THE LOGIC OF ADJUDICATION:
AN ANALYSIS OF THE GROUNDS FOR JUDICIAL ASSERTION

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ABSTRACT

In the process of adjudication, judges are required to assert propositions that answer the issues a particular case raises. To understand whether the judge is correct in his assertions, a theory is needed which would explain the grounds for asserting propositions within a judicial decision. This thesis presents such a theory: that of judicial pluralism. Pluralism claims that the basis for judicial assertion lies in individual conceptions of judicial role. One uses one's conception to construct a tiered propositional schema, whereby particular questions may be answered. The schema is conventional, in that one's conception of role is based on beliefs about what sources a particular society demands that a judge use in reaching a decision, rather than what sources he ought to use. However, an individual's beliefs and attitudes figure prominently, as the concept of role is one about which disagreement is likely to be great.

Pluralism is contrasted with three other theories. It attacks the skeptical position that assertion is subjective and a matter of personal belief, in part because that position fails to notice the conventional aspect of judicial role. It attacks the positivist position that claims that a master rule yielding a normative model can be found in legal systems, in part because that position fails to notice the disparity in positions among judges and observers due to varying propositional schemata. It attacks the position of Professor Dworkin, who claims that a theory of adjudication can always ensure a two-ordered truth value for any judicial question, in part because his position assumes agreement on concepts when such agreement is wanting.

Pluralism is used to address several issues concerning reasoning within the judicial decision. It is also applied to analyze problems within contracts and constitutional law, including a discussion of the political consequences such analysis suggests.

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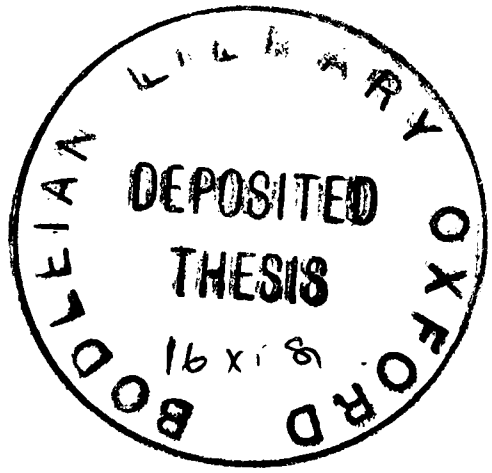

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INTRODUCTION

It is often said that the philospher's task is to belabor the obvious. Slow and careful analysis of commonplace concepts and beliefs is thought to flush out hidden obscurities, clarify implicit ambiguities and reconstruct our thoughts along a more solid foundation. "It is the profession of philosphers to question platitudes that others accept without thinking twice."[1] Philosophy is in a deep sense, to use P. F. Strawson's distinction, descriptive rather than envisionary, for by showing dragons in the shadows to be no more than everyday reptiles seen by misleading light, it confirms our beliefs and reassures us of our observations. This is often difficult, a treacherous task, taking us into great digressions in order to show plain fact. Bertrand Russell explained the process eloquently:

> "Here, as usually in philosphy, the first difficulty is to see that the problem is difficult. If you say to a person untrained in philosophy 'How do you know I have two eyes' he or she will reply, 'What a silly question! I can see you have.' It is not to be supposed that, when our inquiry is finished, we shall have arrived at anything radically different from this unphilosophical position. What will have happened will be that we shall have come to see a complicated structure where we thought everything was simple, that we shall have become aware of the penumbra of certainty surrounding the situations which inspire no doubt, that we shall find doubt more

> frequently justified than we supposed, and that even the most plausible premises will have shown themselves capable of yielding unplausible conclusions. The net result is to substitute articulate hesitation for inarticulate certainty."[2]

This lengthy proclamation (or apology) is quoted at the outset of this thesis because it is a matter easily lost sight of in studies of law. Law, and even philosphy of law, are areas overwhelmingly empirical in their study. Given the ratio between the enormous number of empirical, technical and non-philosophic papers and the philosophic ones, one must assume either that most legal observers feel most fundamental conceptual problems in law have long been answered or that they are not worth taking the time to answer.

The area of judicial decision-making is included in this generalization. Even many of the studies that might be thought philosphical in this area -- Edward Levi's An Introduction to Legal Reasoning[3] or Rupert Cross' Precedent in English Law[4] -- are discussions of how some judges decided some cases, and the rules they seemed to follow. These types of books, as well as their fellows: the jurisprudence textbook exemplified by Salmond on Jurisprudence[5] and the judicial treatise exemplified by Benjamin Cardozo's The Nature of the Judicial Process,[6] offer excellent illustrations and often good descriptions of how case law changes and grows. Despite their professions, they offer either very little or very bad (unfounded, unclear, inconsistent and shallow) philosophy, using 'philosophy' here only in the limited sense of analysis of concepts.

I raise this criticsm not merely to defend my scarce mention of these sources in the thesis or to bemoan the lack of philosophical concern for judicial reasoning. Rather, I want to indicate that the phrasing of many of the questions in this paper is original only by default. While there is some work in the area, it has, in general, long been neglected, to the point where one finds oneself forced to argue against hypothetical positions. These positions are not introduced in lieu of real positions to make for easier targets. To the contrary, they are often what I felt real authors might say if they addressed such issues.

This brings up a related part of scholarship. The questions raised here are sufficiently unusual that even in philosophical works there is often no exact position given on them. An interpretation of leading philosophical works -- by H. L. A. Hart, Joseph Raz, Ronald Dworkin, Neil MacCormick -- will be given, but no claim that mine is the right interpretation should be implied. Often, several interpretations will in fact be offered. The purpose here is to find viable positions to contrast with the one I argue for, and by such comparisons, aid analysis and forward understanding.

I have two further comments on method before briefly explaining what this enterprise has as its object. First, I have some fear that most of what I say is transparently clear. The difficulty of not having settled schools of contrary theories is that one is never sure when one is belaboring the obvious.

Yet discussion has shown me that not all that is in this thesis will be calmly taken. There is the further difficulty that the method of philosophy of law is a derivative one in philosophy, using other more basic methods from other areas -- logic, philosophy of language, game theory, ethics, semantics -- to proceed. This thesis will assume rather than argue for many positions in these areas. Incorporation of technical philosophical positions contributes to the isolation of this thesis from many more conventional treatments of legal reasoning. As for the philosophical positions assumed, Justice Oliver Wendell Holmes said, "It is idle to illustrate further, because to those who agree with me I am uttering commonplaces and to those who disagree I am ignoring the necessary foundation of thought."[7]

My second comment is of a quite different type. Judicial cases are an empirical phenomenon, sufficiently alike to lump together for easy generalization and classification, sufficiently unlike to cause the cautious to be wary of easy classification and all generalization. Greater familiarity with actual cases cannot but help one's understanding of judicial process. Karl Llewellyn even recommended (and followed his own advice in his study, The Common Law Tradition: Deciding Appeals)[8] simply picking up volumes of case reports and reading straight through them to get a feel for the myriad diversity and depth of judicial process. Given the very few necessities that a case must have to be a case, it is presumptuous to do what jurists and

legal scholars routinely do: give general rules about, and the complete classification of, cases. This paper is no different. In that what I say is true at all, it is more likely to be true of the Anglo-American common law tradition I am most familiar with. My readings in anthropology of law and my somewhat limited look at European civil law have convinced me of its applicability to those, and by poor induction, to all systems. To some extent, every discussion of judicial reasoning is in the form of hypothesis: the vagaries of human experience provide a challenge to any complacent social observer, and require all models of social behavior to be tested against changing and overlooked group actions.

There is a corollary to this. Except for the final chapter, samples drawn from actual cases are not common. This is due to the theoretical emphasis of this paper. How actual cases have been decided by actual judges is usually peripheral to any consideration of how they ought to have been decided. Cases can illustrate how a theory works, but they are often too vague or ambiguous to demonstrate the validity of points in a theoretical discussion. What is necessary in most discussions would be a counter-example, or evidence of its existence or non-existence. Such counter-examples are hard to come by. Put in logical terms: existential quantification over most judicial propositions is trivial while universal quantification is as difficult (in judicial statements) as it is in most matters concerning social behavior. Statements in existing theories

are often formulated to exclude counter-example by limiting what is included within the concepts employed. The unproductive mudslinging concerning the issue of whether international law and so-called primitive law are **really law** is the most notorious example of this. These two areas are always seen to be difficulties for someone else's theory, though, and the defender of the attacked theory seems able to easily manipulate the theory to handle them. A further example is Lon Fuller who in his The Morality of Law[9] lists eight ways to fail to make law while seeming to make law. (They include such things as ad hoc decision-making, rule obscurity, rule secrecy, contradictory rules, rapid legal fluctuations, retroactive legislation, rule imposibility, administrative arbitrariness.) It is easy to find places where such failures are evident. Yet if Fuller wishes to share his concept of law to exclude these ostensible legal systems, the only counter -- save a possible specious common-language one that declares ordinary talk sovereign -- is a terminological one. The point is simply that because of the vastness, diversity, and opacity of the legal data, knock-down proof or disproof of many theories is impossible, and single-case evidence of a theory's validity is usually of little worth.

* * * * *

This paper introduces and promotes a theory about judicial

decision-making called pluralism. 'Pluralism' is a well-known concept in political science and theory where it refers to the existence of different factions or interests in a society and the pressure and influence these factions or interests bring to bear on political decision-making. As a political theory, pluralism sees the social order as an entity whereby groups seek to advance their preferences, and by working with other groups and compromising to obtain a greater support, obtain legislation that stabilizes an otherwise fractious community.[10] When given an environment free of restraint and coercion, the pluralist process allows for participatory democracy and inhibits a dictatorship by the majority. Such a theory has in recent years been attacked by philosophers as obscure and confused,[11] and by social scientists as mistaken and malevolent.[12] Whatever the validity or morality of political pluralism, it contains an idea worth considering: namely, that shared language and concepts are often a mask for fundamentally different views of what society is and how it behaves. A single language and single history is the shared legacy of all participants in a society, and these participants naturally clothe their own views in this language and history. Appeals to a common event or concept mark individuals who agree on little else than the fact of their inheritance.

Judicial pluralism uses that idea in its attempt to analyze the ontological status of judicial propositions. Put less grandly, we may want to know the truth value of judicial statements, and to do this we first have to understand what

type of statments they are. Of course, much paper has been wasted reiterating that judicial statements are normative. I say paper has been wasted because it seems a questionable practice to seek to clarify a difficult and obscure concept (judicial decision-making) by appeal to a more difficult and obscure concept (normativity). Many types of things are normative -- law, ethics, games, language, theology, manners, customs -- and yet are otherwise quite dissimilar. If it is obvious that a children's game of tag shares little with the rules of semantic structure of natural languages, it is also clear that game analogies dominate the normative literature and are employed in an attempt to explain the remote and complex by the use of the near and the simple. But this is a diversion, and an area touched upon only incidentally in the chapters ahead, for it is not normativity that interests us, but objectivity. What kind of statements, vis-a-vis the external world, are judicial statements; and can we tell whether they are true or false, or merely something else, like moral, aesthetically pleasing, or politically expedient? What is more to the point, how can we tell?

Judicial pluralism attempts to yield answers to these questions by introducing a thoeretical framework that provides a complete set of judicial propositions, able to answer any potential question that could arise in the course of adjudication. Pluralism does not attempt to provide actual solutions to actual cases. It is one level more abstract than that, and

describes the status, not the contents of judicial reasoning. To return to the justification for the term: political pluralism emphasizes the diversity of input in a common culture through shared linguistic and political institutions. In law, that shared tradition is even stronger. Lawyers and judges are given a distinctive legal training which colors to some extent their knowledge and reasoning on legal questions henceforth. Yet even here, there is a range of opinion, of view, as to what is right and wrong, valid and invalid in the legal sphere.

The shared learning and language coupled with the vast number of uncontroversial cases have lulled some[13] into believing that there exists an objective judicial universe where statements about what is and is not a correct judicial statement are valid in a way not very different from those of the objective empirical universe where there are verifiable statements about trees, tables, and transistors.[14] Whatever this claim's initial plausibility, locating the source of the objectivity is notoriously difficult. When disagreement does arise, how is a solution to be reached? When agreement occurs, are we sure that various individuals have the same basis for their conclusions?

Pluralism does not provide any solution that is easily statable and put into a single sentence. If it is complex, it is because the nature of the subject matter makes it so. If, however, it is seen as undramatic, I would counter that the

genius of the judicial process lies in its facility to disarm drama and turn the volatile into the pedestrian.

[1]Quoted from David Lewis, Convention: A Philosophical Study (1969).

[2]Bertrand Russell, An Inquiry into Meaning and Truth 9 (1940).

[3]Published 1948.

[4]First published 1960, second edition 1968.

[5]Twelfth edition edited by P. J. Fitzgerald (1966).

[6]Published in 1921.

[7]Oliver Wendell Holmes, "Natural Law" in Collected Legal Papers, 314 (1920).

[8]Karl Llewellyn published this in 1960. His advice is found, among other places, on page 6 of this book.

[9]Discussed on pp. 33-94 (rev. ed. 1969).

[10]The theory was rooted in such works as John Locke's Second Treatise on Government (1690) and de Secondat, the Baron Montesquieu's The Spirit of the Laws (1748), but was first fully and persuasively put forward in James Madison, Alexander Hamilton and John Jay's The Federalist Papers (1790), particularly No. 10. It has been stated more recently in social science terms by David B. Truman, The Governmental Process (1951) and Robert A. Dahl, A Preface to Democratic Theory (1956).

[11]Two articulate examples can be found in Brian Barry, Political Argument (1965) and William E. Conolly, The Terms of Political Discourse (1974).

[12]See Theodore J. Lowi, The End of Liberalism (1969) for a case-study based attack.

[13]Ronald Dworkin is perhaps the most prominent of them. See Taking Rights Seriously (1977) for his position, and Chapter VII of this paper for a partial response to it.

[14]Some, throughout history, have doubted any objectivity in the empirical universe. Berkeley, certain logical positivists, and presently some anti-realists may be in this group. Any reference in this paper should be taken to be at least mildly realist, not dissimilar from the realism without Platonic affectations found within Michael Dummett's, Frege: Philosophy of Language (1973).

A STRUCTURE FOR JUDICIAL DECISION-MAKING

The untrained observer, the legal layman, is often bewildered by the variety and complexity of law in modern societies. His immediate reaction to a legal situation is fragmented, depending on what particular aspect of law he sees. A policeman accusing him of theft; a store clerk refusing to allow the return of an unsatisfactory purchase; an executor informing him of a piece of land now his; a tax collector scrutinizing a novel deduction; an attorney advising him of a claim against him by a milkman now crippled by his daughter's rollerskate: each would elicit a different reaction. Moreover, it is unlikely that this untrained observer could readily formulate a belief schema or sketch a general and unified conceptual picture of how these different legal bits might fit together, and what he thinks about them as a whole. But it is more unlikely that our observer would have no cohesive set of ideas and opinions at all. His stock of beliefs is likely to reflect his experience and his reflectiveness. If we pushed our observer to distill his ideas and formulate some general statement concerning law, and we further pushed him to focus his attention on the judicial aspect of law, -- say, by making him a party to a suit -- we are very likely to hear him pronounce on the question of the freedom of the judge to decide cases. He might

settle on this issue simply because it is such a popularly controversial one, or he might see it as a necessary first step in constructing a coherent justification of the various fragmentary, eclectic, and possibly opposing ideas he holds. He might reason that to answer divergent legal questions, it is first necessary to understand what constraints those professionally called upon to answer these questions are under.

In addressing the issue of judicial constraint, he might take either of two popularly held positions (or he might take both, though they are contradictory, with the knowledge that he is in a dilemma but unable to work his way out of it). He might take the position that judges are highly bound by precedent, statutes, regulations, or just generally, rules, and that in any situation, some specific, ascertainable rule applies. He, as a citizen, and a judge as a judge, each simply follow the rules. Law is complex, and rule ascertainment is not always easy. However, if one had the time, energy, and expertise -- if one were in Professor Dworkin's term, Herculean -- one could discover this rule with some certainty. The role of the judge is to acquire the expertise and expend the time and energy. The alternate position would also start with an acknowledgment of the existence of a myriad of statements, precedents, regulations, and rules. It would look to their vagueness, their ambiguity, and their incompleteness with regard to the problems that arise. Given this, the alternate position would say that a judge may do pretty much as he pleases. It

might also point out that this is what judges do anyway. Judges must justify their positions, but justifications are easily and sophistically manufactured.

These two positions are in fact widely held, often by the same individual when he pre-theoretically considers different situations. That such a split is so wide could be passed off as a demonstration of the general ignorance and confusion of the legal laity, (or at least half of it if one position is sound). The difficulty, however, is that such a split is reflected in lawyer's briefs and judges' decisions, as well as in learned treatises and jurisprudential discussions. The split has been incorporated in a sophisticated way into a whole judicial literature, and has given rise to schools of advocacy, as well as ones of reconciliation.

Trying to analyze and ultimately resolve this issue will lead us into the more abstract focus of this paper. Part of this analysis will involve a schematic overview, involving three logically distinct, related levels or orders. These levels represent different levels of judicial reasoning which relate to and incorporate much of what is called 'law'.

1. Judicial Propositions - An Overview

It may be useful to look briefly at these levels. Each level is more abstract than the preceding one. The least abstract first level is made up of answers to all existent

judicial questions. They are propositional in form. Their variety and content is a function of the questions that can arise in a court: for example, is this a valid contract, is the defendant guilty of embezzlement, was the testator sane when he bequeathed his wardrobe to a chimpanzee, is a certain piece of evidence hearsay or admissible hearsay, do the facts stated in the pleadings constitute a sufficient cause of action, what ought to be the proper instructions to the jury? The membership of the set of first order propositions depends upon the first order questions (those upon which the court must rule to resolve the conflict before it) to define what kinds of propositions are necessary. In a trivial sense, this allows that how the judicial questions are framed -- what is the syntactical, terminological, and judicial style -- determines how the propositions will be stated. More importantly, though, the type and range of questions raised in litigation determines what class of propositions will serve as answers, with the propositional set's range being limited only by the imagination of the litigious mind.

The second level contains propositions that justify the set of first order propositions. Suppose that p is a member of level one. Then if, if q then p, q is a member of the second level. This makes the set of second level members extremely populous. At an intuitive level, it includes the reasons we normally associate with legal justification. It also

includes all members of level one, for the answer may serve as a reason for the answer to a later related question. (Also, identity contains an implication principle: p implies p for all p.) For example, suppose p stands for 'The document D is a valid contract.' Then p in one case may be a first level member, answering the question 'Is D a valid contract.' Later in that case (or in another case) we may decide the defendant's defense in a tort suit for trover is good because he had a contractural right to the chattel. That right was based on the fact that a document in question constituted a valid contract: in other words, because p. The same proposition is used in a logically different way in the two cases. The second level includes, finally, other types of reasons for first order truths, including empirical facts and logical and rational devices that are necessary to answer questions antecedent to first order propositions.·

The third order is made up of justifications of the second level criteria. These justifications might be moral, political, prudential, or social (or any other general area, such as theological), though they are more commonly some hybrid of the above. Because justifications attempt to resolve 'why' questions of reasons for action, (i.e., - all are types of rational justification), they tend to indefinite regress or circles. Controversy in the realm of political morality is ubiquitous, and what is conclusive for one person is often merely the starting point for another. Even for an individual,

the question of when explanation should come to an end is a difficult matter, it being a function of the ponderousness of one's mood. For our purposes, all further levels of justification will be collapsed to the third level.

This tertiary schema needs to be further defined and developed. But a brief example might illustrate the place of each level in an ordinary judicial (legal) controversy. Suppose A, a schoolchild, slips on B's icy sidewalk while on his way to school. A institutes a tort suit against B for negligence for his failure to remove the ice. A's case may raise a number of questions, questions whose proper answers are part of the set of first level propositions. These propositions vary in scope and generality. The same basic propositions may be clothed in a broader or narrower form. A may argue that 'Landowners have a general duty of care to keep safe their premises for anyone lawfully upon them' (wide scope) or merely that 'Landowners with sidewalks used by children on their way to and from school must keep them free of ice' (narrow scope). Two rather obvious, but extremely important, related points are evident. First, a fact situation can be stated with a varying degree of first level generality limited only by the imagination of the participants in the action. The uniqueness of individual social situations is a trivial social fact and an unstartling legal truism. However, it is rare that social slices need to be compared exactly, and when precise characterization becomes necessary, the triviality disappears. Such

characterization is commonplace in the courtroom, and is often what the controversy is all about. Is a bicycle a vehicle for licensing purposes, a roller-coaster a common-carrier for tort liability purposes, a fork a dangerous weapon for criminal-law purposes? The matter is less one of terminology than of beliefs, as we shall see shortly. What must be stressed now is that determination of the scope of the issue is a crucial matter. The quick response that scope can be determined from other considerations, past cases for example, if not actually false is unhelpful. How past cases should be read presents just the same sort of problem. Does a past case holding B' liable for A''s injury for tripping on an ice skate on his property help solve the case of A v. B? Is it relevant that ice skates must be put there by a human agent (unlike ice), that A' was on his way to an after-school basketball game, or that B' had himself tripped over the skate? Is it relevant that the judge in the first case declared liability in a very sweeping manner? Further, is this first case rightly decided, or is it merely an ill-considered anomaly that ought to be limited to its instant facts? The quick response only moves the problem back a step.

The second point is that narrow propositions can be justified by general propositions. B is liable for slippery ice because B is liable for ice and snow because B is liable for weather-induced hazards he can alleviate because B is liable for all hazards he can alleviate, etc. Each wider

proposition implies and is a criterion of the included narrow proposition. This does not diminish the difference between reason and conclusion. It only suggests that when one is looking to possible first and second level sets of propositions that are actually apt to be helpful, one sees more generality (or wider scope) as one moves to the second level. If A actually sues B, there is not going to be an infinite number of propositions in controversy on the issue of landowner's liability. There may well be preliminary skirmishes before the issue is joined, and propositions may be shuffled between the levels. Certainly, few actual propositions will be discussed. The relation between any related level one and level two propositions can assume many (and logically an infinite number of) intermediate steps. Here, A may argue that B is liable for any injuries on icy public sidewalks of B's that are used by schoolchildren on their direct way to school because all landowners owe a general duty of care to invitees to keep their premises safe. Missing from this formulation is any statement equating schoolchildren with invitees or paths through one's property with public sidewalks. These statements, as well as hundreds of others, may or may not come into play in the controversy.

Let us suppose that B admits the presence of a duty, the slipperiness of the ice, his neglect in failing to remove it, and its unfortunate effect on A. Yet B wishes to escape

liability by pointing out that A needn't have taken the particular route to the school that he did; that an alternate route through an always cleared public park was available; that B was an old man known not to tend his sidewalk; and that A thus assumed the risk inherent in crossing icy paths. B appeals to similar or related past cases, to policy considerations embedded in judicial pronouncements, or perhaps, to the intention implicit in statutes imposing the liability on landowner in the first place. What kind of action is B taking?

Certainly, he is pointing to first order propositions of assumption of risk. He is justifying these propositions by criteria drawn from statutes and past cases. The statute or past case is merely the form or the container of the criteria. B is appealing to the contents. The contents of these forms (as we shall see later) are commonly used as second order criteria, and blend the logically distinct features of being arguments from authority and arguments from reason. B's appeal to policy embedded in the legal forms is just a more sophisticated and indirect use of legal forms. He, like A, asserts first order propositions (viz.-'Assumption of risk negates liability due to negligence') by appealing to second order criteria (e.g.-'In the case of C v. D, assumption of risk was found).

A and B are using second order criteria differently, but let us overlook that for now. How is the case to be resolved? A disagrees about the relevancy of C v. D. He may claim that C v. D is irrelevant because it is a case of a different

jurisdiction, or that it is distinguishable because there is no adequate alternate route here. He might also argue that C v. D is irrational in that it suggested that those who live in northern climates know how to dress for and move about in winter weather, an assumption factually dubious considering that young children (without the experience of years) are being discussed, and morally niggardly with respect to the very young, the old, the infirm, and the simple. A different kind of reason is being asserted here. The controversy focuses on matters of rationality, identity, political theory, and fairness. Not only are these matters not necessarily contained in legal forms (although they may be instantiated there), they are matters on which no limit or pedigree is used for relevancy. In other words, unlike second level criteria, all of which can intuitively be labeled 'legal', these matters defy any such limited characterization. They thus form the set of third level justifications. It has been assumed thus far that the third level is critical to any understanding of judicial controversy. I shall try to show why in the remainder of this chapter, first by showing that the third level exists, and then showing how one's third level commitments bind one to certain first and second level conclusions.

2. Characterizing Judicial Propositions

Endless learned papers and books have discussed what 'the law' is, what its contents are, what its sources are, how

individual laws are individuated. Often the question is approached as though it is important to find the correct a priori definition, and then empirically discover what phenomena are thereby captured.[1] No doubt, such a method is useful as a political tool in persuading one of the legitimacy of certain rules or even of a whole political order. If something is legal, it often takes on an elevated status, some even claim an intrinsic moral component. Successful guerrillas are quick to label their commands as laws, even laws of ancient, if neglected, vintage. Actions found illegal are often equated with actions that are immoral. The a priori approach then has its uses. Its difficulty is that competing concepts arise with no way to close between them. The approach of this thesis is to look to the role of the judge in formulating judicial statements rather than to categorize legal statements or to search for a proper definition of 'law' or 'the law'. This will be done through an analysis of the structure of judicial reasoning, and through an examination of the propositions that make up that reasoning. As a definition, we shall say that something is a judicial proposition if and only if judges, within a judicial system and while hearing the conflicts that have come before them, either are logically required to hold it to be true, or are required to make use of it to hold some other proposition to be true. The first disjunct refers to the first and second order propositional set, the second disjunct to the third order set.

Before continuing, several points need to be made about the preceeding definition.

