sim(x \in \mathcal{L})) = \text{Np} \quad [\text{NRA}_1]$

which is resolved by the judgment at time $t_2$

(7) $t_2: [\text{NRA}_2] (x \in \mathcal{L}) \text{ or } \sim(x \in \mathcal{L}) = \Delta p \text{ or } \Delta \sim p \quad [\text{NRA}_1]$

Similar semantic confusion surfaces again in Dworkin's argument contra mutual-entailment and truth-functional equivalence positivism where an attempted formalization goes awry:

If "p" represents a proposition of law, and "L(p)" expresses the fact that someone or some group has acted in a way that makes (p) true, then positivism holds that (p) cannot be true unless L(p) is true [at 131].

Mutual-entailment positivism then requires "for example, that Tom's contract is valid if a sovereign has commanded that contracts like his be enforced, and vice versa" while truth-functional equivalence requires "that whenever Tom's contract is valid it will always also be true that some sovereign has commanded judges to enforce contracts like his, and vice versa" (at 132-133).

This symbolization and explication is not quite right. If it were correct, Dworkin would be forced into a position wherefrom he quite rightly recognizes he might have to concede a form of semantic positivism [where (p) just means or is identical to L(p)] which would support NRA₁ against his interpretation of the bivalence thesis (at 132),

363 A placement he never in fact makes, having all along presumed that a judge is settling the case one way or the other, rather than, say, declaring the dispute nonjusticiable; the putative controversy surrounds the judge's answer being 'right.'
though he off-handedly dismisses semantic positivism as “indefensible” (in n.4 at 405).\textsuperscript{364} Given it has been shown that the surface linguistic behaviour of lawyers is perfectly explicable on the NRA\textsubscript{1} thesis, the debate must move to deeper adjudicative theories—a debate which Dworkin also admits may reveal the non-existence of a right answer “in virtue of some more problematic type of indeterminacy or incommensurability in moral theory” (at 144).

For formalization of mutual-entailment or truth-functional positivism which is not reducible to semantic positivism, it will not suffice for “p” to represent a proposition of law. Rather, “p” must represent the statement ‘x is a proposition of law’ lest we find ourselves reverting to semantic positivistic formulae. Thus,

\[(8) \mathcal{L}(p) \otimes (x)\]

can be cashed out in entailment or truth-functional form\textsuperscript{365} as

\[(8a) \text{Rex has acted in a way that makes } p \text{ true entails } x \text{ is a proposition of law. and } x \text{ is a proposition of law entails Rex has acted in a way that makes } p \text{ true;} \text{ or} \]

\[(8b) \text{It is true (false) that Rex has acted in a way that makes } p \text{ true iff it is true (false) that } x \text{ is a proposition of law.} \]

Also

\[(9) \mathcal{L}(\neg p) \otimes \neg (x)\]

which can be cashed out as

\[(9a) \text{Rex has acted in a way that makes } p \text{ false entails it is not the case that } x \text{ is a proposition of law, and vice versa;} \text{ or} \]

\[(9b) \text{It is true (false) that Rex has acted in a way that makes } p \text{ false iff it is not the case that it is true (false) that } x \text{ is a proposition of law.} \]

\textsuperscript{364}For more detailed construction and criticism of a semantic positivism which is ‘indefensible,’ see Dworkin’s opening chapters in LAW’S EMPIRE (1986). But cf. recent criticisms of this approach in R. Gavison, Legal Theory and the Problem of Sense, in R. Gavison [ed.], ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 21 (1987) (claiming ‘Dworkin is constructing a straw man’ and that positivism is not a semantic theory of law (at 23)); and B. Jackson, SEMIOTICS AND LEGAL THEORY (1985) (claiming Hart’s positivism is ‘a theory of legal pragmatics, dressed up in semantic clothing,’ while Dworkin is the one who provides ‘a semantic theory, masquerading as pragmatics’ (at 268-269)).

\textsuperscript{365}\otimes \text{ being an empty placeholder for inserting entailment or truth-functional operators.}
But just as $D_2$ was seen not to be equivalent to the simple negation of $D_1$ in (3) and (4) (in section A.2), the internal negation $L\neg(p)$ is not equivalent to the simple external negation $\neg L(p)$, since the latter should be formalized

$$\neg L(p) \equiv (x \lor \neg x)$$

and which should be interpreted

$$\neg L(p) \equiv (x \lor \neg x)$$

(10a) It is not the case that Rex has acted in a way that makes $p$ true entails it is not the case that either $x$ is or $x$ is not a proposition of law, and vice versa.\[366\] or

(10b) It is not the case that it is true (false) that Rex has acted in a way that makes $p$ true iff it is not the case that either $x$ is or $x$ is not a proposition of law.

And (10), on either interpretation, supports $\text{NRA}_2$, contrary to Dworkin's insistence that these internal and external negations necessarily collapse and thereby provide an argument against $\text{NRA}_2$ (at 133). Neither need this argument put $\text{NRA}_1$ in jeopardy, for as previously indicated [in (6)] supporters both of $\text{NRA}_1$ and $\text{NRA}_2$ are actually making the same argument against a right answer thesis modelled on Dworkin's interpretation of bivalence.

A.4. Concluding observations

Now, Dworkin anticipates a variation on the argument last produced and admits that his own argument fails against it. He notes that propositions of law might be classed 'inherently positive' or 'inherently negative' and that whatever is not prohibited is thereby permitted, though he also claims that this is a reductionist program not fairly descriptive of legal practice (in n.4 at 406). Be that as it may, the argument proffered above is not, it should be noted, identical to this anticipated one, though a positivist might so attempt to extend it (e.g. by arguing that pre-judgment indeterminacy equates with civil permissions). We need not entertain the feasibility or fairness of such a project here. The point of our text is that Dworkin's own argument is reductive in nature and

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\[366\] E.g. consider 'q' which might also represent the statement 'x is a proposition of law' perhaps on other justificatory grounds and upon which Rex acts.
misses fairly describing legal practice, however else it might also fail. 367

In short, Dworkin has not yet made his case secure for a determinate answer, much less a right answer, in every case from the lawyer’s perspective. Nor has he made his thesis firm against the ascribed exercise of significant discretionary power in those classical and Hartian positivistic accounts so providing from the judge’s perspective. At best, his attempt to devise and defeat a significant nra thesis reveals that the disagreement envisioned is finally a deep one of moral and political theory, and not one to be resolved at surface linguistic or formal levels of argument.

367 The argument here should also be distinguished from the analysis and technically more complex formalizations advanced by Raz (e.g. through introduction of modal operators) against Dworkin’s claims in his essay noted in footnote 356, supra. There, a variety of nra-type gaps are shown to be logically inescapable on a proper interpretation of Raz’s sources thesis. While those demonstrations are of considerable interest, they seem to sidestep the thrust of Dworkin’s challenge by requiring acceptance of some controversial theses to motivate the proofs (e.g. Raz’s position on the concept of vagueness in his §3.2). Here, nra answers are shown to be logically consistent with Dworkin’s own understanding of law and common law legal systems, and that his own proffered formalized challenge has missed the mark.
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