1. A broad appeal is made to the concept of the judicial role. Judges' opinions while off the bench, or their random thoughts while presiding and deliberating are of no importance. The dynamics of the judicial role are shaped by the nature of the conflicts brought before them as well as by the expectations of proper judicial behavior they themselves bring (their professional intellectual furniture). A further distinction must be made between judges and judicial role. An examination of a set of judges, even while sitting and presiding will only evoke a generalization about their behavior, whether that behavior concerns decorum, fashion, race, or decision-making. No practice, however regular, itself implies an obligation upon others to follow. 'Judicial role' is an abstraction, and one, though empirical in some aspects, with a normative component. An individual is fulfilling a role if he meets certain standards, and these standards can exist in our minds whether several, many or no individuals comply with them.

2. If 'judges' then can be taken more precisely here to mean judges in their judicial role, it is their conflict-resolution sub-role that is central. Judges do other things besides resolve conflicts directly: they negotiate, they regulate the bar, they preside at weddings, they issue ex parte writs and orders, they guide and instruct juries, they may even swear in government officials. It is conflict resolution that is of concern here.

3. The term 'true' is rarely found in judicial opinions, especially appellate judicial opinions which claim to handle matters of law rather than matters of fact. Putative facts in particular cases are often found to be true or false. Such matters--as, for example, whether a tort defendant was intoxicated or speeding in his car, or whether a witness was telling the truth, or whether a contractor was actually in breach--are the only issue in countless legal actions. Conflict resolution necessitates knowing or trying to know what occurred, and that is often, if not usually, disputed.[2] But after the facts are settled, the range of questions usually labeled 'legal', and, without controversy, normative, remain. These questions, the almost sole concern of higher courts, are rarely framed as matters of truth. The very phrasing of the courts appears antithetical to anything so unyielding as truth. The talk is often enough of analogies and competing precedents, of choices and of majority versus minority rules, of differing interpretations of statutes, or whether a certain rule or principle should apply, or be made to apply.

But if the term is alien, the concept is indispensable. It gives sense and meaning to judicial statements just as it does to all statements, indeed all language. If three witnesses are a requirement for the creation of a valid will, we can say either: 'Three witnesses are required to validate a will' (or p), that "'Three witnesses are required to validate a will' is true'", or that 'It is not true that two witnesses are sufficient to validate a will.' If the dispute the court is settling has to

do with a two-witnessed will, then the issue is whether or not p is true. Certainly the truth or falsity of p is a common type of problem found in courts, even when it is not discussed in such stark terms.

4. Finally, the use of the concepts of judicial role and truth allows us to judge judicial performance from outside. If there is a truth value to the statements, and the statements are the result of the judicial role being performed, then when a particular judge speaks, the truth or falsity of his statements may be evaluated. There are two immediate qualifications to this. First, it applies only to those statements that are susceptible to the simple truth conversion used above. If it is found that some or all of the pronouncements from the bench are of the form, say, of 'It's my personal feeling that three witnesses are necessary to validate a will' or worse, that of 'Today, I declare that three witnesses are necessary to validate a will, although in the past that has not always been my opinion, nor is it consistently that of my colleagues' then the truth-function analysis would have little application. This would hold if some more likely and less preposterous subjective standard were found to be empirically accurate. 'True' would still be a relevant predicate in these cases, it would just be trivial. "P is true" would entail only that a certain judge said it was true. A standard is subjective if its truth depends solely on an individual's preferences, falsity occurring only if the individual was lying about those preferences. The second caveat is that an appeal is made to a normative role of judges, although normative

is the weak sense. 'Normative' points to how judges should act (as opposed to 'empirical,' how they do act). The weak sense of the concept suggests that there are recognized standards of conduct and performance, but does not promote the belief that a single and comprehensive standard should measure all judicial acts at all times (this is the strong sense). The weak sense (at minimum) is necessary to give generality to truth values of judicial statements. A specific judge may declare p, q, r, s, t and (u or v), but if his standards are unique to him, the case outcome would not be objective, but a matter of judicial lottery. In part, ordinary talk of someone being a 'good,' 'bad,' 'incompetent,' 'competent,' or 'capable' judge often can be taken as referring to a weak normative sense of judging. The speaker may be unable to conceive of, let alone articulate, what judicial behavior ought to be in all cases at all times, but does believe that a certain judge fulfills (or falls short of) certain ideals in some cases.

With these four points behind us, we can proceed to a discussion of judicial propositions. A first order proposition might be 'Two witnesses are required to validate a will.' These first order propositions populate legal textbooks and are commonly thought of as the rules of law. They govern behavior of those bound by the legal order. Perhaps a more neutral description would be to say that they serve notice of norms generally perceived to be enforced by the bulk of the courts.

First order propositions can be defined as the set of propositions that answer questions a judge faces. These pro-

positions vary in generality as do the issues. 'Are wills valid when witnessed by only two persons?' is more general than 'Is this will valid when it has features x, y, and z?' Such issues demand different types of answers, and propositions embodying those answers will vary accordingly.

The fact that first order propositions are responsive to a divergent set of issues does not mean that they need to be contingent and haphazard. Issues can be anticipated and theories formulated to meet them. Consistency in a wide sense can be sought. However, this does not need to happen.

Where are these first order propositions located? They are not found, pure and simple, in judicial cases, statutes, administrative decisions, etc. To think they are is to make a subtle category mistake. Such documents are records. They serve to document various political proceedings. They may contain first order judicial propositions, but so may a newspaper editorial or a children's comic book. Moreover, such documents are at best often vague and incomplete, at worst contradictory. These documents may employ statements that coincide with what judges hold, they may suggest what judges should hold, they may often be a reference for a judge in making his decision. But this set of written prescriptions and explanations is not at all the same as mental beliefs. To say that both are normative statements collapses physical and mental states. Nor does it help to say that both offer a certain kind of authority: so do a poisonous spider and an army general. One may obey them while recognizing their basic differences.

First order propositions, then, are rooted in an individual's

beliefs and attitudes. While the propositions may be irrationally formulated or randomly selected, both the internal evidence of the consistency and the external empirical evidence of a vast literature created by judges explaining and defending their decisions suggest that a rational decision process is the general rule. More importantly, perhaps, is the fact that what is crucial is not the actual state of mind of the judges as they decide cases, but the understanding of the decisions by those who read these decisions. The judge may have some private understanding of his situation, but it is through the objectifying medium of decisional language that he is understood.

The language of the judge is the second objectifying influence. The first is that the set of propositions are those that answer the issues before a judge. We have taken the issues rather than the responses as the starting point. It thus does not matter how any particular judge responds, for in that he has failed to address the issues or addressed them incorrectly his answers are irrelevant; while in that he has addressed them correctly he merely duplicates what a good theorist could have come up with independently. The judicial intention is not here part of the picture.

Because the set of propositions is dynamic and empirical--dynamic because the set changes as beliefs and opinions change; empirical because it is to the relevant community's actual beliefs and opinions that we look--the judge's actual decision becomes relevant to understanding first order propositions. Put another way, each decision of a judge has an empirical and a

normative aspect. The set of first order propositions can be used to judge the correctness of the normative conclusion the judge reaches. The empirical aspect becomes a datum for future decisions.

This picture, of an answer to a decision able to be judged according to some set of propositions and not merely a prediction of a judge's intentions, might be called the objective as opposed to the psychological picture of judicial decision making. Two remaining features need to be sketched in before the usefulness of the picture or model can be tested. First, first order propositions must be tied to higher order propositions. Second, the method or analogue for extracting specific answers from the various propositional sets must be discussed.

However, one lingering problem must be examined first: the problem of proposition individuation. Putting aside until later the problem of controversial propositions (e.g.-'Oral wills are never valid' in a jurisdiction where statutes are silent, past cases divided, academic writings split, and educated lay and professional opinion polarized), two difficulties arise. First, there is a problem of extension: which propositions should be included? Certainly action-guiding rather than fact-stating propositions are the important ones. Thus 'A knowingly false statement intentionally given under oath in a courtroom during a proceeding is punishable as perjury' certainly would qualify while the factual report that 'Mr. X lied before this court', even if reported during a judicial decision, would certainly not. What about the statement above requiring two witnesses to validate

a will? It is in a general form, while the statement about Mr. X is specific, but this difference is unimportant. A non-instantiated 'Some men have lied before this court' is still a fact-stating, if unhelpful, proposition. A witness statement like the Mr. X statement is without an explicit direction for action or a sanction.

Yet there is clearly a difference. To understand the meaning of the statement 'Two witnesses are needed to make a will', another action-guiding statement has to be understood as forming a prior condition. This implicit prior condition would have to be of the sort: Only wills with two witnesses should be valid (i.e. -- enforced). It is possible to see how this could be otherwise - how fewer or greater numbers of witnesses could be needed-but it has been decided, for obvious or latent reasons, that two be required. This reasoning need not be embodied by anyone now (as with the case of Roman Law) or anyone ever (as with a proposed code drawn by a cynical, perhaps solonic, author and not yet adopted). The contrast is with a factual statement such as 'Six men are required to lift a car' or 'Two persons are (traditionally) needed to create an offspring.' Such statements resemble the the 'witness' statement in reporting a fact and guiding action if one needs information on either how to lift a car or start a family. The prior normative condition is absent. It is important to see that the reasons for thinking a statement action-guiding in this way need not be reasonable, rational, or relevant. The actual English Common Law rule that emerged from the Middle Ages required three witnesses to a will, and that number may well have been as much based on the sanctity and magic of the number three as on

any respect for the veracity of three signators when joined. Put differently, poor, sloppy, ill-considered, malignant norms are just as much norms as magnificent ones.

The second difficulty for first order propositions is one of division: how are they to be divided up. There is a wide literature[3] and concomitant controversy[4] about legal propositions and their individuation. Whatever the merit of the positions in this area, it can with some integrity be set aside on the grounds that 'legal' does not mean 'judicial.' The purpose of the debate over legal individuation is to separate individual propositions and thus analyze and explain legal systems. Our purpose is not so grand. Yet there are similar difficulties. Are judicial propositions to be general or specific; are they to be listed as a countably infinite series or more managably in the form of rules and their exceptions; is some sort of all-possible-situations-accounted-for completeness to be expected?

The answer to these questions lies with the empirical nature of judicial decision-making. That is, we begin with the premises used by actual judges in their judicial arguments. These premises take a form that, if not as distinctly individual as the judges themselves, is at least made personal and distinct by personal creativity, perspicacity, prejudice, and ignorance. Some judges quite clearly use different premises from other judges. Moreover, as individuals they are apt to use different kinds of premises. They may mix general with specific statements; they may concatenate a series of detailed prescriptions in one place while in another form a general rule and give (or fail to

give or even to imply that there are any) exceptions. What this means is this: if judicial behavior is part of the standard for determining proposition individuation, and judges themselves employ generally conflicting and individually divergent ways of individuation, then an a priori tidy system of propositions would be irrelevant. There is a further logical ground for thinking that exact individuation is an unnecessary exercise. Two series of propositions may have an equivalent content, but a different ordering. In that competing sets are merely divided up differently, ordered differently or differently compounded, no normative difference would necessarily follow.

We turn now to higher order propositions. The structure of propositions is held together by justification. A lower order proposition is justified by the next higher order proposition. Justifications can be trivial, self-evident, or sequentially endless, so it is necessary to characterize the type of justification we are interested in.

When judges are asked to justify a ruling, (as they often feel it is implicitly required they do within the text of their opinions), they are apt to cite widely divergent criteria. A brief perusal of any volume of court reports shows judicial reliance on statutes and past cases, international or local custom, the writings of authors learned and otherwise on topics legal and otherwise, general rules and principles, moral conundrums, public policy, well-known fact, common sense, and most commonly, reasons supposedly self-evident (immediately or derivatively). These form part of the chain of reasoning employed

in the judicial opinion and not otherwise supported. The criteria they (the judges) ought to use offer a parallel structure. Many times logical implication or inference elude judicial notice.

Because logical tidiness is rarely reflected in empirical behavior, most of the literature on judicial reasoning divides easily into one or the other of two accounts. Sociologists, political scientists and historians look to development of case law and see the workings of psychological, social, political, and economic forces on its shape. This attitude ranges from irreverent to resigned, depending on the degree to which they see the stamp of individuals in the course of history (i.e. - the degree to which they see a social or economic determinism operating on historical events). More (legal) professionally oriented writers, by contrast, try to fit cases into logical normative models, often with the idea of showing the failure or triumph of doctrinal development when measured against some moral or political standard.

Both types of account will at times analyze specific cases. Often the analysis will focus on discrepancies between announced holdings and announced reasons for these holdings. A case will appear to say: 'If A then B; A; thus B.'[5] The concern is often with the initial premise: 'If A then B.' What is actually being averred is that a broad principle is being made determinative of a narrow principle. This is to say no more than that the judge must decide specific cases, not lay down general rules or solve abstract problems. The narrow principle, or B, is merely an

abstraction of a result of the case. Suppose we have a negligence action where it is important to judge whether or not the plaintiff was at the time of the alleged tort an invitee on defendant's land. Suppose the plaintiff entered the property to make a telephone call.[6] The narrow question could be: is a public telephone user a business invitee for the purpose of property torts?[7] An affirmative (or negative) result creates a narrow principle or rule. This could be stated to be: 'All telephone callers are protected from landowner negligence(B).' The broader principle, A, would be that all invitees are protected from landowner negligence. The difficulty in the actual case will not be over A, which is accepted everywhere in common law, or that the facts supporting B occurred, if the phone call is not in doubt. The practical difficulty for the court is whether acceptance of A commits us to acceptance of B. The logical difficulty for the writers and critics is to explain how one ever moves from A to B or A to $\sim$B. This problem is often overlooked by the social scientists because of their desire to see pretext disguised as reason when decisions are inelegant or ambiguous. It is often disregarded by legal writers who allow too much logical leeway in their desire to find models and systems.[8]

The above case illustrates the place of second order propositions. Second order propositions can be defined as the set of propositions which justify or yield first order propositions and are in turn justified by other second order propositions or third order propositions. If our plaintiff above, (call him P), had entered the lobby of defendant's building to make a telephone call, and as he was about to enter the booth, a chandelier the

defendant had attached to the ceiling with chewing gum came down on P's foot, causing severe property damage, P might seek to recover damages for the cost of replacing his shoe. If asked why defendant ought to pay, P, if he were versed in court decisions, might appeal to the rule that invitees are generally due a reasonable duty of care. If asked why that is so, he might answer that innocent people ought to be protected from foreseeable danger placed there by those with a duty to maintain their property. Each of these responses is a justification and serves as a reason (good or bad) for the previous statement.

We said above that second order propositions justify first order propositions. To justify is not necessarily to convince. Weak implication illustrates this: if P claimed that r ('Telephone users are invitees') because of s ('Both telephone users and restroom users are invitees'), P would have justified r through logical implication, while undoubtedly failing to convince the previously unconvinced of the truth of r. However, small steps often lead to surprising results, and are necessary for establishing the validity of a reasoning chain.

The occurrence of implication in a chain of propositions ought to make us suspicious again of any attempt to individuate reasons for the purpose of counting them all or using a particular chain as the exclusive exemplar of correct reasoning. One can as always add an infinite number of logically equivalent or weaker statements. Further, second order propositions seem particularly susceptible of divergent characterization. What may seem an adequate justification for one person, to one person,

or in one circumstance may seem to fail in a later or different context. The reasons, rooted as they are in varying individuals' interests, intelligence, backgrounds, and situations, hardly need delineation. The occurrence of many second order reasons in a chain may point to the complexity of the ties that order the propositions, but it may equally well speak of individual style or the rhetorical need to convince a particular audience.

Third order propositions justify second order propositions or other third order propositions. They are the final level in our model, and thus, all theoretically higher order levels are collapsed to the third order. Earlier in the chapter, it was stated that the difference between the first and second levels, and the third level has to do with pedigree. The lower levels contain certain propositions found in legal forms. Their occurrence there may be a matter of controversy or ambiguity; the form itself may be of disputed validity; the proposition may conflict with some other proposition found in a legal form. But, true or not, the claim of pedigree often gives these propositions a prima facie authority. There may be other reasons for respecting the contents of such propositions than merely their attachment to legal forms. For example,a rule against murder or against child abuse may be thought to carry ethical, social, political and prudential force as well as the force of certain legal forms. (A more detailed discussion of legal forms can be found in Chapter IV).

Common legal forms include statutes, edicts, constitutions, past court decisions, codes, ordinances, certain kinds of

recognized customs, international agreements and treaties. Any list must be more suggestive than definitive. Criteria are necessary to decide which statutes, edicts, etc. count (e.g.--which might not be considered to be foreign, superceded, having fallen into desuetude, or in some other way not be presently valid) and perhaps more basically, which things count as statutes, edicts, etc. (e.g.--what administrative proclamations have force, which customs are binding, what is the status of a statute overturned by a years later reversed court decision, or a court decision reversed by a statute which is subsequently repealed). The intuitive notion that it is easy to recognize what has membership in the set of legal forms, and only difficult to specify the grounds for membership, is called into question during times of serious political and social unrest. However, it is the general use of legal forms that gives them their authority. New York judges may look to enactments of the New York legislature, but not to the pronouncements of Gaius or Solon, and thus it is to the New York statutes that one turns to locate a New York legal form. The relationship is causal, empirical, and contingent. If judges did not look to local statutes but to astrological charts, then astrological charts, regardless of their irrationality and their seeming irrelevance, rather than local statutes passed by those theoretically having political authority, would be the relevant legal form in New York.

The utility of a tertiary schema lies in its ability to exhibit the distinct types of justification apparent in higher order propositions.[9] When justification centers on the issue of

pedigree, it is second order. However, not all members of the second order can be traced to legal forms. Rather, the issue is what ought to be the criteria for selecting second order propositions. For any particular first order proposition, many different types of justifications are possible. Suppose the first order question asks whether or not self-defense excuses intentional killing. One might state that it does so excuse because saving ones own life is an inalienable individual right; because such a policy diminishes the pool of potential prisoners, hospital patients, and convalescing workers; or because self-defense is a necessary process in assurring the survival of the fittest, a process which allows for a constantly improving level of civilization. These justifications might be respectably characterized as deontological, economic, consequentialist, and socio-biological. Each of these justifications is impeachable on grounds of rationality and value. None appeal to the idea of an empirical authority that bears respect, or to a reason worth following because it is generally considered to be worth following.

A very different type of justification is being employed when self-defense is justified as an excuse because a certain statute or series of past decisions suggests that it ought to be an excuse.[10] An empirical component -- the force of a legal form -- becomes a consideration. If the relevant statute is repealed, overturned, falls into desuetude, or is found to be improperly enacted, then the second order justification based on that statute is similiarly impeachable. However, the set of propositions found in legal forms and in the second order propositional set

is not coextensive. First order questions arise for which no first order proposition, justifiable by reference to legal forms exists. The justifications for these questions are not immediately to be found within the third level (though they are mediately so, of course). Broad categories with labels such as 'policy' or 'principles of law' are commonly used to supplement the set of legal forms. The non-formal second order propositions are not characterized by their pedigree, but they are circumscribed by the subset of formal second order propositions. The initial issue in justifying first order propositions is always: is there some formal authority for asserting such-and-such a first order proposition?

Third order propositions are neither limited by considerations of pedigree, nor circumscribed by such considerations. Propositions are drawn from wherever necessary to justify sufficiently the lower order propositions.[11] There is a certain kind of position which trivializes the third level, and in order to continue making use of our tertiary schema, it is necessary to understand why this position is inadequate.

We shall call this position 'legal isolationism'. Legal isolationism asserts that reference to legal forms is usually sufficient to provide first order propositions, that manipulation of legal forms in order to extract a second order proposition is a straight-forward matter, and that those few cases not within the purview of legal forms are tightly circumscribed by the legal forms. The isolationist wishes to deny that political, moral, prudential, or social, considerations play an important independ-

ent part in the propositional sets. The reason that the third order is trivialized is that reference to legal forms alone is sufficient for disposition of most cases.[12] The results engendered by the isolationist may allow for results that are ethically reprehensible or politically debilitating, but criticism on these grounds would be considered logically irrelevant.

There are difficulties with the isolationist position. When there is a constitutional conflict within a society, lower order propositional selection is a difficult matter. Which legal forms are valid may be in doubt. Moreover, the manner of determining non-formal second order propositions is left vague. Circumscribing an answer is not the same as determining it. If the third level is a rich set from which to select justifying propositions, then the fact that circumscribing alone occurs is not fatal. Where the third level is impoverished, though, one is left to individual preferences to select non-formal propositions, an essentially subjective method.

There is a deeper difficulty in the isolationist's position. The isolationist believes that the task of sifting through legal forms may be cumbersome, but it is not, on the whole, conceptually difficult. These legal forms, moreover, may be examined without resort to any potentially controversial set of political, social, or ethical beliefs. For example, a statute requiring two witnesses' signatures to validate a will is in no further need of interpretation. Its meaning ought to be the same regardless of ones other beliefs. To suggest that even such an unambiguous statute as this requires a political justification misperceives

the very authority inherent in legal forms. There is a certain justificatory finality in legal forms that makes further reasoning unnecessary. The meaning of a form may present difficulties of syntax and semantics, but resort to larger sets of beliefs is unnecessary.

The isolationist fails to do credit to the complexity of the judicial method. A certain answer appears obvious often because third order beliefs are used, not because they are unnecessary. An example from aesthetics might be helpful.

If one asked a seventeenth century Dutchman such as Johannes Vermeer why his seas and sky in "View of Delft" have a greenish hue to them, he might reply that the answer is obvious. That is just the color they needed to be. He might reply further that if Ruisdael or Rembrandt were consulted, they would say the same thing. Yet we could imagine a Van Eyck, a Titian, a Renoir, or a Dali completing the picture differently. The very idea of a light bulb being the sun in Picasso's "Guernica" epitomizes the variation imaginable. Of course, Dali's completion of Delft's sea and sky would yield a different picture. Vermeer might say of Dali's suggestions as to what colors should be used to shade the sketch that, for a surrealistic picture, Dali might be right. Vermeer would claim, however, that for his (Vermeer's) own realistic pictures, Dali's opinion is irrelevant.

But if Vermeer were pressed to use arguments rather than labels to defend his position, and he was told further that Dali, Titian, or Renoir had suggestions at odds with his own on how to complete his pictures in a style authentically his, Vermeer would

need to appeal to some generalized set of beliefs concerning art. Vermeer may not be able to enunciate the central ideas of these beliefs or to explain all or even very many of their implications. He and his Dutch contemporaries need not have realized that they employed a highly conventionalized and arbitrary set of techniques and artifices in translating the empirical world to the coded shapes, forms, and hues they did. Their view of art and artist was due very largely to the peculiarities of a society prosperous, Protestant, bourgeois, maritime, optimistic, and admiring cf Italian culture. Within their own world, Dutch artists took many problems as having obvious solutions, and would have failed to see that arguments might be necessary to justify their particular conception of art. However, that their own beliefs of art were often implicit does not make them any the less higher order beliefs.

This somewhat remote analogy is presented just to suggest that what appears obvious need not be universally so regarded or unable to be argued for. A further set of propositions is needed. In art, such a propositional set might explain the relation of copy to original or beholder of an object to the creator of that object; or it may deal with more technical matters of light, form, image, and material. In adjudication, the proposition that 'Two witnesses are necessary to validate a will' appears obviously true because ones set of third order propositions gives some analogue for sifting precedents, reading statutes, and otherwise reaching a solution. The obviousness of the result is irrelevant. Judicial belief sets -- whether partial, incomplete, finished,

or refined -- involve a third level and third order propositions. This is especially telling against the timid isolationist, one who recognizes that some cases, at least those commonly tagged as requiring judicial discretion, allow for third order principles. For him, some method must exist to sort between discretion and discretionless cases. The method or analogue would decide, perhaps, whether past precedents are sufficient for resolving the instant case, and what test tells us that. This calls for an enriched set of higher than second order propositions.

3. Judicial Views

In this final section, we shall examine how one might employ the three level propositional structure. We might summarize briefly the discussion up to this point. A judge is required by his institutional role to provide answers to the questions that come before him. These first order questions require an answer, provided here in the form of the first order propositions. In seeking to provide a first order proposition, one is required to justify the assertion of that proposition. Certain justifications can be found by looking to legal forms: that is, other propositions marked by their pedigree can be found to justify these first order propositions. Other justifications do not possess such a pedigree, nor do justifications of those pedigreed propositions that they themselves justify. These non-pedigreed propositions form the third order set, and are drawn from the set of political, ethical, and prudential beliefs and attitudes. How the third order set is constituted is a function of an individual's understanding of what the judicial role involves.

Taken together, the three-tiered propositional set can be called a judicial view. The purpose of the view is to provide answers to specific questions, but it ought not to be thought that judges actually use views to arrive at their conclusions, (though many judges do engage in a course of reasoning very similiar to the method described here). Rather, a view is necessary for assessing whether or not a judge's decision is correct.

The construction of any particular view turns on the contents of the third order propositional set. We mentioned earlier that the sources of the third order propositions include political theory, ethics, and principles of prudence. However, an individual does not borrow propositions as they are. That is, the set of third order propositions are chosen not for their truth but for their relevance. One's concept of what the judicial function is within a society dictates what sources one selects in allowing that function to be fulfilled.

Because the components of the judicial views are chosen, in part, from value-laden areas such as politics and ethics, it might appear that personal preferences alone determine third order propositions. If this were true, something akin to a judicial ideology rather than a judicial view would occur. An ideology, like a view, is a system of related concepts about some facet of human culture.[13] It, too, has attitudinal as well as belief components, and allows one to reach decisions about problems heretofore unconfronted. However, while an ideology may serve as a source for third order propositions, those propositions

are chosen and used differently when they are so transferred. The difference in choice is apparent in the not uncommon judicial statement that "I would rather I did not have to reach this result. It goes against many of my beliefs, values, and opinions to do so. I think that little good will come of it. Nevertheless, I reluctantly will go ahead and hold. . .". The judge may be unhappy with what he sees as being the only available alternatives, or he may plainly disagree with the wisdom of the course of action that others, who he takes to be authority, have pursued. Propositions are picked out from ideological and other sources because of the demands of role. Moreover, when they are picked out, they may not have the same meaning they did previously. This can be because they have been chopped up: taking them out of a consistent, well-ordered set and placing them in a quite different set may change their denotation.

Seeing role as prior to propositions makes more difficult, of course, the definition of judicial role. It is insufficient, even incorrect, to say that it is the role of the judge to apply the correct proposition in the form of an answer to every issue that is adjudicated. Role determines how the propositional set is constituted, and thus any statement that one performs one's role by using the correct propositions fails to understand that it is the selection of propositions to be used that must come before their application is possible.

It might be helpful to conclude with an example that shows how judicial views are dependent on role for third order membership. Let us look at Riggs v. Palmer,[14] a case that held that a

legatee who had murdered his testator would not be permitted to benefit from the will. The usual rule in probate cases was to honor the explicit terms of any will where there was no indication of any fraud, documentary irregularity, or undue influence. However, this rule was held not to be determinative of the instant case because of the principle that no one shall be permitted "to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his crime."

I do not want to examine here the merits of Riggs or the relative importance of rules versus principles.[15] Rather, I wish to show how the imposition of what we will call the 'fairness principle' might be considered improper.

The fairness principle says that, in the courtroom, no man shall benefit by his own wrong. It is a principle that might be found in at least three places: one might find it in a number of moral theories, whether consequentialist or deontic; one might find it in past cases in the form of equity; or it might be found within the cases merely in the form of ordinary holdings, as with more mundane judicial standards.[16] The court in Riggs does not give its source for the principle. Let us suppose, however, that one disagrees with the use of the fairness principle. The disagreement is not with the content of the principle, which is blandly unexceptionable, or even with the need for such a principle in adjudication, for fairness in all its aspects seems a commendable goal for a judicial system. The disagreement lies in the feeling that one or the other of the putative sources of

the fairness principle is either somehow illegitimate or out of bounds for judicial consideration, or that that source has been misused by the Riggs court. A number of scenarios are possible, and we shall look at two.

The first scenario would involve the attribution of the use of the fairness principle to the realm of equity jurisdiction. Equity is usually considered a system of principles which aims to remedy defects in the caselaw by allowing for considerations of fairness, justness, and right dealing.[17] Its jurisdiction is generally limited within a judicial system, (although its appearance, according to some observers, reaches to all judicial systems[18]). When one looks to the past incidences of equity jurisdiction, one notices that that jurisdiction has spread into new areas, but within well-demarcated boundaries.[19] One way of justifying Riggs' employment of the fairness principle would be to see it as part of the role of the judge to make use of equity (where it is relevant) whenever it is not specifically proscribed by past court decisions. A contrary position would see equity as a limited tool, liable to easy abuse, and a fundamental infringement of the general powers of the legislature to lay down the bases of judicial standards. The first position sees the application of equity as a basic component of the role of a judge. The second position sees this application as taking third place to the more important considerations of limited judicial power and deference to established past rules. The extension of equity generally and the application of the fairness principle specifically are functions of what role one believes the judge

ought to adhere to in deciding individual cases.

A second scenario would involve the attribution of the use of the fairness principle not to any organized set of equitable maxims and principles, but directly to an ethical theory that included such a principle. Justice generally is a concern of the courts, and Riggs seems to be a case where the matter of justice is squarely in issue. An advocate of the Riggs decision might suggest that it is the prerogative of the judge, an aspect of his role as a judge, to suspend the normal application of judicial standards when doing so would result in a grave injustice. A contrary opinion would hold that it is beyond the legitimate ken of the judge to employ principles of fairness and justice apart from those that are embedded in legal forms, at least in those cases where a rule clearly applies (as the rule which calls for respect for the written testimentary intentions of a sane testator not under undue influence clearly does).

In both scenarios, the proper scope of the judicial role is a factor in determining what is the source of judicial propositions. Rarely, however, are sources rejected or accepted in such an all-or-nothing fashion. One uses a concept of role to determine which sources are legitimate for obtaining judicial propositions, and such a concept will pick out, among other things, certain legal forms as well as third order sources.[20] Such a concept, if it is more sophisticated, will allow for greater specificity in the selection of propositions. The difficulty in circumscribing satisfactorily the bounds of equity can illustrate why it is that such specificity is required, and give a clue as to how such

specificity might be obtained.

The fairness principle also illustrates how one's own personal preferences and values are not simply incorporated unadulterated into the third order set. One may agree with the fairness principle and yet see its application as being outside the scope of proper judicial behavior. One might be either a consequentialist or a follower of Robert Nozick[21] and yet see the judicial role as one that uses the ethical source of a deontological theory only. A consequentialist might justify this as being more practical, as a constant weighing of principles for membership might be beyond the ability of most sitting judges; while a Nozickean might see this method as one that limits as much as possible governmental interference with the individual. Judicial role is a concept partly empirical. Nozick and consequentialists may notice that, in a given society, it is to deontic principles that judges do in fact look, and thus incorporate into their own (Nozick and the consequentialists) concept of role the provision that a judge (if not a moralist) ought to apply deontic principles. Both Nozick and a consequentialist could thus take the position of supporting deontic sources for the third order set despite the apparent conflict with their own respective ethical positions.

If we have seen that different conceptions of role result in different propostional sets, we have yet to discuss the truth-functional status of these sets. It is to this issue that we now shall turn.

[1]For an analysis and criticism of methods that seek to find a definition of law and other major judicial concepts, see H.L.A. Hart, "Definition and Theory in Jurisprudence," 70 L.Q.R. (1954).

[2]This occurrence has occasioned one experienced judge to question the use of past cases to resolve instant cases. Jerome Frank states that "in most cases in the trial courts the parties do dispute about the facts, and the testimony concerning the facts is oral and conflicting. In such cases, what does it mean to say that the facts of a case are substantially similar to those of an earlier case? It means, at most, merely that the trial court regards the facts of the two cases as about the same." Law and the Modern Mind xvi (sixth edition, 1963). The plausibility of such a position will be examined in Chapter III.

[3]Joseph Raz's book The Concept of a Legal System (1970) presents perhaps the clearest exposition of the view that individuating legal norms contributes to a better understanding of legal systems.

[4]A.M. Honore's "Real Laws" in Law, Morality, and Society: Essays in Houour of H.L.A. Hart (ed. P.M.S. Hacker and J. Raz, 1977) contests Raz's position.

[5]This discussion is to be kept separate from the kind of factual reasoning of weak implications via instantiation of the sort: a penal statute proscribes the sales of liquor to a minor, X sold liquor to a minor, X violated the penal code.

[6]This question of an injured uninvited telephone user suing the landowner was raised and settled in favor of the injured telephone-using plaintiff in Ward v. Avery, 113 Conn. 394, 155 A. 502 (1931); Haley v. Deer, 135 Neb. 459, 282 N.W. 389 (1938); Corton v. Skyland Hotel, 231 N.C. 546, 57 S.E. 2d 793 (1950).

[7]It is unimportant in this whole discussion that the business invitee rule is everywhere in retreat. See William Prosser, Handbook of the Law of Torts, 385-399 (4th edition, 1971). It was once alive, could be so again, and in any case, presents interesting situations for discussion.

[8]This difficulty is famously discussed by Benjamin Cardozo on The Nature of the Judicial Process (1921), but while he

raises the problem eloquently, he gives not a clue as to how it might be analyzed. He admits many different kinds of 'force' on judicial decision-making, and calls on them (legal writers) to recognize these forces so as to better use them. The law is a thing, to be set along side history, tradition, popular morality, politics, etc. in reaching subsequent decisions. What analogue one is to use in reaching these decisions -- even if construction of such an analogue is possible, workable, or desirable -- is left open without comment.

[9] One problem with the two-level schema that divides between 'sources of law' and 'law' advocated by Gray and Frank is that the differences between all justifications are collapsed. See John Chipman Gray, The Nature and Sources of the Law (2nd edition, 1921), and Jerome Frank, Law and the Modern Mind (1930).

[10] That even the most basic moral principles can be omitted from the set of judicial propositions is exemplified by the denial of the privilege of self-defense in early English law. Until the case of Chapleyn of Greye's Inn v. -----, Y.B. 2 Hen. IV 8, pl. 40 (1400), it has been said that "the man who commits homicide by misadventure or in self-defense deserves but needs a pardon." F. Pollock and F.W. Maitland, 2 The History of English Law 479 (second edition, 1898).

[11] We are inclined to think only of moral reasons doing battle with legal reasons for control of our actions and beliefs. Other conflicts arise however. The United States Supreme Court, after lengthy discussion, held that tomatoes are vegetables rather than fruit. Nix v. Heddon, 149 U.S. 304, 13 Sup. Ct. 881 (1893). As fruit is botanically speaking the seed of a plant or that part which contains the seed, the court's holding makes for revolutionary biology. A similar botanical principle contrasting a legal one occured in that court's earlier refusal to label either beans or walnuts as types of seeds, oblivious to what occurs if either is planted. See Robertson v. Solomon, 130 U.S. 412, 414 (1889).

[12] The prima facie authority residing in legal forms is not unlike that residing in Raz's exclusionary reasons, though the reasoning structure here differs on the need for further justification from the suggested in Raz's analysis. See J. Raz, Practical Reasons and Norms 35-106 (1975).

[13] The term ideology has a complex modern history. It was put into wide use by Karl Marx as the propagandistic opposite of history or true history. Ideology was to Marx a false

conception or conceptions of social and economic history, rooted in the unconscious biases of bourgeois thinkers. See Karl Marx and Frederick Engels, The German Ideology (first written 1844; complete English work, 1965). It took on a broader meaning as a Marxist concept, denoting the general difficulty of historians to entertain thoughts and ideas alien to their own times and status (See letter of F. Engels to F. Mehrig of 14 July 1893, found in K. Marx and F. Engels, Selected Works 699 (International Publishers, 1968). Later, disillusioned leftists used it to refer to socialist rather than non-socialist writings, and added a derisory tag to it of being rigid and heavy-handed. (See Arthur Schlesinger, The Vital Center (1949)). It subsequently degenerated to a pejorative comment on one's opponents connoting the dogmatic position, unscientific, and very often communistic, thus coming full circle from the scientific attribution that originally distinguished Marx's claim from other value-laden and myopic positions.

[14]115 N.Y. 506, 22 N.E. 188 (1889). This case is discussed and defended in Benjamin Cardozo, The Nature of the Judicial Process, Chapter I (1921).

[15]This problem is never directly addressed in this thesis, although rule-based and principle-based theories are discussed in Chapters V and VI respectively.

[16]There are some who believe that it is no where to be found in court holdings, at least not in the form that it is stated in. See A. L. Goodhart, Essays in Jurisprudence and Common Law 7 (1931).

[17]One compelling definition of equity was given by an English Chancellor, Cardinal Morton, in 1489: "every law should be in accordance with the law of God; and I know well that an executor who fraudulently misapplies the goods and does not make restitution will be damned in Hell, and to remedy this is in accordance with conscience, as I understand it." Y.B. 4 Hen. VII, Hil. no. 8; cited in T. F. T. Plucknett, A Concise History of the Common Law 685-686 (5th edition, 1956).

[18]Such a position is taken by C. K. Allen in Law in the Making 383-425 (7th edition, 1964).

[19]For a tracing of the development of the growth of equity in English common law, see T.F.T. Plucknett, A Concise History

of the Common Law 675-707 (5th edition, 1956).

[20]One's concept of role is just a matter of individually held beliefs. The perception of role is a conventionally held conception, not subject to truth-functional analysis. This point is discussed at length in Chapter II of this thesis.

[21]Robert Nozick, Anarchy, State and Utopia (1974).

FOUNDATIONS OF JUDICIAL DECISION-MAKING

We began the last chapter by suggesting an individual might be uncertain as to whether judges are bound to make certain decisions--reach a particular result in the case before them--or whether they have a choice, commonly called discretion, in their actions. That question can be reformulated: for some possible conclusion the judge might reach, such conclusion embodied in some proposition p, is p either true or false? After the last chapter, the reformulated question can be divided into two separate questions. Is p either true or false for lower-order propositions? Is p either true or false for third order propositions? The answer this chapter will argue for is that the first question is answered yes, the second no. In order to reach this answer something more must be learned about third order propositions. The first half of the chapter will detail their status and makeup. The second half will show how their construction circumscribes lower-order propositions.

1. The Status of Judicial Propositions

Judicial views are constructions. They are put together by taking an object from one place and a second object from another place and joining them together. The obvious resemblance is to building a house. Conceptual constructions, like material ones, are in part a slave of function--whether the function is to solve cases or to shelter people--but in part open to the individual imagination. One constructs according to knowledge, taste, resources, prudence, and values. Constructions tend to be culture bound. We can see this when we compare varieties of castles in

the fifteenth century Loire valley, with wigwams in sixteenth century Eastern seaport America, or with steel and glass condominums in twentieth century Holland. A crosscultural relocation of one of these among sets of another would be more than a curious anomaly: it would be an unheard of miracle.

Diversity among judicial systems is not always as great. Moreover, within judicial systems it is usually extermely small. Views held by legal observers of the New York state judicial system vary much less than views held by New York architects and builders as to what constitutes a correct set of procedures and answers for constructing a building or development. The similiarity of view is easily mistaken for consensus. This similarity is manifested in several ways. First, when actual cases or even issues raised in cases are presented, there is often ready agreement on the outcome.[1] That is, if a court needs to decide whether a particular document is a (valid) contract or whether an oral land agreement is a valid contract, there is likely to be near unanimity in most cases as to what the right answer is. Put differently, few could disagree about excluding most documents from the set of valid contracts (such as laundry lists, magazine articles, history monographs) or would disagree on inclusion of most documents that constitute the set of valid contracts (standard sales agreements, employment pacts, bank loan papers).

Second, similar sets of reasons and concepts are used to explain and defend decisions. In the case of concepts, resort is often made to some common concept, such as res judicata or

promissory estoppel, which is assumed to be certain and generally understood in the same way. The concept's familiarity and popularity may give the impression of easy certainty. Reasons (or second order propositions) often fall prey to this same impression, particularly when they are widely used. This tendency is heightened by the many judicial concepts and reasons that are employed to disguise real disagreement. 'Reasonable man', 'free speech', 'proximate cause', 'informed consent', 'public nuisance', 'fidiciary duty' or 'No man shall benefit by his own wrong', 'Contracts made under duress shall be voidable', 'No man shall be denied due process of law' are all terms and statements subject to widespread use by individuals who agree on little else but the terms' utility and the statements' validity.

Third, there is a reification of law that has yielded a strong notion of legal concreteness. The tendency -- so vilified by common language philosophers--of making real any common sentential object ('there is x' makes x real) is a natural one. Our rationality is rooted in the familiar set of objects of the empirical world around us, and we use this concrete world as metaphor for more abstract ones. Agreement about the properties of tables and chairs comes easily because statements attaching existence predicates to tables and chairs are so easily verifiable. While verification does not operate in the same manner in the case of judicial statements, it is nevertheless easy to view the judicial arena as not unlike the empirical arena. The consequences of judicial statements are empirical and important.

Such statements are commonly the result of knowledge and investigation. If judicial statements do not take their sense from any simple method of verification, neither, a philosopher might argue, do empirical statements. What is central to both is the concrete aspect that is imprinted in any intuitive or pre-theoretic notion of such statements. Individuals are arrested, assets are impounded, accounts escheat, wages are garnished, witnesses are subpoened, sworn and harried, property is given, taken and confiscated: these are more tangible actions to most people than those that result from more ethereal statements in the form of ethical imperatives, religious injunctions, or mathematical proofs.

Reasons for the belief that there exists a consensus of judicial view are easy to understand. Ultimately, though, these reasons are inadequate. To see why, we must distinguish sharply between what we shall (perhaps artificially) call 'consensus' and 'similiarity' of judicial views. A consensus of beliefs involves a general agreement between individuals about first and second level propositions. In order to have a consensus, there must exist a shared body of beliefs. Total coincidence of held belief, sentiment, and judicial conceptions is not required, but a solidarity, a collective opinion, a shared set of values and method must be present. Where there is a consensus, individuals not only reach the same results, they tend to do so for the same reasons, or at least, they tend to agree on which particular reasons count and how much they count for. 'Similarity' is a weaker concept. Mere agreement on outcome will suffice. Some

reasons will be shared, but important ones will not be. More to the point, different conceptions and a different weighting of reasons occurs. Where similarity is in force, no agreement is inherently guaranteed. There is no reason or necessity for agreement. Agreement occurs, and is statistically significant, if not dominant,[2] because of factors other than a shared set of third order propositions. An illustration may be useful.

Suppose plaintiff P is suing defendant D in tort for assault and battery. D pleads not guilty by reason of self-defense. The facts are straight-forward. After a minor automobile accident --where P and D scraped bumpers in a large parking lot--P and D exchanged angry words. P feels unsatisfied by a mere verbal exchange, and noticing a vendor of baseball bats 50 yards away, proceeds to purchase a bat to use against D. P tells D of this. D decides to face P and his bat, although he could easily escape in his automobile. P is smaller than D and seems likely to hurt D but not to put his life in danger. D is a karate expert however and after breaking the bat with a move of his hand, breaks eighty-six bones in P's body. P thus decides to sue.

D's claim of self-defense comes to this. Even though a reasonably safe way of escape was open, not to have stood one's ground would have been an affront to one's dignity and sense of honor. Under judicial view A, D's agrument is accepted. Honor, dignity, and pride are important third order values and figure in the construction of all (rational) views. Certain other, contrary values--such as pacifism and the sanctity of the human body--figure, but much less importantly.[3] Under judicial view B,

D also wins. View B reasons that holding one's ground discourages the initial use of force. A publicized holding of the courts that one who stands his ground is afforded a certain degree of judicial protection might deter initial displays of violence. A large reduction in initial assaults would have greater weight in a balancing calculus than the small amount of extra violence occasioned by legitimizing self-defense here.

Holders of views A and B might agree on the first order proposition: "a person attacked may stand his ground against an assailant, even when a reasonable and safe means of escape exists." They may even agree on the same second order proposition. This might be statable via a reference to affirming precedent. It might also be done through agreement on second order propositions that are held either for different reasons or because people have different conceptions when they employ the same concept. The first could occur if the second order reason is "holding one's ground is a deterrent to assault," or p. An advocate of view A might endorse p because he believes that holding one's ground serves as a deterrent to assault. An advocate of view B, on the other hand, might endorse p because he believes that public realization that self-defense is a good legal defense would act as a deterrent to assault. The concept ambiguity (the second) can occur if the second order proposition states "that retreat is an affront to one's dignity." The term 'dignity' might be taken as a direct aim or virtue worth having and protecting (view A) or it might be a part of a consequentialist schema, where it is a useful end worth pursuing in certain

societies at certain times, but expendable when the situation demands (view B).

Among the other possibilities for resolving and arguing this case is a utilitarian position that D is guilty, or view C. C is very close to B, sharing many values and conceptions, but it would disagree in the instant case because of a different way of seeing the general empirical circumstances. A holder of view C (as well as B, for that matter) may feel that in a civilized world--or an almost civilized world that aspires to civilization--defense of personal honor does not justify the wounding or killing of another individual when safe retreat is open.[4]

Views A and B are similar. Views B and C are consensual. These latter two share reasons. When their (B and C's) results are in agreement, they can be said to have reached the same results, whereas A and B reached in the example coincidental results. Nothing stronger than similarity can be implied from consistent coincidence of results.

Given this distinction between consensus and similarity, we see how it is possible for third order propositions to vary widely. In fact, because judicial views are constructed as a matter of individual choice, there is no fact-of-the-matter about the contents of these propositions and no right answer as to whether one or the other of them is properly included within the third order set. Put in terms of a meta-language, there is an indeterminate truth value for the statement 'third order p' (where p stands for a propositional member of the third order set). An appropriate label for this argument might be 'judicial pluralism', for it suggests that there exists a number of co-equal third order views.

Pluralism holds that no definitive test exists for what is the proper judicial view. Views are constructed from an individual's beliefs and attitudes through the use of his conception of judicial role. As individual preferences form a basis for the criteria for constructing a view, no objective standard relevant for judging the correctness of that criteria exists. However, views are conventionally constructed, as the criteria used may be more or less appropriate vis-a-vis the general expectations and practices of a given society. Moreover, the language of judicial discourse contains shared public concepts and embedded societal values that limit the scope of view construction.[5] Social components--including education, information networks, mores, folkways, workplace and neighborhood groupings, association networks, and class structure -- shape individual views, and can be used to predict how the relevant conventions will be constructed and are likely to change. Failure to respect some social component as an indicator of a convention's formation might suggest irregularity, or even, in extreme cases, irrationality. If one's view is inappropriately constructed -- employing deviant criteria -- it nevertheless can not be criticized on those grounds as incorrect. The fact that a view is just a matter of belief sets suggests that its status is conventional, and a conventional status, though subject to criticism on moral, political, or logical grounds, is not subject to truth-functional analysis.

In saying that judicial views are conventional and that the convention is rooted in individual choice, it is also necessary

to make clear that the choice is one that appeals to a public scheme. Judicial propositions are declarative of present judicial questions. An essential part of the judge's role is to rationally settle disputes. The dispute settlement--like the actions that gave rise to the dispute--is a public matter. The community takes at least enough notice of the dispute to employ a judge to hear it. The judge, in turn, is expected to use some recognizable, available, knowable criteria for judgment. This is not a suggestion that laws must be in every way public in order to be law. Fuller seems to suggest this when he says that the attempt to create and maintain a system of legal rules miscarries if there is "a failure to publicize, or at least to make available to the affected party the rules he is expected to observe."[6]

Public first order propositions are not the case in at least two common settings: first, when potential parties to a case are subject to potentially harsher measures than they could have expected because of a changing moral or political attitude; second, and very much related, when there exists a number of views regarding a topic, and the approach any particular court will settle upon, or even temporarily employ is in doubt. A good example of both is Henningsen v. Bloomfield Motors, Inc.,[7] a case which broadened the scope of strict liability in the products liability sales area by eliminating the barrier of privity. Defendants argued quite persuasively that they did not imagine they would be held remotely and strictly liable when they sold the faulty automobiles. However, they might have noticed that there

had been a several hundred year evolution toward greater liability that culminated in the instant case; and that certain individuals had long felt liability should be invoked in such cases.[8] Henningsen epitomizes a whole category of cases that represent a major change from their predecessors, but a change long argued for and long in coming. When (at the beginning of the previous paragraph) we spoke of a public set of criteria, we referred to a theoretically knowable set, one knowable at least in hindsight. The knowability goes toward the rationality of a view, not toward the selection as certain of any particular view.

If we have stated that a view is conventional, it is necessary to consider more fully just what being a convention entails. A powerful starting point is the picture of a convention painted by David Lewis in his book Convention: A Philosophical Study.[9] It is Lewis' explicit aim to analyze conventions with the hope of achieving a better understanding of specific problems in language, problems concerning analyticity, entailment, synonymy, and in general, the semantics of natural languages. He admits that language is only one conventional activity among many others,[10] but the examination of the semantics of natural languages is virtually his sole focus. In that his theory is here attacked, it is so primarily for its possible non-linguistic applications, not for its main focus.

Lewis defines a convention as:

"A regularity R in the behavior of members of a population P when they are agents in a recurrent situation S is a convention if and only if it is true that, and it is common

knowledge in P that, in almost any instance of S among members of P,

(1) almost everyone conforms to R;

(2) almost everyone expects almost everyone else to conform to R;

(3) almost everyone has approximately the same preferences regarding all possible combinations of actions;

(4) almost everyone prefers that any one more conform to R, on condition that almost everyone conform to R;

(5) almost everyone would prefer that any one more conform to R', on condition that almost everyone conform to R', where R' is some possible regularity in the behavior of members of P in S, such that almost no one in almost any instance of S among members of P could conform both to R' and to R."[11]

Lewis' definition does not require agreement, although it allows that agreement is one of several possible methods for initiating a convention.[12] He sees a convention as a regularity in behavior which holds as though there did exist an agreement on how to behave or act. The regularity is maintained because of a preference among members of the population that there be conformity to the regularity.

There are several difficulties with Lewis's definition, especially as it might hope to be relevant to judicial conventions.

1. The first difficulty is with understanding what is meant

by population. Lewis himself never discusses just what is meant by the term, but from the examples he gives, he seems to refer either to broad geographically proximate groups, or to groups that share a specific interest. He speaks of the set of individuals that are residents of towns (pp. 43, 60), of countries (pp. 44, 49), and of groups of countries (p. 44). He also includes examples of people who are fellow campers or canoeists and share certain immediate interests in safety and efficiency, of two men who need to see each other and must necessarily coordinate scheduling, and of a group of logicians needing to work out a common symbology. What is shared by this otherwise eclectic set of convention-makers is a certainty of criteria for inclusion within the group. There may be some vagueness about where to draw lines--Lewis' use of Welshmen is a good example of this, where Englishmen living in Wales, former Welshmen not now living in Wales, and mixed-parentage offspring with a Welsh ancestor all present borderline cases--but there is an identifiable core group with an ascertainable existence apart from association with the convention. For Lewis, members of a population belong both to some set with non-convention existence conditions for membership and to a set of convention-employers. If this were not true, his first condition of the definition ('(1) almost everyone conforms to R') would be absurd. Some members do not employ the convention and these people are identifiable.

There is the small initial difficulty that in two-person conventions, there is no room for almost everyone to conform. This objection is rendered trivial if Lewis decides to change the

definition to 'almost everyone or everyone.' It would still leave the difficulty of how one idenfifies a population apart from the convention if it has a membership to two. This seems to be a problem of very small populations and of populations which employ actually agreed upon conventions. If a group of one hundred card players attending a bridge tournament with several thousand participants specifically agrees to use a series of hand signals to indicate their bids, thereby lessening the possibility of giving illegal information through unintentional but recognizable voice inflections, how is one able to speak of a population identifiable apart from the convention-makers?

The reason that there is a problem with not knowing of a population apart from its convention-using behavior is this. If almost everyone or everyone is to conform (condition 1) and expects their fellow members of the population to conform (condition 2), it is necessary to know who everyone is. Where there is no actual agreement, one cannot know by seeing who signed the pact. Where there is actual agreement, it is easy to ascertain who the convention-makers were, but Lewis fails to specify how to determine the set of potential convention-users. He thus does not offer criteria for telling when a practice rises to the level of a convention. Without these criteria, Lewis' definition says no more than people know that others perform/ behave/believe as their contemporaries at times do. This definition is thus too weak to allow us to individuate the concept of convention, or in other words, to separate conventions from other social regularities.

2. Lewis' third condition--"almost everyone has approximately the same preferences regarding all possible combinations of actions"--is unnecessarily restrictive. A good illustration would be the behavior of non-fascist judges who remained on the bench during the years Germany was ruled by the National Socialist Party. Suppose the population is the German bench (and possibly bar) and the regularity is the enforcement of Nazi rules in situations when these judges are sitting and such rules are applicable. The existence of a convention would be denied under Lewis's criteria if these judges are acting under coercion, and preferring to see their fellow judges (and Germans generally) disobey the Nazi regime. These judges' behavior is outwardly indistinguishable from that of Nazi judges, who endorse the rules they enforce. Given the fear so widespread during that time, perhaps there could be no way to discover the anti-fascist judges' true feelings. Under Lewis' third condition, two conventions are in force. A society could be envisioned in which thousands of conventions exist--based on the various degrees of alienation that judges feel toward a totalitarian political system.[13] Yet there would be great empirical difficulty figuring out just how many.

3. Lewis' difficulties with the third condition are compounded when one looks closely at this fourth condition: "almost everyone prefers that any one more conform to R, on condition that almost everyone conform to R." In that those anti-fascist judges secretly and silently cheered non-conformity by their judicial brethren, they were not employing any convention when deciding

cases. Lest Lewis be allowed to simply respond that they were just not engaging in conventional behavior, and thus they were rightly excluded, a parallel example in language -- an area he wants always to include as the paradigm case of conventional behavior -- comes to mind. Suppose a group of young Welshmen are raised speaking only English. They are politically nationalistic and desire the complete and eternal separation of their beloved Wales from imperial England. As part of their political program, they are promoting the resurgence of Welsh as a spoken language, and intend, when they have the time, to learn to speak it themselves. They applaud those who do speak Welsh and experience self-loathing and loathing of their English-speaking peers for speaking English. In point of fact, though, the non-Welsh-speaking Welshmen are not speaking pure English, but a hybrid English-Celt language. Suppose this group (population) became a majority in Wales. These people would fall afoul of condition 4 and their language would not be conventional. While they may not care about English-Celt being spoken in Southern Wales, say, (which they consider hopelessly Anglicized) they do not wish it spoken everywhere. They thus do not wish everyone to conform to regularity R. Besides contradicting Lewis' explicit statement to the contrary,[14] it highlights that cases of reluctant agreement ought not to be excluded.

4. Lewis' condition 2 --"almost everyone expects almost everyone else to conform to R" -- is too restrictive. This condition asserts that within the relevant population, there is a general expectation of mutual compliance with the convention.

Lewis formulated the condition in such a way as to allow for a "few abnormal agents" but not to tolerate "a convention to which most people want there to be exceptions, however few the exceptions they want."[16] These two worries miss the real concern however. A convention may exist which is in competition with another or several other conventions. Non-conformity is then not a matter of a few abnormal agents, but a large set of individuals promoting a competing view. Again, the concern is not with some population members wanting exceptions to their own convention, but with the convention of other individuals.

This idea of competing conventions is a difficulty for Lewis under either interpretation of what the proper domain of a population should be. If population is determined independently of convention usage, then there is no way of making sense of competing conventions. If in language, for example, there is deviant usage, there is no way of distinguishing dialect from ideolect. If population is tied to convention, then deviant usage would be symptomatic of a different activity. Competing dialects would constitute different languages.

Lewis' point of expecting conformity from others is empirically difficult to imagine. We have come to expect dialects in language, variations in many types of games, and certainly disagreement in judicial decision-making. If one takes the convention of table manners -- the proper way to eat, correct use of cutlery, what ought to be restricted from table discussion, the method of passing platters, appropriate dress--one might find a large set of people who would agree as to what good table manners

ought to be. Few would be surprised if many in that group failed to conform their behavior to this stated belief.

These criticisms of Lewis' definition have provided the basis for our own idea of convention. The fundamental difference between Lewis' view and the one being suggested here lies in the area of conformity to convention. The view here is that often conventions compete. This would require a condition (one that might be inherent in Lewis' definition) that individuals consider their own convention superior. They may do so for strongly held political, aesthetic, or ethical reasons; or for weakly held reasons of convenience or inertia. The latter would hold if there was some question about a minor rule change in a recreational game (say a dispute as to whether to use NCAA or NBA rules of dribbling and traveling during playground basketball games), where factors such as past practice, greater familiarity with one method, or ease of putting one rule rather than the other into practice would be decisive.

We could thus reformulate Lewis' definition. This might be seen as stating that:

> A regularity R in the behavior of members of a population P when they are agents in a recurrent situation S is a convention if and only if it is true that, and it is common knowledge in P that, in almost any instance of S among members of P,
>
> (1) a significant group within P conforms to R;
>
> (2) almost all members of P will conform to some regularity, and one or more groups will claim

that the regularity they practice is superior. (Disagreement is thus possible about contenders for the designation of the best R);

(3) Personal preferences in R are mediate: they are executed through R, such that if R did not exist, their practices might be different;

(4) A significant group prefers that anyone more conform to R, either

a) on condition that almost everyone conforms or ought to conform to R, or

b) because that group has reason to conform to the preferences of another group that follows conjunct 'a)';

(5) A significant group would prefer that any one more conform to R', on condition that almost everyone conform to R', where R' is some possible regularity in the behavior of members of P in S, such that almost any instance of S among members of P could conform both to R' and to R.

Given this definition, let us focus on the convention of judicial reasoning to fill out the description of conventions. It is evident[17] that judges hold different views about judicial questions. They possess different values, beliefs, and backgrounds. These differences shape individual conceptions of the judicial role. When put in situations where they are required to judge, they employ a convention based on this conception or role. They are aware of competing conventions that provide different

solutions to the common questions. When one tries to answer the questions a judge faces, one employs a convention. It is not necessary that one knows in advance how many individuals adhere to any given convention or even who is a member of which. Attorneys notoriously look for judges that they feel are sympathetic to their view, and just as notoriously, are often mistaken in their estimate. Moreover, as convention conformity is only randomly related to population percentage, a judicial convention can be unique to a single individual. The lack of need for total conformity allows for the logical possibility of what in fact occurs: a continuum of similar conventions, overlapping (sharing regularity) in their approach to certain situations. This involves no terminological difficulties because Lewis' second condition of the widespread expectation of general conformity is dropped, and his fourth condition of widespread preference is expanded. Judges do not expect universal agreement within the bench, but are accustomed to different schools of thought, each with their own approaches to and means of interpreting judicial questions.[18] Moreover, the very generality of certain basic terms of judicial discourse--including 'sane', 'reasonable', negligent', and 'knew or should have have known' -- serve to allow competing conventions to coexist within a society.

Lewis' definition focuses on behavior. He finds that conventions are instantiated by regularity of action. His is not a behaviorist model though, for he requires investigation of such mental processes as expectations and hypothetical preferences. We shall need to make the belief component slightly more explicit.

The regularity in judicial decision-making is manifestly evident. Regular use of materials (statutes and cases), regular court procedure, and regular patterns of notice of the empirical world (narrowly called judicial notice but more broadly using basic precepts of common language, reason and common sense in resolving cases) are commonplace. Judicial regularities, however, are a matter of reason and justification. A judicial convention is constructed from shared preferences backed by shared attitudes and beliefs[19] relevant to those regularities. Because a set of attitudes and beliefs about a matter as broad as the set of judicial propositions is unlikely to be the same for any two persons, it might be thought a question as to whether a judicial convention is really a convention. Even if some disparity between different individuals' patterns is allowed, is the amount of disparity too great to overcome? Does explicitly introducing beliefs destroy the idea of a convention?

Fortunately, this is a terminological difficulty only. It does not matter whether or not a judicial convention is in this sense truly a convention. What is important is that it otherwise behaves as a convention. Judges are not expected to impose directly their own preferences, but are assumed to have applied propositions drawn from the conventionalized construction of a judicial view. Moreover, the judicial view is dependent in part upon one's understanding of how judges have, in the past, operated. Thus one who shares few particular preferences with most of a

population subject to a particular judicial system will nevertheless be constrained to adapt his judicial view vis-a-vis that system, to the preferences of that society. Empirical regularities of themselves count in constructing a judicial view. This allows us, for example, to construct a view of Roman Law during the time of Gaius, although one may share few Roman values, and fewer political or social beliefs.

It is crucial to remember that employed beliefs and attitudes are derivative: they depend on a conception of role. The difference between the derivative and the direct can be seen when a judge reaches a result in a case that is inconsistent with the way he would have resolved the difficulty if he were not a judge. For example, the Massachusetts legislature enacted a firearm possession act which required without exception the imposition of a one year prison term on anyone found carrying an unlicensed firearm within the commonwealth. Judge K was appalled by this piece of legislation, and believes that in the case of persons without a previous conviction at least, the penalty is at least twelve-fold too stiff. He subsequently sits on a criminal court and finds himself required to sentence a defendant found quilty of illegal possession of firearms. K believes it is the role of the judge to provide the sentence the legislature provides in criminal cases. His derivative belief conflicts with his direct ethical and political beliefs.

The fact that K's derivative belief and direct belief do not immediately square does not imply any ultimate inconsistency.

If K believes that a duty to conform to a legislative act is more important than personal beliefs about criminal sentencing, he can square the apparent conflict. But it should not be assumed that K has in fact squared the conflict. This assumption might arise because the fact that K did make a decision is seen as indicative of some rational weighing of the competing choices. This weighing involves the evaluation of all relevant judicial propositions and an ordering of those propositions according to importance. This is a faulty assumption. There is no logical guarantee that one's choices are consistent with one another. Choice inconsistency is not necessarily a matter of irrationality, where one makes decisions manifestly at odds with other decisions. It is more likely to be a matter of a failure to work out a completely consistent plan in advance. Given the range of possible questions that a court might be called upon to address, it would be unreasonable to expect very many individuals to have a thorough and complete set of answers to them all. Since answers are then provided on either an ad hoc or partial set (of answers) basis, inconsistencies can be expected.

The example of Judge X raises the final problem to be discussed in this section: the problem of the status of the third order view. We said that the view is constructed, and constructed according to convention. The third order propositions assembled are valid according to the convention, not absolutely. That is, the propositional set is dependent on role, not on general considerations (as seen with Judge K). But are conventions themselves somehow true or false, or logically right or wrong?

From the very name of the theory propounded here--pluralism--it is apparent that those questions must be answered no. Pluralism states that there are a number of different views and in that they are not self-contradictory, they are all equal with respect to any question of truth or validity. Third order propositions do not have a truth-value in a two-valued logic,[20] and have an indeterminate truth-value in a three-valued logic.

Conventions are commonly taken to be arbitrary: that is, their features are not necessary ones. There is a possible argument that judicial conventions, or more exactly the set of third order propositions of any particular convention, are susceptible to being objectively true or false. The argument is this. The judicial decision-making role is a precise one. Not just any description of it will do. A proper characterization of the role is available based on a proper understanding of political morality and a knowledge of the political workings of the society. A variation of this idea would tie judicial role-characterization to what the prevailing opinion among some relevant group--government officials, the bench, the bench and bar, educated individuals, all citizens of the society--is. These two positions might be called the objective moral position and the popular moral position.

There are a number of difficulties with the objective moral position. It assumes at the outset that there is an objective moral realm, a position recently under severe attack.[21] It assumes further that there is an objective public morality, a morality that is capable of judging, in particular, governmental acts and the

public acts of individuals. Public morality is a more complicated matter than personal morality,[22] and one where the widespread controversies undermine confidence that commonly accepted tenets of the type found in private morality will be found. But even if an objective morality is conceded, such a position confuses idealistic conceptions of role with actually held ones. If some measure existed by which to judge role, and an entire society--because of ignorance, malevolence, or plain contrariness--decides on a different measure, then if they are to be considered as all being wrong, there will be a convention which is followed by no individuals and a non-convention that reflects a widespread regularity in behavior, with shared beliefs and mutual (successful) expectations in a discrete population. This flatly contradicts the meaning of a convention.

The popular moral position aims to avoid this dilemma by basing the measure of what a role should be on prevailing opinion. However, choosing the correct group for the standard of judgment is a difficult matter. The example of language is instructive here. Controversy is commonplace on the issue of whether general usage or educated usage should determine which words are acceptable to a good language user. Lexicographers need to make a decision, and are often faced with a choice between using obsolete criteria and using mediocre criteria.[23] The dispute is reducible to a debate between seeing language usage as central and seeing good language usage as central, but the dispute is reducible no further. The same kind of dilemma exists in settling what group should determine the proper conception of role. No

method seems available for final settlement of the controversy.

There is a further difficulty for the advocate of the popular moral position. There is no reason why any normative consequences should flow from the fact of majority opinion. Merely because most people believe in a certain role for judges, it does not follow that they are right or should be followed. This type of move would be from 'is' to 'ought' and within the naturalistic fallacy even if the backdrop of convention were not involved. Moreover, as convention is rooted in regularity, the availability of conflicting conventions based on competing regularities among different sub-populations renders any claim of exclusivity independently invalid.

If any particular set of third order propositions is then, indeed, not susceptible to any test of correctness, are judicial views unable to be criticized? Is each individual's judicial view just a fact about the world, and entitled to equal respect with all other views? The answer is clearly no. Views may be criticized as irrational, immoral, unpolitic, cumbersome, contradictory, inelegant, and even irrelevant. These areas -- logic, ethics, politics, aesthetics, sociology -- serve as ways to judge judicial views. One reason that the practice of allowing minority or dissenting opinions to be published along side of the majority opinion exists is a recognition that even though these opinions have no standing (in American judisdictions, a limited standing in English jurisdictions) as legal authority, they reflect an alternate view that may be ethically, logically, politically, aesthetically, or sociologically superior. Such superiority is

not a function of majority approval, and this fact is widely recognized.

There is a final point that we shall return to later.[24] It might be thought that since third order propositions reflect belief and are commonly stated as an assertion, the speakers of these statements believe them to be right. Incorporated into the judicial convention is this 'someone-must-be-right' component. The adversary system where a single answer must be and is reached reflects this component, as does ordinary language talk of legal facts-of-the-matter. This includes, for example, seeing contracts as either valid or invalid, evidence as either being admissable or inadmissable, commercial paper as negotiable or not, and real covenants as either having been created or not.

While the language in these types of statements is somewhat misleading--as the propositional form that yields statements is common to very different types of assertions--there is an underlying point. People are engaging in argument about third order propositions, and the argument focuses on which of two contradictory propositional sets is right. However, this in fact mistakes a desire for conformity with a belief in correctness. If X holds a certain view, he is eager to have others endorse that view. He wants others to conform their views to his. When they do not, he will criticize these individuals and attempt to undermine their position, with reasons where possible. The attempt he makes is in part polemical. He succeeds not by some proof that his view is right. He succeeds when others agree, when they

conform to his position. The advocacy system in courtrooms is best seen this way. Attorneys seek to convince, and when they convince they stop, whether or not there are additional points that might theoretically be relevant, and certainly whether or not the best reasons have been put forward. Attorneys certainly do not act as scholars. They do not seek all evidence that would bear on a problem and present it, even if it is contrary to their cause. This desire for conformity rather than truth runs throughout the whole fabric of judicial reasoning. Whatever the psychological process where a need for approval arises that must be cured through the endorsement of one's idea by others, it provides enough passion to allow for third order argument.

2. The Logic of Judicial Propositions

We began this chapter by stating that though third order propositions were devoid of truth value, first and second order propositions are not so devoid. They can be tagged as being 'true' or 'false', and are so in lieu of the commitments made on the third order. This is easily seen. Third order propositions need to have as much validity as any set of postulates. Their status, however, does not affect theorems or lower-order propositions that flow (follow) from them.

A sharp distinction needs to be drawn between lower-order propositional validity within a view and between two or more competing views. There may be an incongruence of sets of propositions between two or more conventions with no way to settle

which set is right. Within a convention, however, the result is determinable and no inconsistency is necessary. This process is analogous to systems based on different sets of postulates in mathematics. For example, if one uses the Lobachevskian postulate in place of Euclid's fifth postulate in constructing a geometry--that is, rejecting the postulate that one and only one line parallel to a given line can be drawn through a fixed point external to the line, and allowing more than one parallel through the fixed point--one can develop a system as self-consistent as the Greek's. A theorem in the Russian system, however, is no more true outside the postulated geometry than one in the Greek system.

Views were first introduced to explain how actual persons formulate answers to judicial questions. An ambiguity has seemingly arisen, for 'view' is not only used here as reflecting an empirical reality, but as a logical construct for yielding answers to all possible questions. Judges (and others) have views, while views denote a reasoning structure for solving problems.

The reason that these two sides of 'view' do not seem coterminous is because the views judges actually have tend to be incomplete, fragmented, vague, and even contradictory constructs. As such, they appear inadequate for generating a self-consistent, let alone complete, set of lower-order propositions. But if we take a closer look at the nature of the inadequacies of actual views, we shall see that inelegant as they are, they commit their holder to consequences that he may not foresee or even be able to articulate.

The inadequacies of actual views are of three kinds. The first is that they are incomplete. Judges and judicial observers are not required to be general theorists. They do not need to possess answers to every question before being allowed to give their responses to a few questions. They are instead called upon to do just the opposite: give responses to the ongoing series of questions that they face. When a question is put before them that they had not considered--a common occurrence in modern societies where increasing social complexity makes for an endless stream of new judicial problems--they are often without any immediate answer, or seemingly without a method of determining an answer. The situations where judges are without answers are at times called sui generis, meaning cases which are new or unique, and yet many are thought to be routine. The sui generis case occurs when resorting to third order propositions does not readily yield an answer. (Readiness here is a sliding concept, making the sui generis case one of degree.) Good examples are cases where a plaintiff states a novel cause of action. In Wilkinson v. Downton[25] a plaintiff wife sued a practical joker in tort for extreme and intentional outrage that caused severe emotional distress. Defendant had falsely told her that her husband had been badly injured in an accident which left him with two broken legs. She was to come with two pillows and bring him home. The shock caused her serious and permanent physical consequences and temporarily altered her reasoning. Traditional tort cases outside the parameters of assault cases did not allow

for recovery, but neither did they involve such extreme behavior. Such behavior had been considered a cause for liability in certain public carrier cases[26] but had not been so considered in ordinary cases. The judges, no doubt, had a judicial view that allowed assault-type recovery while denying ordinary insult and indignity recovery. They had not formulated concepts sufficiently full to include the Wilkinson case. Their view was incomplete, as the apparent shock at the case by the judges evidences.

The sui generis case exemplifies the problem of incompleteness, but it is not coincidental with it. Views are constructed from areas such as aesthetics, politics, and ethics. These are subjects themselves difficult and complex. They are not ones that individuals are likely to have worked-out consistent positions on. Thus, even in ordinary cases, the judge may find that the third order set runs out. He may find that he makes decisions without being able very adequately to justify or defend them, (they are intuitive rather than reasoned). Legal fictions or technicalities may be employed to bolster a position. This occurred with many courts in the emotional distress cases, finding contract liability where there was no contract,[27] and technical assault,[28] battery,[29] or false imprisonment[30] through a convoluted reasoning process not normally used, or ever used with great confidence.

The judge's difficulty sometimes involves a conflict between competing third order propositions. Individuals often hold conflicting beliefs. This is sometimes manifested in strictly

conflicting propositions, such as where part of the view yields p and another part ~p. This can be due to belief uncertainty, cognitive dissonance, or inadequate consideration of the consequences of one's commitments. When cases are retrospectively "confined or limited to the facts" there is an explicit recognition of this. A good example of this is the case of Grain Dealers National Fire Ins. C. v. Union Co., 159 Ohio St. 124, 111 N.E. 2d 256, 261 (1953) where the court stated that

> "some of the members of this court are of opinion that if the exact facts of the Pickering case should again come before the court the judgment therein shall be re-examined, but we are of the opinion that that judgment must be confined to those facts."

More often contradiction is avoided by alteration of ones view. Third order principles are formulated so incompletely or vaguely that by the time the contradiction is apparent--made so, for instance, by a difficult case--it can be avoided by slightly changing the view without seeming to. An example of this is Riggs v. Palmer,[31] the case of the legatee who murdered his testator, mentioned in the previous chapter. Let us suppose that prior to hearing the case, or even being given the facts of the situation, an individual or judge believed both in the binding force of a will disposing of an estate of a testator in conformity with law (p), and that no man should profit from his own inequities or take advantage of his own criminal wrong (q). p and q lead to contrary results if taken as broadly as they are stated, as demonstrated in a Riggs v. Palmer situation. Yet the actual court in Riggs did what individuals constantly do: they redefined either

p or q or both so that 'p·q' becomes true. But in all other ways p and q are unchanged. (This could be accomplished, for example, by letting p=s, where s is some set $\langle s_i \rangle$ with members s_0, s_1, $s_2 \ldots s_i$. Then if 's·q' is false, a new set $\langle s_i' \rangle$ is constructed with members s_0, $s_2 \ldots s_i$ that excludes $s_1 \cdot s_i' = p'$, and the Riggs court endorses p' instead of p.) The original p and q did conflict, but is is likely that there was no one who realized they conflicted.

The third empirical view inadequacy is evidenced in the Riggs example. It is vagueness. A principle is vague if there are cases in which it is in theory indeterminate whether the principle applies. Of course, such philosophers as W. V. O. Quine have argued that there is an indeterminancy in all language,[32] but the vagueness here is of the type reducible (if not, according to a Quinean, eliminatable) by simply further specifying which cases fall under the principle.[33] This is just what the court did in Riggs, where p and q were originally vague, and, after the case, made less so. The requirement to think hard about the specific case in hand while hedging one's bets on future cases--since the facts of the future are unconsidered and potentially difficult--is one encouraged in a judicial system. It is also a requirement that is well-handled by employing vague third order propositions. It might be argued that Riggs did not change the court's view, that Riggs merely forced the court to reason toward an answer inherent in the prior view. This misunderstands what vagueness implies. If an object's vagueness is removed through specification of the cases under that object, then the object's meaning has

changed. It thus cannot be said that the Riggs court merely applied p and q and worked out the consequences. In working out the consequences they altered p and q.

If actually held views are faulty when judged by a standard of logical completeness, consistency, and precision, how is it that we can claim that the set of third order propositions can yield a unique and consistent set of answers to lower-order questions? The logical answer is that these are limitations on a view's scope, but they do not affect the fact of truth-value of the lower-order propositions. Where a view is too vague or incomplete it does not provide answers.

The degree to which a view does provide answers we shall call its determination level. If a third order proposition yields a lower-order proposition, we shall say it determines that proposition. Similarly, if a set of third order propositions yields a set of lower-order propositions, it determines that set. Underdetermination occurs when the third order propositions are not sufficient to give definition to some set of lower-order propositions. Overdetermination occurs when different third order propositions each are sufficient to yield a single lower-order proposition.[34] An illustration here would be useful.

Let us suppose that P agreed to loan D a small sum of money in local currency in return for a much larger sum to be paid back later in a foreign currency. D agreed to the bargain because he was in desperate need of local funds to effect his escape to freedom in a foreign country. (The facts, though not the issues,

are essentially those of Batsakis v. Demotsis, 226 S.W. 2nd 673 (Tex. Civ. App. 1949)). D fails to repay and P brings suit. If the only first order question raised by the case was whether or not D should be forced to repay the loan, it would be easy to imagine a judicial view which overdetermined the outcome of P v. D. If in-point precedents had occurred, one third order proposition might state that such precedents should determine relevant cases (viz.- P v. D). If equity considerations were found in third level propositions, they too might suggest that one who makes a promise ought to keep it. Again, if considerations such as protecting and encouraging commercial transactions, ensuring the freedom of individuals to bargain, and limiting judicial interference in regard to the fairness of the terms of otherwise unexceptionable contracts all were represented in third order propositions, then P v. D would be determinable from a number of different higher-order propositions. It would be, in short, overdetermined.

P v. D as given is a simple case, and overdetermination, being in part a function of the complexity of first order questions, is not surprising. Suppose that D introduced the defense of usury. He claimed that the amount to be repaid was so much larger than the amount borrowed, when either currency was converted, that the contract ought not to be enforced as made. Let us also suppose that usury is a recognized defense to certain contract claims, and that each of the third order propositions stated--those concerning precedent, equity, commercial enterprise, bargain-

ing freedom, and judicial interference--was limited in its application to non-usurous situations. Usury was a concept, though, that in the past had been held to apply only to same-currency transactions. If no other third order propositions would be relevant, then the answer to P v.D is underdetermined. That is, the third order propositions, while circumscribing the limits of the first order answer, are insufficient to shape it fully.

Finally, if the five original third order propositions are not specifically held to apply only to non-usurous situations, then we may have an example of overdetermination resulting in inconsistency. Until P v. D, such a set of propositions might have been thought to be consistent as stated. However, conflict can be imagined if propositions ensuring respect for precedent, and promotion of commercial transactions and contractual enterprise are seen to be at odds with propositions guaranteeing judicial equity and the promotion of fair contractual dealing. In finding that one's view is faulty because of overdetermination, one would, if desiring to maintain a rational and consistent view, be required to alter the third order propositional set.

Those ignorant of the law and of judicial reasoning are likely to have an impoverished judicial view. Virtually every lower-order answer will underdetermined. Enriched judicial views are laden with overdetermination. A view is enriched to the degree that the propositions in it are fertile of consequences. The judicial systems of modern western societies, with their abundant judicial tradition and their sophisticated social and moral

theories, tend to generate enriched judicial views among their populace.

One can view legal history as a movement from underdetermination to overdetermination.[35] Initially, judicial role is uncertain, and the test for criteria for formulating lower-order propositions is extremely vague. As a tradition of dispute resolution develops, a concomitant increasing sophistication takes place in incorporating social and ethical ideas in one's judicial view. The move toward overdetermination can easily be wrongly intepreted as merely a movement toward determination, toward the closing of choices for selection in the third order set. But subsets of third order propositions change independently and unevenly. English common-law saw increasing sophistication in trust and property law at a time when equity and procedure remained primitive. Under Lord Mansfield, contract law and restitution were areas that in a few years moved from being impoverished to being enriched.

Part of a non-impoverished view is a decision-rendering proposition. The legal laity in sophisticated legal systems, and any individual in primitive systems, might possibly exclude a decision-rendering proposition (DRP) from their view. The former may defer to the bench and bar while the latter to some deity, fate, or private dispute resolution. Not having a DRP means a view can allow questions to go unresolved. Any particular DRP may have have a greater or lesser scope over the domain of conflicts.

We can now tie view as empirically held by individuals to the

view as logical construct. An individual's view is usually found to be either under- or overdetermined.[36] If it is underdetermined, it will fail to accomplish what the construct will do. But this is the case only in elementary systems or among the legal laity. An overdetermined view will allow for a self-consistent set of lower-order propositions, and if it contains a DRP, a complete set. But in formulating these lower-order propositions it will change. It will not be the same view. It will become more like the view it should be, if we assume a normative principle that demands full logical consistency to be introduced. This 'should' comes to this. A third order set of propositions yields an analogue for reaching lower-order propositions. When that analogue is a result of overdetermination, then application of the analogue will give a new view and thus a new analogue. Schematically, this means $View_{overdetermined} \rightarrow Analogue \rightarrow View_{o} \rightarrow Analogue_{o}$.

An example might allow us to see just how this process works. Let us begin by looking at the case of R. v. Dwyer.[37] In that case the Motor Trade Association (MTA) was empowered to put on a stop list automobile vendors who sold cars at other than a fixed price. One vendor, Read, not a member of the association, had discounted on price and was told by an officer of the MTA, Dwyer, to either contribute L250 to an indemnity fund of the MTA or face publication as a price violator. Read refused; the MTA published his name; and Dwyer was charged under the Larceny Act with essentially committing blackmail.[38] He was convicted and lost on

appeal.

There are certain interesting points of statutory interpretation and precedent about the case, but it is not these that are important here.[39] The case can be seen as one where ordinary notions about contract and crime conflict. The contract notion is this. Parties ought to be able to bargain freely. Where a quid pro quo is offered, it should be left to the offeree to accept or reject it. If what the offeror is offering is a thing he has a right to do or have, it is all the more certain that the thing furnishes good consideration.[40] The criminal notion is this. Where parties do not stand in any personal relationship, one party should not be able to threaten the other with some odious act for the purpose of extracting money. Threats to reveal publically some act of the offeree, in order to shame, redicule, or cause the arrest of him, are to be discouraged.

Let us go one step beyond the facts of R. v. Dwyer. Let us assume that Read agreed to make the payment and Dwyer left his name off of the publication list. Read then refused to pay and Dwyer sued for breach of contract.

A judge may approach this case (in at least) three different ways. In the terminology of the common law courts, one might see the problem as one of criminal law, contract law, or procedure. If one approaches Dwyer v. Read from a criminal-law perspective, one would be using certain third order propositions involving protection of individuals from threat and coercion. These propositions would be related to a wider set of propositions that express beliefs and attitudes about public safety, the role of

the police, intentionality and motive, and justifications for anti-social acts. This subset of the judicial view relevent to criminal matters involves a complex maze of psychological, social, political and moral concepts. Even if an individual had no ready answer to Dwyer v. Read, this subset could provide an answer.

The first approach would label the contract criminal and thus unenforceable, giving the answer p as the holding of the case.[41] A second, contract, approach would involve areas of consideration, consent, duress, and unconscionability. The third order view embodies beliefs about market-place economics, transactional freedom, and the place of contract in a modern society. The contract subset within the third order could give an answer to Dwyer v. Read of q. A third approach, based on procedural beliefs would act in the same way. The main question could be the effect of R. v. Dwyer on Dwyer v. Read. Issues of the relevancy and admissibility of the criminal finding in R. v. Dwyer on the civil suit would arise. Again, a finding of r could follow from the third order procedural-type beliefs about procedural fairness, institutional morality and credibility, and even matters of double jeopardy for the same act. Also to be considered would be beliefs about equity and the practice of allowing plaintiffs with "dirty hands" to ask for court action.[42]

Each of these three subsets of the third order set--labeled here the criminal, the contractual, and the procedural[43]--is sufficient to resolve Dwyer v. Read. The proposition that answers the question as to whether Read entered into a valid contract with Dwyer is overdetermined. If $p \equiv q \equiv r$, then this overdetermination

has no effect on the view. If $p \not\equiv q$, and $q \not\equiv r$ and $p \not\equiv r$, then the compatibility that may have been earlier, ends, (or to use Dummett's phrase, falls apart[44]). When '$p \equiv q \equiv r$' is not true, then in order to solve the case, a new view must come about.

Such an occurrence is common when view subsets have the sweep of the type seen above. When discussion of a contractual matter involves beliefs regarding the concepts of freedom, safety, and fairness--concepts at once broad and difficult--overdetermination should not be surprising. Each subset yields its own analogue or method for settling questions that fall under its scope. When overdetermination is present and analogues yield different results, the subsets must cut back on that scope to avoid contradiction.

It might be thought that this is an improper description, that if $q \equiv \sim p$, that one cannot hold p and q at the same time. One discovers that the breadth of ones sub-views through the testing procedure inherent in solving cases is often unforeseen.[45] When it is discovered that $q \equiv r$, Dwyer v. Read does not change an individual's view: it merely helps him discover what his view truly (correctly) is.

This objection is misconceived. Suppose a third order set at time T_1. Two futures are possible after T_1. Dwyer v. Read might occur at T_2 or some case might arise where the contract sub-view is in conflict with, say, a property sub-view. If this second case arises after T_1, but before T_2, the results of Dwyer v. Read could well be different. The resolution of the prior case will cause

adjustment due to overdetermination. Vagueness will be alleviated and an analogue will result. The determination of this case will mean different subviews will exist than would have at T_2 if the case had not preceded Read. Individuals' actual views are not written down for ready use. They are mental entities, and a variation in the temporal case scenario will cause a difference in views.

The picture presented here is not meant to play fast-and-loose with the concept of identity. It merely attempts to show how the third order set at T_1 becomes the third order set at T_2. It has two interesting consequences. First, it does answer the question as to whether lower-order propositions can be considered true or false. They can be so considered. Their truth value is a function of third order propositions. However, since the third order set is susceptible to constant evolution, any enumeration of the set of lower-order statements at some given time is not of much interest. The second consequence is that it shows one way that judicial views change over time. The intuitive picture that familiar concepts continue to yield new results has been shown to be more-or-less accurate when analyzed from the point of view of conventionalized, tertiary, propositional schemata.

[1]Justice Cardozo, a long and close observer, speaks of this convergence of view when he relates how men view cases, even conduct themselves "with no rules except those of custom and conscience to regulate their conduct. The feeling is that nine times out of ten, if not oftener, the conduct of right-minded men could not have been different if the rule embodied in the decision had been announced by statute in advance." Benjamin N. Cardozo, The Nature of the Judicial Process 142-143 (1921). Such a statement is revealing, for it implicitly suggests that third order propositions could account for decisions as easily as first order.

[2]This would occur if a high f factor or correlation resulted.

[3]This is probably the prevailing opinion in American jurisdictions, expecially in the American South and the West, where a competent police force is often a recent event, and personal dispute settlement is a way of life. See Brown v. United States, 256 U.S. 335 (1921); State v. Hiatt, 187 Wash. 226, 60 p. 2nd 71 (1936).

[4]This is a favored position of many legal academics and some American jurisdictions. See Beale, "Retreat from Murderous Assault" 16 Harv. L. Rev. 567 (1903); Restatement of Torts 65; State v. Cox, 138 Me. 151, 23 A. 2nd. 634 (1941); Ford v. State 222 Ark. 16, 257 S.W. 2nd 30 (1953).

[5]Wittgenstein's maxim from the Tractatus that the limits of our language are the limits of our thought represents a strong theory of conceptual dependence on linguistic structure. Such a theory suggests that the way we think and reason is in large part a function of the language we use and our understanding of and ability to use it. Thus widely deviant (or wild) interpretations of concepts or abberant reasoning are likely to be an indication of either a failure properly to use language or the presence of a different language. See Ludwig Wittgenstein, Tractatus Logico-Philosophicus (1921, first English edition 1922).

[6]Lon Fuller, The Morality of Law 39 (rev. ed. 1969). Fuller seems at times to require a total failure (page 39),

while at others only a partial failure (pp. 152-186). A total failure--where no rules are ever known--seems empirically impossible. It is a serious defect in Fuller's theory that he does not make clear that failure proceeds along a continuum and that one is not faced with either no law or law, but the presence of a greater or lesser number of legal features. Fuller does not give the reader the theoretical equipment to assess the (ubiquitous) intermediate cases.

[7]32 N.J. 358, 161 A. 2d 69 (1960). This case and its consequences are analyzed in Friedrich Kessler, "Products Liability" 76 Yale L.J. 887, 889 (1967).

[8]Edward Levi, in An Introduction to Legal Reasoning (1949), discusses this evolution, pp. 6-19.

[9]Published in 1969.

[10]Id. at 3.

[11]Id. on p. 78. Lewis offers an equivalent quantified definition on pp. 78-79.

[12]He discusses several others at 85-88 of Convention.

[13]Though totalitarian, this society would have certain attractive qualities--perhaps increased safety, a profitable economy, a low unemployment rate--that would allow for this spectrum of feeling to be held by the various judges.

[14]This is stated, among other places, in Convention at 203.

[15]A convention would not necessarily be established under condition 5 if there existed any substantial split of opinion on the language issue within Wales.

[16]Both quotations are from Convention at 77.

[17]See Chapter VII for a lengthy empirical demonstration.

[18]Lewis does allow for degrees of convention (Convention at 76-80), but for him dissent undermines the existence of a convention. Here it merely undermines the popularity of a convention.

[19]The meaning of the terms 'beliefs' and 'attitudes' should be taken to be the ones common in philosophy of mind, and taken more directly from Roger Scruton. Paraphrasing only slightly from Scruton, we can say that if the statement s expresses a belief, then the rules governing the use of the expression s must refer to the truth-conditions of this belief. Their being answerable to truth-conditions, and identified by reference to these conditions, is what distinguishes beliefs from all other mental states. It follows that, if statements of the form s express beliefs, then there will be criteria for their truth. On the other hand, if statements of this form express attitudes, then they will not have criteria; such statements will answer only to necessary conditions, conditions governing the kind of thing to which they are applied. Scruton's usage is the one adopted here. See Roger Scruton, "Attitudes, Beliefs, and Reasons" in Morality and Moral Reasoning 25, 54-55 (ed. John Casey, 1971).

[20]Depending on one's approach to the problem of the excluded-middle, there may have to be a 'false' value for third order propositions in certain logical systems. This would present difficulties with negation that are beyond the scope of this thesis. One possible line of analysis for handling three-order judicial logic would be to put it in a modal logic (possible-worlds) form, such as the one developed by David Lewis in Counterfactuals (1973). For a thorough discussion of the parameters and limitations of a two-valued logic, see Crispin Wright, Wittgenstein on the Foundations of Mathematics (1980).

[21]A skeptical or relativist position is put forward in J.L. Mackie, Ethics: Inventing Right and Wrong 15-49 (1977); Gilbert Harman, "Moral Relativism Defended" 84 Philosophical Review 19 (1975); Bernard Williams, Problems of the Self 166-204 (1973); and in Simon Blackburn, "Moral Realism" in Morality and Moral Reasoning 101 (ed. John Casey, 1971). These works and others make clear that ethical objectivity is not a self-evident position, but one open to severe doubt, at the least.

[22]My reasons for this follow Stuart Hampshire's. They include greater consequences of action, the need to understand a greater number of interests, and the necessary use of force and even violence in certain recurring situations. See Hampshire, "Morality and Pessimism" and "Public and Private Morality" in Public and Private Morality (ed. Stuart Hampshire, 1978).

[23]For example, the leading American unabridged dictionary attempted to update its contents so as to keep up with the current American language. One response from a legal organization exemplifies the wide disparity in standards in the area, as it was willing to advocate continued use of the obviously inadequate older dictionary instead of the new edition with its faults:

> "The editors are unable to recommend that the Third Edition Merriam-Webster New International Dictionary replace the Second Edition as a general authority for definition and italicization. The new edition fails to distinguish those foreign words which should be italicized in English writing, and is in general insufficiently prescriptive. Continued reliance on the Second Edition is recommended." A Uniform System of Citation ii (ed. Harvard Law Review, Columbia Law Journal, eleventh edition, 1967).

[24]See Chapter VI.

[25]2 Q.B.D. 57 (1897).

[26]This occurred first in a contract cause of action with Chamberlain v. Chandler, 3 Mason 242, 5 Fed. Cas. No. 2575 (C.C. Mass. 1823); and then in tort with Cole v. Atlanta and W.P.R. Co., 102 Ga. 474, 31 S.E. 107 (1897) and Goddard v. Grand Trunk R. Co. 57 Me. 2021 2 Am. Rep. 39 (1869).

[27]See Texas and Pac. R. Co. v. Jones, Tex. Civ. App., 39 S.W. 124 (1897); Moody v. Kenny, 153 La. 1007, 97 So. 21 (1923) (involved a yet-to-be-registered hotel guest where recovery was based on a contract not yet agreed to and without consideration passing).

[28]See Atlanta Hub Co. v. Jones, 47 Ga. App. 778, 171 S.E. 470 (1933); Kurpgeweit v. Kirby, 88 Neb. 72, 129 N.W.

177 (1910); Leach v. Leach, 11 Tex. Civ. App. 699, 33 S.W. 703 (1895).

[29]See De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (1881).

[30]See Salisbury v. Paulson, 51 Utah 552, 172 P. 315 (1918).

[31]115 N.Y. 506, 22 N.E. 188 (1889).



[32]Argued for by Willard Van Orman Quine in Word and Object (1960).

[33]Joseph Raz in The Authority of Law: Essays on Law and Morality 52-57 (1979) speaks of an indeterminacy that cannot be closed in judicial statements. As I understand it, this indeterminacy occurs either because of the vagueness of terms (the Quinean reason) or because what he calls closure rules--rules that settle cases which fall into the gap between the reach of neighboring rules--are inapplicable. If one argues with the theory of meaning that a certain amount of vagueness in language is inevitable and irreducible, then Raz and Quine are right, but only in a trivial way. The terms can be given truth conditions for proper usuage that comes as close as we would want. The second reason for indeterminacy is due to an incompleteness of second order propositions. While this is a theoretically possible occurrence, it is not a likely empirical one. It requires a third level that neglects the problem, that is without relevant overdetermination, and that lacks a decision-rendering proposition (see below). Raz's example examines a statute requiring 'ship-owners to Ø.' Subsequent to the enactment, a new vessel is built that is not clearly a ship. Raz says of this vessel that "it is neither true nor false that the legislator intended the obligation to apply to the owners of such vessels" (p. 72n). Raz is using an extremely restricted notion of 'intention' here. Legislators qua legislators can not be said to have intentions in the same way as they do outside their role. As legislators, they are part of a corporate unit. When they act, it is unreasonable to assume that the same component of foreseeability commonplace in ordinary intentionality ought to apply. When I say 'x should Ø' it is fair to assume that I have some idea of what x is. If a new kind of x should

be encountered, then it is certainly proper to say that I had no intention concerning whether this new x should Ø. But that is hardly the case with a group of legislators. They can be expected to know that new cases will arise, and that these new cases will have to be settled. To say, as Raz does, that there is a necessary indeterminacy if a new fact situation (outside the purview of the statutory language) arises, is to limit intention by foreseeability. This does not allow that a legislator might intend for reasonable adjudication of disputes under the statute through judicial interpretation and extension of the statutory language. Raz thus claims that a indeterminacy occurs when a legislative intention is to limit intention with foreseeability, and not to allow for intending for reasonable settlement through the judiciary later.

But even if Raz is correct that intention can fail this easily, indeterminacy would occur only if the third level proposition underdetermined the second order issue. Here, the third level would have to allow a restricted use of intention, and no other way to settle the case of whether the new vessel should Ø. Raz might argue that vis-a-vis ones third order subset of propositions on intentionality, there might be indeterminacy, even if one's whole view would settle the matter. But this is not to argue for any necessary vagueness in the view, only necessary vagueness in terms, as discussed above. A more thorough look at several of Raz's assumptions on judicial reasoning is attempted in Chapter V.

[34]The idea of determination is borrowed from philosophy of language. The senses of most words are both under- and over-determined with certain consequences for a theory or meaning. See Michael Dummett, Frege: Philosophy of Language 585-627 (1973).

[35]The process stops, or is at least sidetracked, when there occurs serious socially or politically rooted disruption to the legal order. Given the deep-seated cultural and social bonds that tie communities and states, judicial views are rather slower to change than political institutions. For this reason, what may to contemporary observers look like a major unheavel in a judicial system due to a political revolution is often judged a minor diversion in retrospect. Both the American and the English Civil Wars, with their dramatic consequences for governmental institutions and political process, failed to make a similar imprint on judicial institutions or judicial views.

[36]The logical possibility is a remote empirical one. Dworkin's Herculean judge perhaps would qualify, but it is likely that even he instead is employing overdetermined principles to reason his way to a result. (See Ronald Dworkin, Taking Rights Seriously, Chapter IV(1977)).

[37]2 K.B. 258 (1926).

[38]The Larceny Act, 1916, contains the following relevant provision:

> "29. Every person who -- (1) utters, knowing the contents thereof, any letter or writing demanding of any person who menaces, and without any reasonable or probable cause, any property or valuable thing; . . . shall be guilty of felony, and on conviction thereof liable to penal servitude for life."

[39]They are discussed in an admirable technical manner by A. L. Goodhart in "Blackmail and Consideration in Contracts" 44 Law Quarterly Rev. 436 (1928), reprinted in A. L. Goodhart, Essays in Jurisprudence and the Common Law 175 (1931).

[40]This position was stated by Scrutton, L.J. in Hardie and Lane v. Chilton 2 K.B. 306, 319 (1928) during a discussion where he criticized R. v. Dwyer.

[41]The view could also lead to ~p, depending on the third order propositions.

[42]We can assume a full merger of law and equity in contract suits at the time of the case.

[43]It is not essential or even necessarily practical to divide up the third set according to legal subject headings. Discrete groupings of actual view subsets are likely to be organized on a much smaller scale, and certainly in a vaguer manner.

[44]Dummett, Frege: Philosophy of Language 624 (1973).

[45]Varieties of this position are discussed and criticized

SKEPTICISM AND ADJUDICATION

The previous two chapters have discussed the status of third order propositions. It was argued that they were constructed conventionally, and though susceptible to criticism drawn from the areas of logic, ethics, and politics, are not able to be labeled as true or false. This position owes something to a larger skeptical position, one that argues against there being any kind of existence for a whole range of legal objects. This skeptical position has been advanced with different degrees of extremity by a school of legal philosophers called the legal realists. Pluralism is skeptical about a certain kind of objectivity in judicial reasoning--the objective truth of third order propositions--and is to that extent at the moderate end of the legal realism spectrum.

This chapter will examine other positions on the spectrum. An analysis of the defects of these positions will help serve to justify the pluralist position. It needs to be mentioned that few skeptical positions were articulated in terms anything like the ones that will be used here. This is, in large part, because the realists borrowed their terminology from social psychologists rather than philosophers, and thus addressed issues of truth and ontological status only indirectly. It might also be useful to say a word about actual legal realists and their present obscurity.

The legal realists were a group of first American and later Scandinavian jurists and academics who found unsatisfactory what they saw as the artificial and formalistic legal analysis widespread in Europe and America. They believed that philosophy of law should be conducted in the same way as cases in law: starting with the specific, and moving toward the general with the intention of returning to the specific. They saw this approach as a sharp contrast to the neo-Kantian approach which began with categories, and attempted to fit law into the larger category of morality on an a priori basis.[1] They viewed the analytic school of John Austin and the British empiricists as being preoccupied with classification, to the detriment of actual decisions and legal process. John Chipman Gray said the analytic study "may easily result in a barren scholasticism" and "that the besetting sin of the analytic jurist is the conviction that his classification and definitions are final."[2]

The early legal realists--Oliver Wendell Holmes, John Chipman Gray, Karl Llewellyn--scorned independent conceptual analysis. They wished always to construct theory directly from empirical study. Logic and system-building alone will mislead. Holmes said as much in what became the slogan of the legal realists:

> "It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[3]

If the legal realists turned from logic to experience as the object of their study, they moved from philosophy to social science as their method of study. Roscoe Pound called for a "sociological jurisprudence"[4] and later realists such as Thurman Arnold in The Symbols of Government[5] and Morris Cohen in Law and the Social Order[6] attempted to use social scientific tools to analyze actual legal systems. This move brought with it a renewed sense that prediction was the goal of the jurist. The sociologist, after all, attempted to predict. As it was decisional results that were being examined, it was those that were to be predicted. The legal realists found that rules alone could not predict with certainty, and thus they felt some comfirmation of their abandonment of analytic jurisprudence. Their glee at this discovery led one of them to say that

> "rules are important so far as they help you to predict what judges will do. That is all their importance except as pretty playthings."7

These legal realists, in rejecting what they thought to be bad philosophy, moved to a social scientific method that purported to use virtually no philosophy. Theirs was a program, a way of proceeding. Their program did contain minimal theoretical commitments, including a belief that there was no law apart from what the judges declared there to be. This originally seemed to mean no more than actual laws are those that are enforced, perhaps a truism. It can be interpreted as saying much more: that there is no law, despite rules or statutes to the contrary, until a judge makes his decision.

The ambiguity in this position can be seen in the statement of O. W. Holmes that "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else."[8] Holmes' statement allows for no explanation of what a contractual duty may mean to a judge. The duty must seem sufficiently worth enforcing for a judge to enforce it. Moreover, in those cases where the validity of a contract is in doubt -- for reasons of duress, fraud, public policy, illegality, failure of consideration, or formal irregularities -- even the contracting parties may need to gauge whether the contract ought to be enforced as a precondition to understanding whether or not it is likely to be. For Holmes' statement to be true, a judge would have to be a passive agent to some ethereal determinism which would allow predictions to come true without the consideration of human agents. One might see how statements concerning future weather conditions would qualify as such determined predictions, for weather results do not require human intentions or considerations. Legal predictions do not behave similiarly, though.

In any case, the legal realist's abhorrence of philosophy allowed him to be saddled with certain philosophical positions attributed to him by others, positions he was often unwilling or unable to shake.[9] The realist position that the rule stated in the case was not necessarily the rule that caused the judge to decide the case was seen to be a rule skepticism rather than a simple psychological observation.[10]

If the realists did not abhor or question rules generally, they did assume at least one skeptical stance about rules. This was that legal validity was a function of judicial decisions. This was taken to mean that a statute or rule existed, people could follow it, but it had no legal validity until passed on by a court. A distinction can be made here between consequences and validity. A putative law may cause people to change their behavior, it may even cause a policeman to arrest them, but it would not be a valid law until the judges passed on it. The skepticism concerns any claim of equal status between putative law and the law of the judicial decision.

The immediate difficulty with this position--aside from the question as to whether past precedent falls into the category of putative law (as Jerome Frank thought it should)[11] or good law (as Gray believed)[12]--is that what criteria the judge ought to use to reach his decision appears to be relativized. It is just a matter of choice. This position was attacked, and an altered legal realism was born. This new realism, called Scandanivian realism after the region of its greatest numbers of adherents, allowed for a second level of prediction. One can predict the criteria judges use, as well as the results. This involves a certain hybrid of the psychological and the logical. Alf Ross states the position thus:

> "'A=D is valid law' is a prediction to the effect that D under certain conditions will be taken as the basis for decisions in future, legal disputes."13

A consequence of this position is that the criteria a judge can

use to make a decision can be discovered by predicting what criteria a judge in the same position would use in deciding a case. There is thus a normative standard for a judge deciding a case: it arises in employing a prediction of what a judge ought to do.

This remedy robs legal realism of much of its original point. No longer will law be explained in terms of judges results: a normative element is introduced. The basis of this normative element is obscure, however. It leaves open the issue of whether there is an objective standard by which to measure judicial behavior, and it certainly does not provide any criteria for a judge to use in adjudication. The position is unsatisfactory to those who see law as primarily a social phenomenon and also to those who wish to know what logical structure inheres in legal statements.

The legal realists spoke, appropriately enough, in legal terms, but they were primarily concerned with judicial reasoning. The legal realists differed among themselves, or course, and their positions can be reconstructed as skepticism of four kinds. Each of these kinds, if true, would be fatal to the pluralist thesis and the entire reasoning schema presented here.

1. First Order Skepticism

The realist[14] might be skeptical about first order judicial propositions. He might believe, that is, that there are no correct answers to the questions faced by judges. This is the

most general sort of skepticism and denies that there are even a discrete set of issues that are properly ascribable to an individual case. It points out that cases are often complicated, and they are by definition controversial. The judge is in a position to define what the issues are, to shape, if not manipulate, their content.

This position includes the legal realists who called themselves fact-skeptics. Their position was put forward forthrightly by Jerome Frank:

> "No matter how precise or definite may be the formal legal rules, say these fact skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless, it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) law-suits not yet tried. The fact skeptics, thinking that therefore the pursuit of greatly increased legal certainty is, for the most part, futile--and that its pursuit, indeed may well work injustice--aim rather at increased judicial justice."15

The first order skeptic believes that the way judicial questions are put is a matter of individual judgment. Because of the uncertainty of first level propositions, any pyramiding that includes higher-order statements is futile, for it is a structure rooted in a shifting base. There are two claims to the first order skeptic's position and they are both incorrect.

The first claim is that somehow the facts are inherently unclear in a case. The strong version of this claim would say that facts are always unclear, and that one can never know for certain any precise piece of information about the outside world. This position is akin to a general philosophical skepticism, and is liable to all the criticisms of it brought forth since Berkeley.

Refutation takes the form of: how can we say that x is false if there does not exist some y which is true, by which we can measure the falsity of x.[16] The merits of this debate aside, the strong version is not the one advanced by any actual legal realists, who are fundamentally empirical in their approach. The weak version, though, is. It says that facts are often, even usually, unclear in court cases and one must make stabs in the dark at truth. Witnesses exaggerate, lie, or forget, documents are fragmentary or forged, verification procedures are faulty, lawyers often mislead or themselves are misled, and a great deal of relevant evidence is unavailable. Notorious examples of factual mistakes in the courtroom are so commonplace as to throw into doubt their notoriety. The result of this unclarity of facts is that the findings of courts can have little correspondence to the actual events, and that holdings based on those findings are arbitrary.[17]

This entire position rests on an assumed equivalence. It assumes that judicial truth means just the same thing as truth. This is wrong, not because there are two very different kinds of truth, but because the truth conditions of an empirical statement are different than those on which first order propositions are based. Under the canonical Tarskian formulation for empirical statements, 'M shot L' is true if and only if M shot L.[18] Let S ≡ 'M shot L.' The skeptics argue that S triggers some first level proposition (p), such as 'If A, B, C and S, then p', where A, B, and C might be other conditions allowing for p, when for

instance, a first-degree murder has taken place. If S is false then p is either false, or more exactly, does not occur.

The fallacy in the skeptic's position is not in the formula 'if A, B, C and S, then p.' It is in holding that, for S to be true, M did indeed shoot L. In judicial systems, 'M shot L' is true if an only if it is found that M shot L. What triggers p is a finding of S, not S itself. The fact that the finding is not truly, empirically S may be a case of injustice or irrationality, but it does not undermine the truth of the relevant first order proposition, p.

The first order skeptic's second claim is that the facts of judicial cases are open to any interpretation, or at least many interpretations, each equally valid. Facts are so vague and ambiguous that their consequences are uncertain, and liable to manipulation. The above formula becomes 'if A, B, C, S, and S_i, then p', where S_i represents the additional facts needed to make sense of S and yield a first order proposition. S_i is a subjective matter, varying with the personal preferences of individual judges. In terms of our example, let us suppose that L was a trespasser on M's property, shot with an automatically triggered spring gun. The privilege to protect property does not include the right to use deadly force, and thus certain facts -- that L was a trespasser, that M had constructed many signs warning of the gun, that L in fact saw the signs, that M's property was in a remote area, both easily and previously vandalized, that L had intended to commit larceny, and that the property involved

sentimental considerations -- relating to the protection of property ought not to be considered in formulating p. However, they are, in fact, always considered, and may mitigate or even excuse blame in the right circumstances. A judge always looks to such circumstances, and finds p alone an inadequate basis on which to rule. The introduction of p' recognizes this practice.

The plausibility of this position diminishes if it is made clear that the fact that judges actually interpret facts differently is irrelevant to the skeptic's claims. The issue is whether there is a proper method of interpreting facts. The fact that protection of property counts differently with different judges can be seen as indicating disagreement about p, a disagreement perhaps not made explicit in judicial discourse. In order to show that p' rather than p is central, a skeptic needs to argue that there is no correct method of interpreting facts. This entails that S_i is indeterminate, for if S_i had a fixed meaning, then S_i would be just another component of the proposition p, along with A, B, C, etc.

If the first order skeptic wishes to distinguish S_i from A, B, C, etc., he must do so by showing S_i to be indeterminate in meaning. That is, in order to fix the sense of S_i, one must appeal to personal preferences not shared by a general public. This is not ordinary (Quinean) indeterminacy, for such ordinary indeterminacy applies equally to all terms found within a natural language, and is thus insufficient to distinguish S_i. It instead must be an indeterminacy based on the fact that interpretation of

facts is a personal matter. However, if a judge believes that his interpretation is correct, he ought to redefine p so as to include it. If he believes such redefinition is impossible, it can only be because the facts, rather than his preferences, are elusive. This, however, returns him to the first claim, with the successful concomitant counter-arguments showing its failure.

2. Second Order Skepticism

The legal realist may be skeptical about the set of second order propositions. This is close to the position taken by most American realists. This position recognizes the authority and validity of judicial pronouncements, but does not believe that any correct criteria exist for selecting these pronouncements. This has given rise to the 'sources of law' theory. This theory holds that traditional legal sources--statutes, customs, constitutions, treaties, administrative rulings, and even past cases--have only a contingent relationship to actual judicial decisions. While they can be used in reaching judgment, they are not necessary to the conclusion. That is, no conclusion made necessary from analysis of these sources must follow in a judicial decision. The second order skeptics thus make use of the distinction between 'the law' and 'sources of the law.'[19] Sources are a useful guide to prediction, but they are not determinative of first order questions. Judges can ultimately choose whatever criteria they prefer. This view was expressed in a thrice repeated quotation of Bishop Hoadley in J. C. Gray's

The Nature and Sources of the Law:

> "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them."20

The second level skeptic sees opinions as containing justifications or rationalizations for decisions. The justifications given may or may not be the ones used. The skeptic's method is prediction, though it is necessary to see that prediction alone does not imply skepticism. One could easily attempt to predict decisions of a culture as an anthropologist might do--with the aim of later constructing the normative propositions that led to decision.

There are some points in common between a second order skeptic and a judicial pluralist. For this reason, it is necessary to examine several arguments used against the realists which need not be fatal to the second order skeptic. These arguments are taken from H. L. A. Hart's The Concept of Law[21] and while they may have been telling against the actual realist arguments they considered, they fail against the theoretical positions constructed here.

The first argument of Hart's concerns the distinction made between 'sources of law' and 'law'.[22] Hart is unhappy at separating the two, feeling that rules guide judicial behavior, and that any distinction between the judicial decision and other legal sources is artificial and misleading. His argument is curious. Hart says that judges, upon coming to office, encounter

established rules, and adherence to these rules forms the standard of behavior for judges.[23] He then goes on to say that

> "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."[24]

What Hart is against is any normative position that allows judges free rein in reaching a decision. But an argument that because judges have followed a set of criteria in the past they a) ought to do so now or b) do in fact do so now is a non-sequitur. His position is based on a game analogy he made earlier.[25] The analogy is basically this: if a game has rules that are settled by the scorer at his own discretion, and any statements made by a player or observer as to whether or not the scorer is right are only a matter of prediction, then the game is one of 'scorer's discretion', not a normal game. Such a game as scorer's discretion could not make sense of a player following a rule in playing the game. The scorer's rulings are his own, and they are infallible. Yet we know that in most games scorers can make mistakes and players can use rules. The same is true in legal systems.

The argument is pointless against our second order skeptic, for he can accept that if there has been consistency in judicial decision-making, and some criteria are available that would (if employed) explain that consistency, then if the criteria are changed and the consistency ends, we can at least say that a different game is being played (or a judicial system has different

first order propositions). The skeptic would claim that Hart's analysis begs the question, by assuming that a single game is always being played. If the identity of the game is tied to individuating the criteria, then the fact that only one game is allowed needs to be argued for. If a number of competing games are possible, then any normative constraint that dictates a following of the rules of the game is without meaning. One must follow some criteria, but just which criteria is left so open as to make a skeptical position viable.

Part of the failure of the Hartian argument is due to its focus on the terms 'law' and 'sources of law'. It is doubtful if as much critical energy would have been spent if 'law' was taken to mean (denote) judicial decisions and 'sources of law' to mean law. The purpose of employing the distinction was to show that what judges actually decided need not be determined by other legal forms, and that any relationship between the two is contingent. This leads us to Hart's second criticism.

Hart's second argument is that skepticism about criteria is really skepticism about rules. His evidence that any realists actually held to a full-blown rule skepticism is based on their labeling themselves as being rule skeptics. Apart from their label, little evidence from their papers indeed exists. Hart does quote Llewellyn to the effect that "rules are important so far as they help you to predict what judges do. That is all their importance except as pretty playthings."[26] In context, this quote says no more than vis-a-vis judicial decision-making, rules are only useful as predictors. There is certainly no

reason for a second order skeptic to also be a rule skeptic. He can believe in moral rules, rules in games, rules of thumb, syntactical and semantic rules, and rules of manners. He can even believe in legal rules. He just does not need to see them as necessary criteria for deciding cases. Ethical rules do not decide cases, yet they remain rules. Hart argues that theirs is really the position of the disappointed absolutist, for it notices that judges do not always follow rules and falsely moves to the position that they never do.[27] But the second order skeptic does not need to deny that judges follow rules. He only needs to deny that they follow a single discrete set of rules. That is, the skeptic can accept that a judge might follow Rule Set A or Rule Set B or Rule Set C. He would just deny that any particular rule set is correct.

Hart's third argument takes issue with the skeptical assertion that prediction alone fully explains judicial behavior. Hart insists rules are 'used.'

> "Moreover, even where what the rules require is clear to all, the statement of it may often be made in the form of a prediction of the courts' decision. But it is important to notice that predominantly in the latter case, and to a varying degree in the former, the basis for such prediction is the knowledge that the courts regard legal rules not as predictions, but as standards to be followed in decision, determinate enough in spite of their open texture, to limit, though not to exclude, their discretion."28

The skeptic could respond to Hart that asserting rule use is not the same thing as showing it. Using a chess analogy immediately following the quotation, Hart emphasizes the non-predictive

aspect of rules. Chess players use rules rather than predict what chess officials would hold in case of disputes. The skeptic might respond that this only demonstrates the disanalogy between chess and judicial decision-making. Where rules are controversial and uncertain, prediction operates.

The skeptic might suggest a counter-example, in the form of the liberal judge forced to preside in a fascist courtroom, an example used earlier in this thesis.[29] That liberal judge was in a position similar to many of his colleagues: he was required to be a party to a judicial system that was a component of a political system with which he disagreed. This particular liberal judge based his decisions on what he thought the fascist secret police wished to hear. Here is an example of a court regarding legal rules as predictions, contrary to Hart's statement above. The judge predicts what he thinks the fascists want to hear in deciding cases.

Ultimately this is more than a mere counter-example to Hart's position. It undermines the distinction critical to many anti-realists, the distinction between prediction and use. The realists are supposed to be unable to account for rule usage, since theirs is the language of prediction. But the liberal judge employs rule usage in order to predict. In a real judicial system, there is apt to be a disparity between any set of rules and the results they entail on the one hand, and actual decisions on the other. Rules can be useful as predictors, but the two do not have the same logical extension. (This assumes what a Humean would deny: that constant conjunction implies causation.[30] The conjunction

here is between rules and results of predictions. In real judicial systems divergence is too great to allow any assumption of causation from conjunction alone). But though the realist admits rule utility, he does not need to admit to any higher-order rule set implying answers to first order questions.

These three arguments of Hart are thus not fatal to the position of the second order skeptic. He can still make his claim that no objective criteria exist on which first order propositions depend. Justifications are easy to find for first order reasons, but overdetermination is prevalent enough to deny special status to a particular set of justifications.

The skeptic is unhappy with the notion that second order propositions are found or discovered. He sees them nowhere in the empirical universe and knows of no guide for the logical universe.[31] Less abstractly, the skeptic is willing to recognize that there may be agreement on many first order propositions, and this agreement lends them a kind of certainty due any regular occurrence. However, there are cases of first order disagreement, and in those cases, no criteria exist for selecting an answer. People reason, but they reason differently and imperfectly, and prediction is the best one can hope to do.

The mistake the second order skeptic in fact is making is in his equating formalized truth with empirical truth, or put differently, truth within an axiomatized system and truth from correspondence to the exterior world. If I say of the piece of paper before me 'This lease is valid', I am making a statement

about the social world.[32] The statement refers to a series of relationships between a person sitting peacefully in an apartment (a lessee) and a person somewhere else, who regularly collects money from the apartment dweller (the lessor). The government, the utility companies, the insurance companies, sub-lessees, and zoning boards all alter their behavior in small ways because of the lease. When I justify the statement 'This lease is valid', I am no longer making a statement about the social world. I am making a statement about the logical world. I am declaring a logical relationship between the justified and the justifying statements, and appealing to some criteria on which to base that relationship.

Of course, many statements that justify seem also to be statements about the external world. But when these statements function as justifications, they are logical in nature. When the second order skeptic doubts the objectivity of second order propositions, he is entertaining a logical, not an empirical, doubt. He can see that first order statements are often undecided, and seem to have doubtful or controversial empirical existence. A number of possible answers compete. He can discover which one prevails by observation. Second order propositions are not discoverable in the same way. One cannot look about to find the correct set of rules or criteria for judgment. (Those stated in cases are misleading in several ways).[33] Nor can one even be sure what criteria were used in a single case.

The skeptic here is looking, so to speak, in the wrong place.

Judicial reasoning chains are not discovered, they are constructed. The fact that many competing sets of second order propositions exist suggests many different constructs rather than none. The skeptic implicitly accepts this when he allows for overdetermination, a concept he must accept if he is to avoid being attacked by Hart for being a pure rule skeptic. But overdetermination implies determination. One just is never sure when the criteria fall apart just what the result will be. But if lower-order propositions are determinable, then, even if no empirical test is available for selecting the correct criteria, criteria must exist. If they logically exist, then second order skepticism fails.

3. Third Order Skepticism

The arguments for (and against) second order skepticism can be at least partially applied toward first order propositions. In that the first order propositions take a normative form, and are often uncertain, they are subject to being labeled as subjective. The same interchangeability applies for the third order skeptic's argument in its application to second order propositions.

The third order skeptic denies the viability of third order propositions (judicial views). He cannot deny that a third order set in some sense exists, and that judicial reasoning stops after the second level. This position was shown to be implausible in Chapter I, and our third order skeptic accepts that argument. Instead, he wishes to argue for the subjectivity of the third

level vis-a-vis the lower levels. That is, the third level set is inadequately formed to yield objective lower-order propositions. It would be like a geometry where the initial axioms are not well-formulated, and thus are unable to serve as a foundation for subsequent theorems and corollaries.

Third level inadequacy can occur in one of two ways. One can be a skeptic about the subjects that form the basis of the third order. For example, one can endorse ethical subjectivism or political relativism and believe that the standards by which to assess whether a moral or political assertion is correct provide no criteria for judicial-assertion validity. Because criteria for standards in these areas are lacking, the structure that includes propositions dependent on them is faulty. A more tentative skeptic might believe that this position allows that even the most basic standards used in any field are completely arbitrary, a difficult position to accept while still making sense of the terms used in speaking of ethics or politics. The tentative skeptic would, however, say that the criteria for choosing standards are so vague and indeterminate that no rigorous schema could be developed using such concepts.

The position of the third order skeptic needs to be clearly distinguished at this point from the position of the judicial pluralist. Both positions hold that third level propositions are a matter of individual choice. Both also hold that the basis for that choice is one's conception of judicial role. The pluralist claims that once one understands judicial role and attempts to

construct a judicial view based on judicial role, one is committed to an entire reasoning schema. Although there are standards for what is involved in judicial role, choice is not logically determinative. Choice here need not be a conscious intentional matter. It instead can be taken to denote the set of beliefs one possesses on relevant issues. The strong skeptic can hold that even minimal standards for appropriateness of judicial role are absent, but he would be more likely to merely contend that whatever minimal standards apply, they do not affect the essential non-assertability of third order propositions. The tentative skeptic would allow for propositional assertability, but deny that these assertions commit the speaker to specific lower-order propositions.

The distinctions that constitute the basis of these separate positions may be made clearer through the use of an illustration. Suppose Z was a prospector for gold who had successfully discovered and laid claim to a gold mine in a remote and frozen wasteland. Shortly after the discovery, Z fell heir to a series of misfortunes and thirty years later found himself destitute and thousands of miles from his property. In order to recover his gold mine, Z borrowed $200 from Y, with the promise to repay it back with $10,000 interest. Z used the money to successfully recover his property, worth over one million dollars. He refused to repay Y however. Y sues for breach. Z claims unconscionability and usury.[34]

This case presents in an explicit way several third order

areas that are relevant to its eventual resolution: freedom to make bargains, unconscionable agreements, exorbitant loans. The strong skeptic would admit to their relevance. He would see that on the side of Y would be the values of free contract and contractual reliance, while on the side of Z would be the values of equity and fairness. The strong skeptic then could say one of two things. He might say that one just has no (correct) way to choose between Y and Z. One's conception of judicial role is too weak to allow it to yield propositions on matters of contract altogether. He might say that the conception of role allows for such things as fairness, contractual freedom, equity, etc., but it neither gives us an analogue for choosing between these, nor does it allow us to make more specific characterizations. How, after all, does one move from the fact that judges ought to decide cases fairly to the specific parameters of the law of usury? The strong skeptic can admit to the case of Y v. Z being resolved in a reasoned way. He would just say that the third order reasons have no particular attachment to the judicial role. They were constructed as the individual saw fit from his general stock of ideas. He (that individual) is not committed to the construction as a matter of his view of judicial reasoning.

In order for strong skepticism to be plausible, two things must be true. Only an extremely impoverished notion of judicial role can exist, and the areas that third order propositions draw upon must be very narrow. The notion of judicial role must be too weak to allow for one to begin construction of a third

order view. The skeptic might allow that one's conception of a proper role would include settling disputes, settling them fairly, and employing some criteria for their resolution. He would argue that beyond that 'role' is too uncertain and too weak a concept to yield third order propositions. Thus, in Y v. Z, the strong skeptic would allow that there must be a decision, and it ought to be a just one based on some standards of justice. But he would then say that in regard to any non-arbitrary decision analogue, that is all one can say.

There is a type of logical argument that might be made against the skeptic, but is is ultimately unsuccessful. It is a variant of the argument from the paradigm case, and a proponent of it might claim here that if a concept or term is to be meaningful, there must be instances when the concept or term has a paradigmatic application. While some applications of the concept or term may be a matter for doubt, the occurrence of a central or paradigm instance is necessary if we are to understand what we even mean by the concept or term. The concept here is 'judicial role.' If this concept is to be used, there must be some general agreement about what is meant by it.[35] The concept needs to be strong enough to allow for a paradigm case. There need be no actual instances of such a case, but we need to be able to recognize what such cases would look like if there were. If 'role' is inadequate to answer all cases, it can answer some, and thus tentative skepticism is the strongest skeptical position possible.

The paradigm case argument challenges the skeptical assertion that one can both understand the concept of judicial role, and

yet fail to be able to articulate cases of what exactly role entails. If one's concept of judicial role tells us how a judge ought to decide cases, it also ought to be able to instantiate a single case that could be so decided.

The simple objection to this argument is that it confuses meaning with use. It assumes that for "judicial role" to be meaningful, it has to have an application. The skeptic would deny that 'role' has any application of the kind needed to yield propositions, but would accept 'role' as meaningful in that it allows us to make sense of the judicial reasoning schema. The more serious objection is that the argument misses the point of the skeptic. The skeptic can allow for the possibility of a paradigm case. He may say that there is some matter, Q v. R, that could be settled simply by resort to role. But role is too impoverished a concept to decide many cases, and certainly is useless in Y v. Z.

The difficulty in the strong skeptical position is not conceptual, but empirical. It moves from the fact that a conception of role can be extremely limited to the unwarranted and inaccurate position that it is in fact so limited. Let us look at Y v. Z. It presents thorny ethical issues concerning bargain fairness and one individual using a second individual's misfortune to enrich himself to an extent impossible if the misfortune were less severe. It is easy to imagine groups of judges, say those of a primitive aboriginal Asian tribe, whose notion of judicial role was inadequate to allow for resolution of such issues. If one assumes that Henry Maine was correct, and history is the story of a movement of societies from status based to

contract based, then perhaps the entire notion of contract is alien to these aborigines.[36] But Y v. Z could not arise in an aborigine society. The concepts necessary to solve the case are the same concepts that gave rise to it. This is really an explanation for what is an empirical commonplace: enriched concepts of judicial roles. The skeptic is reluctant to imply very much from judicial role, but actual members of the bench and of society generally are not. Y's act of initiating the case, and Z's particular defense demonstrate that some individuals make use of a richer concept of judicial role.

The tentative skeptic may step in and agree with this criticism of the strong skeptic. He could allow that judicial role can be a rich notion. It might allow for a methodology for searching for principles--such as those found in legal forms; and it might provide principles directly. More importantly, such a rich notion is widely held. However, the types of principles it provides are too general to solve specific cases. The kind of fine reasoning needed in Y v. Z, for example, is out of reach of even a rich notion of role.

The tentative skeptic is mistaking the failure of a conception of judicial role to yield an immediate (complete) analogue for an inability of the propositions yielded to allow for an eventual resolution of first order questions. The moves from fairness to contract fairness to conscionability in matters of consideration disparity to a resolution of Y v. Z are not all easy ones. One does not just contemplate the meaning of judicial role and arrive

at the solution to Y v. Z. One must analyze ones third order propositions that are relevant to Y v. Z. This involves squaring conflicting propositions and determining the scope of concepts embedded within the judicial view. The fact that many of these concepts--such as fairness, justice, freedom, or reasonableness are extremely vague--is only a problem for lower-order determination if they, taken as a set, underdetermine those lower-order propositions. If, however, the individual holder of the view can use what may singly be a vague concept in conjunction with others to reach a resolution, (to arrive at a unique set of lower-order propositions), vagueness need not be a problem. In any case, specific underdetermination in an area is an empirical matter, and its occasional occurrence does not save the skeptic.

4. The Emotivist Possibility

The final form of skepticism can only be discussed briefly, for any adequate approach leads into an array of problems in the philosophy of language. This form is emotivism, a theory which holds that in the case of certain kinds of judgments, here judicial statements, the meaning of a statement lies in its ability to communicate an attitude or emotion, and thus to inspire an act of will without conveying truth.[37] An emotivist would hold that third level propositions are purely emotive in that they are aimed at expressing feeling and stimulating the action of others.

An emotivist position is too insubstantial to begin to account

for the complexity found in judicial reasoning. The emotivist wants to take two facts--that role is a matter of individual choice, and that there is an attitudinal component of third level propositions--and build an entire anti-rational theory. These facts do not commit us to such a theory. Pluralism suggests that one needs to consider one's own position toward judicial role as a fact, that one cannot choose but to hold many of the attitudes one does hold. Given an individual's commitment to his own initial position, certain further matters (a judicial view) may be developed. The validity of this commitment need not be, in any sense, objective to be usable, just as the fact that a given postulate is arbitrary is irrelevant to the validity of the theorems one deduces from that postulate. Further, that there is an attitudinal component to a view does not imply that that component constitutes the entire view.[38] The language of judicial reasoning is so replete with belief statements that the emotivism that seems attractive in a field as intuitive as aesthetics appears slightly ludicrous in law.

[1]It is less important whether this is true than the fact that at the time it was perceived to be true. One neo-Kantian who was so characterized was Korkunov for his General Theory of Law. Roscoe Pound, himself not a legal realist, shared many of their views and prejudices. His account of the aridity of these schools is typical. See his Law and Morals (1923) generally and pp. 89-124 for a picture of neo-Kantian and related schools.

[2]Both quotes are from John Chipman Gray, The Nature and Sources of the Law 2, 3 (2nd ed. 1921).

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

[4]Pound's term is widespread throughout his works. One example of his approach is found in his An Introduction to the Philosophy of Law (1922).

[5]Published in 1935.

[6]Published in 1933.

[7]Karl Llewellyn, The Bramble Bush 14 (3rd ed.).

[8]From O.W. Holmes, "The Path of the Law" 10 Harv. L Rev. 457 (1897); reprinted in Collected Legal Papers 167, 175 (1920).

[9]A good example of a legal realist unhappy with the kind of philosophical criticism he encountered but without any idea as to how to meet that criticism was Karl Llewellyn. In the third edition of the Bramble Bush he claims critics have showed him "to disbelieve in rules, to deny them and their existence and desirability, to approve and exalt brute force and arbitrary power and unfettered tyranny, to disbelieve in ideals and particularly in justice. This was painful to me." (p. 10). However painful, he seems unable in the foreword or the text to put his position aright. He can only manage to state that his views do not constitute a philosophy.

[10]Ronald Dworkin's characterization, typical in its overstatement of the claim of the legal realists, is instructive. "This is an error, the realists argued, because judges actually decide cases according to their own political and moral tastes, and then choose an appropriate legal rule as a rationalization." (Dworkin, Taking Rights Seriously 3 (1977)). It is misleading in two ways. Realists thought judges decided cases according to some criteria, but that criteria might be more rational and complicated than taste. 'Taste' implies arbitrariness and subjectivity, a position no realist ever endorsed. Second, the method they endorsed was observation. Realists tried to look at cases and see why they were decided the way they were. They made no claim as to whether all judges rationalized their decisions. This was the kind of statement they despised. Some judges rationalized; some judges decided the cases for the reasons they said. A social scientist simply looks at cases and tries to see which process occurred.

[11]See Jerome Frank, Law and the Modern Mind. 35-52, 183-199 (sixth ed.1949).

[12]See Gray, The Nature and Sources of Law 96-104 where he invokes the traditional distinction between settled case law and unsettled case law.

[13]Alf Ross, On Law and Justice 75 (1958).

[14]There is a certain irony in labeling as a realist anyone who is arguing for a skeptical position. In modern philosophical lingo, skepticism is part of a related group of positions called anti-realism. In fact, the legal realists are all steadfastly anti-Platonist, in that they believe the abstract truths of law are not there ready for discovery, but are constructed by individuals. For a further characterization of these often misleading tags, see Michael Dummett, "Truth" 59 Proceedings of the Aristotelian Society 141 (1958), reprinted in Philosophical Logic 49 (ed. Peter Strawson, 1967); and John McDowell "Truth Conditions, Bivalence and Verificationism" in Truth and Meaning: Essays in Semantics (ed. Gareth Evans and John McDowell, 1976).

[15]Jerome Frank, Courts on Trial: Myth and Reality in American Justice 74 (1949).

[16]This type of argument is advanced, among other places, in J.L. Austin, Sense and Sensibilia 70-79 (1962) and Gilbert Ryle, Dilemmas 94 (1954). A more general treatment can be found in Ludwig Wittgenstein, On Certainty (1969).

[17]The fact-skeptics--Jerome Frank, Leon Green, Max Radin, Thurmond Arnold, William O. Douglas, and E.M. Morgan --might well have balked at these being considered the consequences of their position, and would have probably argued that this is not what they had in mind. The actual position of these men is irrelevant here.

[18]Tarski's much repeated formula is 's is true in L if and only if p.' See A. Tarski, 'The Concept of Truth in Formalized Languages' in his Logic, Semantics, Meta-Mathametics (1956).

[19]The distinction was first and most convincingly put forward by John Chipman Gray in his The Nature and Sources of the Law (second ed. 1921). Gray tempered his skepticism by creating a second order body of rules that judges discover and apply in reading a decision. The status and definition of this body is left very obscure. See Chapter IV.

[20]Found on pp. 102, 125, 172 of the second edition.

[21]Published in 1961. Hart uses other arguments, but these are tied to a defense of his theory of rules and cannot be examined here. The type of general argument advanced by Hart will be examined more thoroughly in Chapter V.

[22]The arguments are not kept well-separated by Hart, but are embedded in his general treatment of what he feels are rule-extremists (formalists and skeptics) found in Chapter VII of Concept.

[23]Concept at 141-142.

[24]Concept at 142.

[25]Concept at 138-140.

[26]Concept at 135 quoting from Karl Llewellyn, The Bramble Bush 9 (2nd edition). Hart does not acknowledge Llewellyn's explanation of what he meant and did not mean by that statement found in the forward of the third edition. (See n. 9).

[27]This argument is basically made on pp. 136-137 of Concept.

[28]Concept at 143.

[29]The example was borrowed in large part from Ronald Dworkin, who put it to different uses.

[30]See David Hume, A Treatise of Human Nature, Book I Part III (1734).

[31]The argument here is akin to the one John Mackie calls the argument from queerness. It would, plugging in Mackie's terminology, suggest that if there were objective second order propositions, they would be entities of a very strange sort, utterly different from anything else in the universe (the metaphysical objection); and that if we were to be aware of them, it would have to be by some special faculty of perception, quite different from our ordinary perceptual faculties (the epistemological objection). Mackie's argument is aimed at an objective second order ethical position. Regardless of its force there, it is not telling against a conventionalized system posited here. See J.L. Mackie, Ethics: Inventing Right and Wrong 38-42 (1977).

[32]In making a statement, a speaker commonly does more than one thing. He may be trying to persuade or convince, as well as define or declare. In saying that a statement has reference to the empirical world, I wished to show one use only, and contrast this use with one not necessarily captured by higher-order statements. The idea of variant sentence functions is common to speech-act theory. See J.L. Austin, How to do Things with Words (1962) and John Searle, Speech Acts: An Essay in the Philosophy of Language (1969).

[33]See Chapter IV for a discussion of several of the problems of reading a case.

[34]The facts are essentially those of Embola v. Tupella, 127 Wash. 285, 220 P. 789 (1923). The court there affirmed a judgment in favor of plaintiff lender, finding that the speculativeness of the loan made it fall outside the range of either the usury or unconscionability defenses.

[35]Wittgenstein said that "if language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments." Ludwig Wittgenstein, Philosophical Investigations I 242 (1953).

[36]Maine's position can be found in his Ancient Law (1861). Maine's view was heavily influenced by the English model, where property was the dominant legal sphere, and slow to yield to contract. While this movement from status to contract is somewhat descriptive of Europe--although there are difficulties even there, where courts of law merchant had a long and ancient stay, and where many contract ideas were imbedded in property concepts, but were in fact hostile to notions of feudalism--it has grave defects as a general thesis. Brazil, which moved from a society of independent Indian tribes engaged in commerce and allowing for personal freedom to a largely regimented society based on wealth and authority, and allowing for virtually no important commerce without government intervention, provides at least one depressing counter-example to Maine.

[37]The two works most often associated with the propounding of emotivism as a theory that can explain values are A.J. Ayer in the first edition of Language, Truth and Logic and Charles L. Stevenson, Ethics and Language (1944). J.O. Urmson's The Emotive Theory of Ethics (1968) is the outstanding critical work. Within law, the legal realist Alf Ross endorses the emotivist position throughout his On Law and Justice (1958) but in a disorganized way difficult to follow fully.

[38]Richard M. Hare's attack on emotivism for failing to explain all the aspects of moral statements is analogous. He sees moral statements as having both a

prescriptive and descriptive content. The emotivists only noticed the prescriptive and falsely deduced that beliefs play no part in moral reasoning. See R.M. Hare, The Language of Morals (1952) and Freedom and Reason (1963).

THE CONCEPT OF THE JUDICIAL DECISION

Judicial reasoning finds its focus in the form of the judicial decision. The judicial decision serves a number of functions apart from relating the answers the judge provides to the first order questions. Two closely aligned functions -- that of providing a record for inspection and appeal, and that of allowing a judge an opportunity to state reasons to justify his holdings in the case -- are often collapsed into the answer-providing function. Disagreement about what a judgment within a decision 'means,' 'holds,' or 'stands for' is sometimes not really a disagreement but a confusion. A judge's given reasons need not, for example, imply the conclusions he gives. If one person claims the decision stands for what the stated reasons imply and another that it stands for what the conclusion states, they are not disagreeing about any thing. To suppose they were disagreeing (as they may often suppose) would be to conflate distinct matters unknowingly.

There is a fundamental problem here. In constructing a judicial view, it is necessary to include an analogue for locating the sources of authority of the lower-order propositional set. This analogue, in the form of a set of related propositions, is a necessary part of the third order propositional set. Legal forms, for example, are not self-evident sources of authority. Nor, once identified as relevant, are they subject to one and only one

interpretation. Questions of identity and interpretation are handled differently depending on one's judicial view. But logical distinctions remain regardless of one's view, and we shall examine several of these in this chapter. The first section will discuss formal aspects of the judicial decision; the second section will discuss legal forms; the third section will examine in a cursory way the method of reasoning by analogy.

1. Reasons and Conclusions in Judicial Decisions

There is a vast literature of works that purport to explain how to read, understand, and use judicial decisions.[1] Much of it centers on just what a holding of a decision entails and how one distinguishes the holding (in common law sometimes called the ratio decidendi) from other conclusions (obiter dicta).[2] Decisions are authority, arguments from past decisions (the doctrine of precedent) are arguments from authority, and thus it is important to understand where the authority is strong (in the form of the ratio decidendi) and where it is weak (in the form of the obiter dicta).[3] There is a prior question often passed over which involves asking in what way a decision serves as an authority. In order to examine this question, several distinctions need to be made.

1. The first distinction is between the actual conclusions stated in the decision, and the conclusion one can imply from the reasons stated within the opinion. The reasons in the opinion may imply one of five possible things: the conclusion the opinion

actually states; a different (either contrary or contradictory) conclusion; the conclusion or another conclusion (the disjunct here being inclusive); either the conclusion or another conclusion (the disjunct here being exclusive); or no conclusion. Strict logical implication of the kind found in mathematical statements is not to be expected. The reasons for a certain and widespread imprecision are well-known. Judicial reasons are stated in language that is often vague and ambiguous; judicial intention is often uncertain; and many premises in the reasoning chain are left unstated. However, the reasons a judge offers in his opinion are not meant to imply strictly. They are premises in judicial argument, and such an argument is employed within a socially shared tradition. Given that tradition and its concomitant common discourse, we can speak of implication of reasons within actual decisions.

Reasons are presumably included in opinions because judges believe, taken as a set, they imply the conclusion they state. This is certainly sometimes the case. Often, though, they do not. If the judge makes a mistake -- such as where he says 'if p, q, r, and s then t' and 'p, q, r and s' implies either ~t or, more specifically, u -- the two will vary, and there will be a wrong determination. More commonly, there can occur an under- or overdetermination. Underdetermination occurs when reasons run out: for example, when 'if p, q, r and s then t' is true but the judge assumed 'if p, q, and s then t.' Overdetermination occurs

when both 'if p, q, r and s then t' and 'if m, n, o, and p then t' are true and the judge uses both of these statements to reach his conclusion (t).

It should not be assumed that a disparity between reasons and conclusions is necessarily due to fuzzy thinking. It can be personally advantageous for the judge to mask his indecision or uncertainty. In a more basic sense, it can be institutionally advantageous for courts generally to settle disputes in individual cases while not heightening or highlighting the kind of disparity of views that often gives rise to entire dockets of disputes.[4] In that a certain obfuscation is encouraged, ambiguity is sure to follow.

The existence of this distinction is seemingly disputed by some. These disputers see an integrated decision with reasons leading to the stated conclusion. For example, Professor Rupert Cross says

> "The ratio decidendi of a case is any rule of law expressly or implicitly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury."[5]

Rather than assuming that reasons and conclusions coincide (that is, each imply the same proposition or set of propositions) to give the ratio, it is more accurate to say, if one wants to retain the idea of a ratio, that in every case, there are two sets of rationes: the first given by the reasons stated in the opinion; the second given by the opinion's conclusion.[6] Sometimes these

two coincide (they each imply the other), but even then, they can be individuated, and can serve as a way to check on one another.

2. A second and more important distinction is that between decisional reasons as reasons and decisional reasons as authority. Each decision contains an argument or number of arguments for the conclusion or conclusions it reaches. Reasons figure as premises in those arguments. In order to put forth a judicial argument, the judge must consider just who it is that he is addressing. He assumes a large body of shared knowledge in any case, and the scope of that assumption will vary depending on such ordinary things as whether the case is one of first instance or appeal, whether he is sitting alone or en banc, whether the type of case is commonplace or esoteric, and whether the situation is straightforward or complicated. In order to advance an argument, it may be just as necessary to employ traditional legal propositions as to employ propositions of fact, logic, ethics, or politics.

However, reasons in judicial decisions are taken as authority for future cases.[7] The reasons able to be restated as normative propositions are especially susceptible to this. The difficulty arises when one decides to criticize judgment. It is a necessary but often neglected aspect of analysis to decide whether reasons are suspect as logical premises or as authority. For example, let us return to Riggs v. Palmer[8], the case of the legatee who murdered his testator, but nevertheless sought to enjoy the benefits of

the will. One of the reasons announced by the court for its decision denying the legatee recovery was that no man ought to be able to benefit by his own wrong. One could criticize that reason as being faulty authority. It is vague, says more than is necessary to reach a conclusion to the case (it is overbroad), and is of suspicious pedigree (nowhere in the decision is it made clear where such a reason has been found in case law or statutes before). It is contradicted by the results of other cases, such as those involving intentional contract breachers who violate a contract where there is no benefit to the bargain. Such breachers are in a position to benefit from their wrong. The above (no benefit from wrongdoing) reason could be attacked logically as well. It might not be thought to lead to the conclusion, but merely to duplicate it in a more general form. That is, given the counter-reason that the estate ought to be disposed of in accordance with the testator's written intentions, a statement concerning a reluctance to reward wrongs in the courtroom is of uncertain relevance. Does the reason go toward a reevaluation of what the testator's intention was or would have been if he knew he was to be poisoned, or does it establish a rule that overrides other rules (and when does it do so)?

Either of these lines of criticism is valid. However, if one were to reject the proposition 'no man shall benefit from his own wrong' as authority because it is logically faulty in the argument, one would be committing an error. A complementary error is committed if one rejects the reason as logically valid merely

because it is of suspicious origin. A statement may carry authority regardless of errors of reasoning, just as one may employ a groundless argument in support of a correct and valid conclusion.

3. A third distinction, and one that has occasioned controversy where one might have doubted that such controversy was possible, is the distinction between the actual questions raised by the case and the questions the opinion states and addresses. Fact situations are complex and initially bewildering in the number of issues one can garner from them. Judges often address them in the manner the advocates before them suggest they be addressed. Appellate courts usually discuss only those issues being appealed. At times, issues are neglected or overlooked; at times, they are misunderstood.[9] The more common occurrence is that perceptions of what is important within a controversy change.

Even a slight movement in separating the questions actually addressed from the questions theoretically raisable can have dramatic consequences. The shift in products liability cases from the 'inherently dangerous' rule to products merely 'dangerous' illustrates this principle well.[10] Thomas v. Winchester[11] involved a case of mislabeled poison sold to a remote vendee. The issue for the court was whether the remote vendor's action put life in 'imminent danger', the test under a relevant precedent.[12] A subsequent decision, MacPherson v. Buick,[13] allowed recovery in a similar case where a defective automobile was involved. The

later court looked back at Thomas v. Winchester and found there the foundations of general liability for all defective articles. The later court simply looked at Thomas as raising a general issue never considered by the original court.

When one says a case stands for something, one must be careful to keep separate what those who decided the case thought it stood for from what others beginning with the facts and ending with the conclusion may reason that it stands for. This difference between the author of the decision's acts, and acts others see as possible, is also relevant to the fourth distinction: that between judicial intention with respect to the case and other (and later) parties' intentions.

4. The distinction here was put forth by Karl Llewellyn as the

> "distinction between the ratio decidendi, the court's own version of the rule of the case and the true rule of the case, to wit what it will be made to stand for by another later court."14

We can put Llewellyn's distinction into general terms, and distinguish between the view of the case as seen by the judges who decided it, and later observers who assess the judgment. A difference can arise when just interpreting a previous decision involves deviations from the original intention of its authors, as when a decision is of ancient or alien (borrowed from another or predecessor legal system) origin, or when one is trying to fit a troublesome decision within an otherwise tidy line of past cases. Interpretation can also range wider afield, and wide discrepancies may occur when a later

court or observer fastens onto an earlier decision's ambiguity or vagueness and proceeds to gloss or rereason the previous case.[15]

A. W. B. Simpson contests this distinction.[16] He speaks in terms of the ratio decidendi, but his position is able to be generalized. What Simpson says is this:

> "The reductio ad absurdum of this confusion is to be found expressed in the theory that the ratio decidendi of a case is a rule which is constructed by a later court when called upon to consider the case. To define the ratio in this way is surely perverse -- if it were correct to do so a number of oddities would follow. For example it would be a contradiction to say that a court had misunderstood an earlier case's ratio, for by definition this could not be so; it could neither be understood nor misunderstood; confronted with two variant judicial decisions as to the ratio of an earlier case one would have to say that the case had two different rationes decidendi; analysis of cases which had not yet been considered by a court would have to be portrayed as prophecies as to what in the future would be the ratio decidendi of a case already decided."[17]

Simpson might, given the divergence of use of the term, want to offer his own definition of ratio. He could also argue, as Cross does in places, [18] that the accepted usage of the phrase 'ratio decidendi' lies in its expression by the original court, as that court intended it be taken. However, instead he uses a logical argument that suggests that the point discussed above is untenable because the idea of a ratio being constructed later than the case is logically not viable. He uses three arguments to support this idea, none of them satisfactory.[19]

First, he says that by allowing for a later interpretation of what a case stands for, we are prevented from asserting that a court had misunderstood an earlier court's ratio. If this were

true, the most one could say (as Simpson does) is that it is odd. It is not incoherent, and one can, in fact, see advantages to such an approach. Where the stated conclusions of an earlier decision are not implied by the decision's stated reasons or with the court's action, one can simply disregard the inconsistent (and usually irrational) conclusion. However, Simpson's objection fails for another reason. One can recognize parallel types of approaches to case analysis as useful and used without being committed to any single one. Even if one is committed to the approach of later construction, one can speak of getting an earlier ratio wrong. It would not be, strictly speaking, asserting an incorrect ratio, but asserting that an incorrect conclusion had been reached, but this is a small matter of terminology. In any case, the type of analysis and criticism available under Simpson's preferred approach would continue to be available.

Simpson's second argument is that if later cases may interpret an earlier one differently, we are put in the unhappy position of saying that that earlier case has two or more rationes decidendi. This, however, confuses conditions for asserting a proposition with conditions for that proposition being true. Suppose two later courts seek to discover whether a previous decision's conclusions are justified. That they may disagree on their answers does not suggest that either is without grounds for making its assertions. If both later courts have authority to declare judgment, then presumably there is some

method for deciding which of the case's judgments is superior. As for whether the original conclusion was justifiable, this question is a matter that anyone who analyzes it is equally able (if not equally competent) to comment upon. Disagreement is not an indication that subsequent analysis is impossible. The same argument can be made for the ratio. That courts may disagree about where to locate it is not a reason to suggest that any contradiction need arise. If the original decision is a social fact to be observed, then subsequent disagreement as to its ratio decidendi is just a matter to be settled in the way any dispute can be.

Simpson's third argument is that, until a decision is reexamined, if a ratio is subsequently constructed, then one can only predict what its holding will be. This is exactly what occurs as a normal aspect of the concept of precedent anyway. When one looks to judicial decisions (or statutes for that matter), one is concerned about how they will be applied in subsequent cases. There may be some normative standard that will tell what the answer ought to be, and such a standard may be the controlling element in a prediction. If judges use standards, one can not only predict, but one can predict with some confidence. It is not a criticism of a method that it employs prediction, if the expectations of persons interested in court opinions focus upon prediction, and one can construct a method which allows one (at least in theory) to be successful in predicting future court judgments.

5. The final distinction drawn here will be between some canonical or formula-bound way of presenting reasons, and the judges' peculiar and individual method of presenting them. Style has always been recognized as an important component in a case, and the American realists often pointed to schools of style and the effects each had on the way the decision was presented.[20] If one were given a set of facts and a set of competing arguments, one might devise an analogue for ordering facts and argument in such a way as to be able to reach a determination. If one were then to criticize an individual's (or judge's) ordering, one could have a standard to measure it by. Suppose that to make use of this analogue, information was needed that was, at times, missing. Suppose further that the method for attaining this information, whether missing or complete, was to be found in the ordering that the analogue was meant to criticize. Then any criticism leveled at a judge's treatment would be suspect, for the criteria that yield the analogue are themselves a function of the case being criticized. This can be made clear with an illustration.

Suppose D and P are adjoining landowners. D is a plant biologist, and carries on regular and extensive experiments on his property. He has devised a spray that causes regular grass to mutate into a giant cereal --woody, fast-growing, pungent, and high in protein -- when applied regularly. Because of the prevailing wind, and the fact that P took down a high fence that once separated their properties, P's yard has become a cereal

jungle. P is unhappy and therefore sues D. The judge, sitting in an American jurisdiction, holds for D. He reasons the D's work is socially useful,[21] that P could have taken steps to prevent the growth by simply not removing the fence,[22] and that P came to the property knowing of D's operations.[23]

An observer would note that the judge treated the matter as one of private nuisance. In examining what the case stands for, this observer would note (at least) two facts. First, the reasoning of the judge is ambiguous. We do not know whether each of the stated reasons alone would have told against P, or whether they are all necessary. The reasons themselves are closely tied to certain facts, and how general the reasons are (that is, how many fact situations they cover) is not known. Under the court's opinion, given a replica of P v. D, D wins. But given cases like P v. D, we cannot say how P or D might do. The second fact is that an alternate basis of liability might exist: that of trespass.[24] We do not know from the actual case P v. D whether or not trespass was barred because the jungle growth did not constitute interference with possession, because the statute of limitation had run out,[25] for some other good reason, or because no one thought of it.

The style of the judge's opinion prevents us from knowing which lines of reasoning he considered necessary and which lines sufficient. It also prevents a full understanding of which other possible causes of action might lie in such cases. One might wish to criticize P v. D, claiming that trespass ought to have

been considered or that one or another line of reasoning was irrelevant. To do so, one might use an analogue based, in part, on the holdings of past decisions. These past decisions, though, are, in theory, as vulnerable as P v. D to the objection that style shaped their meaning. The analogue is uncertain to the degree that style allows for ambiguities. There is thus a large measure of indeterminacy of intention in judging decisions, an indeterminacy that undermines any attempt to use precisely past decisions to assess the validity of future ones.

These five distinctions made, we can now say something about what role a case has in judicial reasoning. All five distinctions suggest that reliance on previous decisions as authority is far from an uncomplicated matter. One's judicial view gives a method for approaching a past decision as well as answering questions in a present case. However, there is a logical space between one's giving judgment and one's understanding an already answered case.

A judge lists reasons in his judgment, but these reasons are not necessarily the ones that brought him to the conclusion. He may not know or remember these, nor may anyone be able to offer a satisfactory account of his (the judge's) reasons. But the judge does not look to his own psychological reasons as relevant for inclusion in his decision. He looks to reasons that are appropriate and justify a decision. In this important sense, judicial decisions are reconstructions. Having arrived at a decision, the judge employs an analogue yielded by his judicial

view and reconstructs his decision on a rational basis. (No duplicity ought to be imputed here to judges. They may employ the reasons in the reconstruction that motivated their decision, or at the least, that they believe motivated their decision. But these reasons are used differently when they are marshalled as justifications.) The actual reasons for his decision are outside the purview of any propositional set. The reasons stated are evidence of his judicial view.

In order to understand what a judge meant by his stated reasoning, one must have some notion of his judicial view. This will tell why he put forth the reasons he did. But it is one's own view that determines how one assesses the meaning of judicial decisions. One can look at the distinctions made earlier and see them as competing alternatives for inclusion within a judicial view. In this sense, when one speaks of a case standing for some proposition or holding some thing, the case is a reconstructed reconstruction, what we might call a 'rereconstruction.' One's own judicial view tells one how to read the case -- whether one looks to reasons or conclusions, whether one takes questions as they would seem actually to be raised or were treated as raised, whether or not to look to the judge's intention as central, how to treat the individualistic style of reasoning in past cases -- and puts in an orderly basis the disparate elements of individual cases and allows classification of the variety of cases.

The distinctions discussed might also be seen as suggestive of methods of adjudication. Third level commitments govern what

approach one ought to take to a case. A commitment will dictate whether, for instance, one looks to all the stated reasons in a previous decision or to just the stated conclusion. The same logic holds for other legal forms. Strict versus revisionary interpretations of written constitutions, or statutes interpreted on their face versus statutes interpreted according to legislative intent as evidenced by legislative committee records and floor debates: these are competing positions based on competing views, and debate as to which position one should take is constitutive of view disparities. Of course, the various positions give different results in actual cases only occasionally. This is characteristic of judicial views generally. Identity of conclusions between competing views on so many question can lull one into believing that only one view is operating. However, if intersubjective agreement does not imply an objective standard, neither should agreement between different views suggest that only one view is operating.

2. Legal Forms

Judicial decisions are central to a discussion of judicial reasoning. Within the context of legal systems, they are one among several elements we earlier labeled as legal forms. These forms individually each have their own nuances, but they share several formal features that will be examined here. Certain of the difficulties inherent in interpreting the meaning of cases are common to all legal forms, and have in fact been more quickly

recognized as difficulties in other forms. Both statutory and constitutional interpretations are usually deemed difficult matters, and ones where the criteria for settlement are a matter of controversy. As with cases, other legal forms often exhibit a certain logic intended to persuade. They thus collapse an otherwise clear distinction between sources that agrue from authority and sources that argue through reason. There is the difficulty in all legal forms of deciding what concept of intention to employ. Customs originate with no individual; cases with a certain, ascertainable individual; statutes with a discrete corporate body of individuals with a range of competing views; constitutions with several corporate bodies, often without a certain ascertainable membership. If intention is well-accepted as a necessary component in any theory of meaning,[26] then how one constructs a concept of intention that will be broad enough to interpret legal forms is a general difficulty in this area.[27]

There is a popular picture of legal forms. Forms, usually called sources of law, are taken as authoritative reasons for determining a certain judicial proposition. If a question arises before a court, one turns to legal forms which are 1) complete or nearly complete; 2) easily picked out from the universe of possible sources as those which are relevant; 3) authoritative according to some not too difficult preference ordering (for instance, if a case and a statute conflict, choose the statute; if an earlier statute conflicts with a final court's gloss on it, choose the case). A great deal of debate among legal theorists

centers on just how well forms fulfill the task set for them in the above picture. Do they answer all questions or most?[28] Are such things as customs, international agreements, or administrative rulings properly legal forms of themselves, or do they figure merely derivatively, so that, for example, administrative rulings are authoritative only in that they are prescribed by statutes?[29] Are judicial interpretations of constitutions subject to legislative alteration or alteration by future courts?[30] Does repeal of a statute give life to prior case law at odds with that statute, even though that case law has not evolved and been tempered by other cases subsequent to the statute's entactment?[31] All these kinds of questions assume the popular picture is true. The picture, however, is incomplete, and depending on how one fills it out, it is either nearly accurate or quite misleading.

Legal forms are introduced into judicial reasoning twice. These might be thought of as the definitional occurrence and the resolution occurrence.[32] The definitional occurrence of legal forms indicates the place legal forms possess in forming a definition of judicial role. The resolution occurrence indicates the part played by legal forms in reaching an actual decision in a case. Legal forms are social facts, evidence of individual or group practices or intentions. They contain propositions, but are themselves largely documentary (and occasionally, unwritten but easily recognized social, business, or religious customs). The ties legal forms have to the judicial decision are so tight that it is easy to forget that they are not a necessary, but a contingent element in judicial decision-making (One could imagine a system, perhaps not unlike that of early English equity, where they would exist as

facts, but be largely ignored. In such a system, the Chancellor might claim not to be governed by the central court cases, past equity cases, custom, and certainly local regulations and pronouncements[33]). The intimacy also obscures the fact that forms enter twice into the judicial equation.

The initial intrusion of legal forms comes with the definitional occurrence. We said in Chapter I that the entire structure of judicial reasoning rests on the concept of role. Many of the kinds of questions found in courtrooms are also found, in slightly altered terminology perhaps, in many other settings. Conflicts make for judicial cases, and the type of forum that views the conflicts has a great deal to do with its characterization and resolution. The judicial forum, quite obviously, is dependent on the role of the judge. What he should do is the question in every conflict that comes into a courtroom.

Formulating a concept of role involves constructing a procedure for deciding cases. That is, a part of role involves making decisions on what types of things a judge ought to use to resolve cases. A not uncommon set of claimants for inclusion would include a notion of justice, a notion of fairness or equity, a certain political and social philosophy, and loyalty or adherence to certain legal forms. A conflict at this point between, for instance, a statute (a legal form) and some fairness principle is not an argument about how to resolve specific cases. It is rather an argument about what things are allowed to be considered by judges in order for them to be said to be properly behaving as judges. I may believe that judges ought to consider the

pronouncements of legislatures, without being committed to any position concerning competition between statutes and equity principles. I would only be saying that a judge is not behaving as a judge if he does not consider statutes.

Legal forms are among the competitors for inclusion in the concept of judicial role, in that role entails a method of proceeding for the judge. The details of this method are embedded in third order propositions. It is here that the popular picture is misleading. This picture suggests that one turns to legal forms and more or less finds answers to first order questions. However, in the case of the definitional occurrence, one uses legal forms to determine role. Whether to look to legal forms, and to what extent they are the concern (or a concern) in defining role are the questions. One has to determine the exact direct scope of forms in the definition, and then analyze the derivative part that they always play. This can be seen more clearly with an example.

Let us consider the case of Williams v. Walker-Thomas Furniture Co.[34] A plaintiff-respondent furniture company sold household items to defendant-appellant on credit.[35] The sales and credit were made pursuant to a complicated contract, whereby each purchase price was added to the general amount owed and each payment was credited pro rata toward paying off all past purchases. Purchases were deemed to be leases until all outstanding debts to the company had been paid. As the court said,

> "as a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings."

Five years after initiating the contract relationship, defendant made and defaulted on a final purchase. Plaintiff sued in replevin for possession of all the items defendant ever purchased. Defendant claimed unconscionability by reason of past cases[36] and a recently enacted statute of limited relevancy.[37] Defendant won on appeal on the grounds that the contract may have been unconscionable, in large part because the defendant was in a weak bargaining position due to economic duress, and thus had no real choice but to sign an unfair contract. Further, unconscionability was a concern relevant to the court and one in which the lower court was empowered to consider in order to overturn otherwise valid contracts, a power the lower court had failed to exercise. There was a dissent.

The main disagreement between the majority and the dissent was over competing conceptions of judicial role, and the exact place of legal forms in constructing role.[38] The dissent thought that looking to legal forms should provide a more or less complete description of judicial role, at least in terms of how a judge ought to proceed. It did not argue that the contract was fair, or that general considerations of 'public policy' did not suggest that there was duress in the bargaining situation. Further, and more basically, it did not argue that precedents

were disregarded, statutes ignored, or any legal form abused. It argued, though not in these terms, that it was not part of the judge's task to assess fairness in agreements; or more generally, that judges may not look outside legal forms for criteria by which to make decisions.

The argument of the majority is slightly more complicated. At first glance, it too appears to hold that a judge may not go beyond legal forms in reaching a decision. The court states that no controlling authority exists on the points raised in the case, and thus the congressional adoption of the Uniform Commercial Code-§2-302 becomes "persuasive authority for following the rationale of the cases from which the section is explicitly derived." This argument is untenable -- its difficulties are many: subsequent statutes are generally considered irrelevant to the resolution of cases arising prior to their enactment (this would be especially true in contract matters where reliance of the parties is a major concern); statutes are more often taken as changing case law, one reason for their introduction, and thus would suggest here that the legislative belief was that the case law did not remedy unconscionable contracts; there were relevant precedents in favor of plaintiff; four hundred years of contract law suggested that bargains, unless they are illegal, formally faulty, or subject to some recognized excusing defense ought to be enforced -- and seems unlikely to be the one on which the court actually based its decision. Rather, the court, despite a slew of case citations and discussion of the U. C. C., simply argued that

the contract was in fact unfair. It was apparently self-evident to the court that if a contract was this unfair, it could not be enforced. The cases and the Code agreed with this conclusion, but they were not (according to the opinion) the basis of it. Legal forms here figured in that they evidenced a fairness principle: their inclusion in looking to role was derivative. The court recognized that it may well be in the minority in its perception of the proper conception of judicial role, and thus recommended to the Congress that it codify the decision. But its own position on judicial role obviously, from the holding, required no codification to allow a conscionability test in the case of any challenged contract.

The Williams case suggests how the popular picture of legal forms can be misleading. The dissent is not merely arguing within the context of legal forms, it is implicitly arguing for their primacy. The majority is either arguing for forms to be one consideration among many or it is arguing for forms to be given a token primacy, but one which should not obscure the extent to which they are only one factor among several. If the popular picture suggests that first order questions can be answered always, or even ever, solely by resort to legal forms, it misleads by failing to state that how one considers legal forms is tied to one's view of role. Depending on the answers to the prior questions of role, solutions suggested by legal forms may be more or less relevant, more or less important. This is why, for instance, a computer could not solve cases satisfactorily, even

if a thorough knowledge of legal forms were programmed in. Judges hold competing positions about the place of legal forms, and no single analogue would duplicate the varieties of judicial behavior.[39]

Williams does illustrate how, even when there is controversy over the definitional occurrence, the resolution occurrence can be straightforward. The entire court agreed on how one would, given certain assumptions about role, reach a decision. The professional education of bench and bar focuses heavily on the study and employment of legal forms, and once such forms are considered relevant, debate about their workings is extremely narrow. The popular picture is a simple picture, and this shared universe of knowledge allows the simplicity to remain and yet be accurate. When conflicts come before courts, the modus operandi is apparent and consistent. Both majority and dissent in Williams looked to cases and statutes, and found very nearly the same thing. Their procedure was almost identical. It was the use they make of the procedure that differed.

A brief word here might be helpful on what was meant when we said that legal forms contain propositions, but are not themselves part of the chain of judicial reasoning. It was suggested in Chapter I that legal forms are identified by their pedigree. They are public objects, which are generally taken as having a special relevance to judicial decision-making. This relevance is in part due to their authority, as standards on which to base a decision;

and in part on their pedigree, as they are taken as intending to be so used. This does not mean that the actual or imputed intentions of the authors of legal forms are reasons for attributing authority to those forms, a quite unsupportable assertion. Rather, the forms' authors can be thought to have realized that their work would be taken as authority, and to have written with that realization in mind. The intention here is one read in, and makes no pretense of being identical to the actual intentions of the authors. Statutes, published cases, and constitutions may be intended as authority for future decisions. Customs rarely are. But each legal form has such an intention read back (or glossed back) into it. Thus, the propositions that one can extract from legal forms have an immediate relevance to the tertiary chain. But it is only as use is made of them propositionally that they are important. The legal realists saw this and thus said forms are not law but evidence of law. A clearer way of putting it would be to say that forms are not law but their propositional contents can be made to be (depending on one's third order propositional set).

3. Reasoning by Analogy

Judicial reasoning is often thought to be primarily reasoning by analogy. That is, at least in the case of common law, a judge is expected to look to specific previous decisions to decide a specific instant case. A movement from the general to the specific is deductive; from the specific to the general is induc-

tive; and from the specific to the specific reasoning by analogy.[40] This movement from specific to specific often involves a generalization being made after the first case is analyzed, and that generalization forms the basis for deciding the next case. It thus resembles an induction followed by a deduction. One observer described it as:

> "a three-step process described by the doctrine of precedent in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similiar situation. The steps are these: similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."41

Analogy ought to be considered a separate kind of reasoning from induction, however, for it characterizes those cases when there is, at the outset, no already established rule (as provided for by induction), but where it is necessary to look to a specific case to generate a rule. In analogous reasoning, the second case can be impeached if the first case is faulty, while in induction followed by a deduction, normally one only attacks as far back as the rule. An attack on a specific instance of that rule is not fully sufficient to impeach the rule, only to weaken its scope or to create an exception.

I want to argue in this final section that reasoning by analogy is not a distinct matter from reasoning by deduction (deduction here denotes a standard zero and first order logic that allows for implication and equivalence). Instead, analogy is a method of proceeding when certain premises in a deductive argument are hidden or obscure. When a truly non-deductive method

is employed, it is really more apt to call it argument by metaphor than argument by analogy.

These points can be best illustrated by contrasting the view here with the one Joseph Raz presents in The Authority of Law.[42] Raz begins by suggesting that there are two positions a court can be in: one where it is bound by a statute or a ratio, and one where it is not.[43] It is only in the latter case that reasoning by analogy comes into play.

> "A court relies on analogy whenever it draws on similarities or dissimilarities between the present case and previous cases which are not binding precedents applying to the present case."44

Thus, in cases where a court is not bound, it uses analogy, which allows it to discover new rules. These new rules are not binding; they are, however, persuasive. Raz sees this position as a compromise between that held by Dworkin, whom he characterizes as holding that analogies are binding,[45] and that held by those who "have concluded that analogical argument is mere window dressing, a form of argument without legal or other force resorted to for cosmetic reasons."[46] Analogies for Raz "are always morally relevant" but "there is no point in saying judges are legally obligated to use analogical arguments."[47] He sees analogies as a reforming aspect of adjudication, one where new ideas that are brought in as new rules via old cases are used differently.

Raz sees the actual procedure of applying an analogy as this: one looks at the series of relevant features the instant case possesses; one then looks at a past case that shares some but not all of these features; one somehow sees that past case as relevant;

and finally one borrows the conclusion of the past case and uses it in the instant one.

The major difficulty with Raz's position is that it seems to confuse cases with propositions (or using his own terminology, rules). Raz appears committed to the view that a past case can be binding authority for only one thing, and that thing is intimately connected with the factual background of the specific case. Let us imagine a jurisdiction which presently is seeing its first case (let us call it case F) of the tort defense of self-defense being raised in an assault and battery type of civil suit. Past cases had allowed self-defense in criminal cases, but F is a case of first instance. According to Raz, a judge is under no obligation to consider the criminal cases, and if he did, he would be engaging in a moral activity.

We suggested earlier in this chapter that interpreting the ratio decidendi of a case is a matter that can vary according to one's judicial view. Certainly, judicial views can be imagined where reasons provided in one context are always considered relevant (if not determinative) in others. Under such views, there would be no 'new rules' (as Raz calls them), but merely the discovered implications of existing propositions. However, even under a judicial view with a narrower notion of inter-contextual relevancy, the premises of any argument need to be considered as part of the ratio (according to the rule of logical implication). One element in the criminal propositional set would necessarily specify the scope of the criminal self-defense claim. It would offer a

(higher-order) reason that justifies that claim. (Such a reason -- as, for example, that it discourages violence, that it allows for just deserts for assailants, that it allows for the protection of potential third-party innocent victims, that it is a cost-efficient method of imposing punishment on those who ought to be punished, that it allows for the retributive inclinations of a society to be spent in a fruitful and limited manner -- could either be stated or implied in the cases.) Raz would argue that higher-order reasons are always non-obligatory in the related civil cases, because of the disparity in factual context.

Let us suppose a second case of first instance. This second case, case N, involves a prosecution against a wife for criminal assault against her husband. The wife claims self-defense. N would be the first instance of self-defense being used within a marriage, allowing that marriage is a legal relationship that allows certain kinds of contract (between persons) not always permissable outside that relationship.

Raz at this point has a choice. He may claim either that a new rule is needed to decide F but not N, or that new rules are needed to decide both F and N. If he claims the first, then he must distinguish F from N. Certainly he cannot say the N shares more features with the traditional self-defense type of case than F does, for they each share all relevant features but one (lack of criminal proceedings versus a lack of non-marital proceedings). In fact, given the complications that one could imagine, it would be difficult to know how to measure the similiarity of factual

situations. It, moreover, is not clear why greater similiarity alone would be a reason for allowing N to be governed by precedent and F to be left to analogy.

Raz could say that the difference between N and the traditional cases is not significant. The circumstances of marriage ought not to make a difference in an assault and self-defense case. That is, the reasons for allowing self-defense in normal circumstances apply in N. Raz, however, cannot distinguish N from F on these grounds. The reasons for allowing self-defense in F might be compelling, and they certainly are likely to be the same reasons as are found in civil cases. If one looks to reasons rather than facts, one is allowing that even in new factual situations, a court may be (logically) required to apply reasons from analogous cases to determine the result, a position that Raz wants to reject.

(It might be thought that N is obviously distinguishable from F on the grounds that N just is covered by the 'old rule' that one is entitled to protect oneself from deadly assault while F is not. However, assuming that this is the formulation of the rule enunciated in past decisions, both N and F are covered. Of course, the rule can be formulated in such a way as to exclude F, but we are, ex hypothesi, not so formulating it. We can assume a broad formulation of the rule where exceptions have subsequently been introduced before. In other words, we can assume what often occurs: courts not overly careful about the possibility of future difficult cases leaving determination of those cases and reformu-

lation of the rule to a future court.)

Raz's other option is to say that in both F and N a new rule is needed. The obvious difficulty with this position is that if one is free to decide N as one sees fit, then when is one ever compelled to decide cases in accordance with 'old rules'? Each case presents a unique factual situation. For a rule to be of any use, it thus must cover diverse cases with common features. Specifying in advance which cases are covered under a rule involves understanding the reasons a given rule is applied. These (higher-order) reasons compel the use of the given rule when no rational differences exist between the instant situation and the type of situation that the rule was meant to cover. This is just the type of situation, however, that Raz claims analogy covers. If the rule is not applied, an irrationality exists in the rule system; if it is applied, then the instant case is not one outside the purview of existing propositions.

One might object that the categories of criminal and civil are so basic, that whatever difficulty there might be generally in delineating the scope of specific rules, the criminal/civil distinction is easy to trace throughout the case law. Given this fact, one could see how F might be distinguished from N. Such a distinction ignores the numerous intermediate cases between criminal and tort categories, including cases in tort with punitive damages, criminal proceedings where restitution to the victim must be paid, and declaratory judgment actions which ask for advice on some contemplated action by plaintiff that may eventually

sound in either tort or criminal.

Raz schematically tries to show when an argument from analogy holds.[49] Let us assume two cases, P and Q. Each has facts shown by lower case letters, implications of facts shown by upper case letters not P or Q. The precedent case used as analogy for Raz is:

P: a,b,c,d,e,g/A, B, C→X

The instant case is:

Q: a_2, b_2, $\bar{c}_2$, d_2, $\bar{e}_2$ /A, B, D → ?

Raz says that we know A, B, C→X, but we do not know if A, B→X or A, B, D→X. If P is introduced as an analogy, it is for the proposition that A, B→X, which would solve Q.

The problem is that long before Q needs to be settled, it is appropriate to ask what is meant by P yielding X. Suppose P is a case deciding whether a contract has been made. We see consent (mutual assent), consideration, and an exchange of promises, A, B, and C. The specific facts would be at least a set, a, b, c, d, e, and g. What does the case stand for? It certainly does stand for 'A, B, C→X' where X means the contract is valid, but it is strictly applicable only where there is exactly A, B, and C. Suppose 'a' is the fact that Smith consented and 'A' denotes consent. If 'A' is a broad concept of legal consent -- freely entered into with certain kinds of knowledge of the bargain, etc. -- then 'a' does not imply 'A'. No 'a' will be that complex.[50] Here 'A's' meaning will derive from propositions outside the facts of the case. In order to work out the logic of 'A', an investi-

gation of the criteria that yield its parameters is eventually necessary. When Q arises, perhaps a consent case where duress is more explicitly at issue, the scope of 'A' will be determined both for P and Q. But in committing oneself on P, one is committed to a certain line on Q. If 'a→A', on the other hand, then each case stands only for its facts. This seems to make each case unique, and yield a degenerate notion of implication in case law.

The problem with Raz's explanation of analogy lies, in large part, with its allowing for exactly two kinds of cases: those where the court is bound by past decisions and those where it is not. One is, however, bound by reasons rather than decisional judgments. This process begins with the construction of the tertiary propositional schema. One is committed to the implications of one's judicial view. This means that a number of conclusions can be generated, each of which is binding, that are not normally associated with the holdings of past decisions. For example, suppose in reaching judgment in a property case, one needs to hold that 'if p then q.' Regardless of the general relevancy of that property case in a subsequent commercial paper dispute, if p arises in the course of resolving that commercial paper case, then if one is committed to p, one is also committed to q. One can think of a judge as looking to other cases to investigate what he is committed to if he is to have a rational judicial view. In that sense, it can be said that analogies intrude rather than entice.[51]

(It should be said briefly (the matter is covered more thoroughly in Chapter VI) that this is not Professor Dworkin's view. Third order propositions not being objective, no analogue exists for settling disputes between those with different views. Thus analogy, in that it is part of the process that begins on the third level, is not uniform. It seeks internal consistency, but allows for change even in that third level as consequences are revealed. Thus, in Raz's terms, it is reformative rather than conservative, a tag he gives to Dworkin's theory.[52])

Raz might object that he could admit everything that has been said, but still be able to say that certain cases are not ones of deduction or a search for hidden premises and deduction from them once they are found. These other cases employ a method whereby a rule of one case is applied to another case, even though it does not strictly apply. These cases sometimes use a method labeled 'legal fictions.'[53] In other cases, the new rule is so obviously a change from what was, that the court employs a different tag, as in cases of 'tacit consent' or 'constructive eviction.' The cases, though, share the feature of holding some proposition that they know not to be (strictly) true. They are thus using metaphor, a rhetorical device to transpose a term form its original concept.

Raz's sole example of a case that reasons by analogy can best be interpreted this way. In D v. NSPCC[54] the House of Lords held that, in an action for negligence against the National Society for Prevention of Cruelty to Children, the defense was allowed to hide the identity of one of its informants, even though that identity

was relevant to the case. Existing rules seemed flatly to compel the NSPCC to reveal its source. However, a rule (or proposition) allowed government agencies to keep similar information secret if revealing it would be contrary to the public interest or the efficient function of government. The Lords held that in those cases where the NSPCC serves a public function, it is entitled to the protections of privilege afforded governmental agencies.

It seems unlikely that the holding in D. v. NSPCC was motivated by a desire for propositional consistency, as no prior instances of a separation between an agency's governmental aspect and its public function aspect appeared to have arisen. (If one supposes, however, that it was because the government agencies served a public function that they were accorded the privilege, this does not help Raz. It would make the case one of deduction, where a judge ought to be bound to view the NSPCC as holding the privilege.) Normally, private agencies are without the privilege. For Raz to claim that one is free to choose whether or not to grant the NSPCC the privilege, he would have to allow that cases that withheld (usually, no doubt, without discussion) the privilege as a matter of course from private agencies before the instant case did not endorse the rule that they seemed to use. Ruling for the NSPCC not only expands the rule of privilege for those meeting (the now revised) test, it cuts back the scope of the rule that allows for the discovery of information in normal circumstances. If rules can be thus cut back, when are they ever binding? If one is permitted to later come up with reasons for reading in

exceptions, then, in fact, the distinction that Raz bases his argument upon, that between binding and non-binding situations, falls apart.

A more reasonable explanation of D. v. NSPCC involves seeing it as an instance of metaphor. A metaphor is a device that allows one to alter propositional sets (or, for Raz, existing or old rules) not merely by adding new propositions, but by changing unsatisfactory old ones. In D. v. NSPCC, the property of 'public function' was separated from its governmental usage home. The two were no longer synonymous. Thus, certain cases that previously were outside the purview of governmental rules could be brought in without destroying the concept of 'governmental' or the content of a large quantity of previous case law. The great utility of both metaphor and deduction masked as analogy is that they allow judicial growth and refinement without offending notions of consistency, justice, disinterestedness, or fairness.

[1]That literature will in no significant way be considered here. However, the chapter is written against a backdrop of this case literature, and it is well to mention certain of the leading works that furnish that backdrop: Karl Llewellyn, The Common Law Tradition: Deciding Appeals (1960); Henry Hart and A. Sachs, The Legal Process (1958); C. K. Allen, Law in the Making (seventh edition, 1964); Rupert Cross, Precedent in English Law (second edition, 1968); Edward Levi, An Introduction to Legal Reasoning (1948); Benjamin Cardozo, The Nature of the Judicial Process (1921); Arthur Goodhart, "Determining the Ratio Decidendi of a Case" 40 Yale L. J. 161 (1930).

[2]This distinction -- between the ratio and the obiter-- was once at the heart of jurisprudential discussion, but is now largely out of favor. If the categories seem slightly archaic, the idea behind them is still vital. The idea is concerned with how one understands a case, and goes about deciding what is critical and what is peripheral to the judgment. It is useful here as a quick way to enter into discussion of a case without setting up a possibly safer, but certainly more cumbersome, system.

[3]The authority of judicial decisions is a dominant common law notion. It is weaker in civil law, and many have argued that cases have no role to play as authority in civil law jurisdictions. Typical is the comment of John Henry Merryman: "The result of all this is that the accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations and custom as sources of law. This listing is exclusive." J. H. Merryman, The Civil Law Tradition 25 (1969). However, as Merryman himself points out later, "the civil law is a law of the professors" (p. 60). These professors often draft the statutes and write the texts which control interpretation. Professional scholarship is based in large measure on an examination of past decisions. Thus, even here, the judicial case as an authority has an importance, if one somewhat removed. Of course, in that constitutions have allowed for judicial review of certain cases in some civil law jurisdictions, the idea that the legislature is the sole source of authority is further eroded.

[4]Certain of the consequences of this process of evading general issues while deciding specific ones are discussed further in Chapter VII.

[5]Rupert Cross, Precedent in English Law 77 (second edition, 1968). Cross does qualify this by noting that "The adoption of one line of reasoning by the judge is not incompatible with his adopting a further line of reasoning. Allowance must be made for the fact that a case may have more than one ratio decidendi." (p. 77 n). What Cross means by more than one ratio still involves lines of reasoning tied to judgment; he merely allows that there may either be more than one judgment or two parallel lines that are compatible and lead to judgment. (See pp. 53-4, 86-90). He does not recognize a separation between the stated reasons and the stated judgment.

It might be said in Cross' defense that he claims to be describing how 'ratio' is generally used by lawyers rather than how it is rightly to be used (pp. 76-77). He later wavers in that restriction, and seems uncertain in this area, as he does throughout his entire work, as to whether he is laying out a description of certain social data or whether he is recommending how that data could be used as a basis for improvement. For example, he tells the reader when and to what extent a ratio is binding, using the lawyer's description of that term presumably, but treating it as if the ambiguities and difficulties in it did not exist. (See pp. 90-101 of Precedent).

[6]This is apart, of course, from any other propagation method for a ratio, such as several issues, several judgments, etc. It is one necessary, rather than contingent, division.

[7]This is obviously meant to be taken within the common law tradition. There is evidence that it holds to some extent in civil law as well (See note 3).

[8]115 N.Y. 506, 22 N.E. 188 (1889).

[9]An area that exemplifies all those possibilities is that which involves the cases which examine whether a sum of money serves as good consideration for a promise to pay a greatly larger sum. The issue of usury is virtually never raised in these cases. A good sampling are noted in Arthur Corbin's Contracts §129 (1950).

[10]A good brief discussion of this evolution can be found in Edward Levi, An Introduction to Legal Reasoning 8-27 (1948). The conclusions he draws from this type of evolution are not shared here.

[11]6 N.Y. 397 (1852).

[12]The precedent was Dixon v. Bell, 5 Maule & Selwyn 198 (1816). The case to be distinguished was Winterbottom v. Wright, 10 Meeson & Welsby 109 (1842).

[13]217 N.Y. 382, 111 N.E. 1050 (1916).

[14]Llewellyn continues by saying that "one of the vital elements of our doctrine of precedent is this: that any later court can always reexamine a prior case, and under the principle that the court could decide only what was before it, and that the older case must now be read with that in view, can arrive at the conclusion that the dispute before the earlier court was much narrower than that court thought it was, called therefore for the application of a much narrower rule. Indeed, the argument goes further. It goes on to state that no broader rule could have been laid down ex-cathedra, because to do that would have transcended the powers of the earlier court." Bramble Bush 52 (third edition 1960). Llewellyn does not fully accept the third distinction. He fails to see that a subsequent reading of a case can broaden as well as narrow the conclusions. This is routinely done in constitutional law cases and done generally when there is an attempt to eliminate overcrowed classification.

[15]It is perhaps this phenomenon that Glanville Williams had in mind when he said that the phrase 'ratio decidendi' is slightly ambiguous. See his Learning the Law 72 (sixth edition).

[16]He discusses the point in "The Ratio Decidendi of a Case and the Doctrine of Binding Precedent" in Oxford Essays in Jurisprudence 148 (ed. A. G. Guest, 1961).

[17]Id. at 169.

[18]Rupert Cross, Precedent in English Law 35-101 (second edition, 1961).

[19]A certain license is taken here to spin out arguments from scanty assertions in Simpson's text.

[20]Karl Llewellyn saw the development of Anglo-American common law as a battle between two types of judicial style. The Grand Style allowed for growth through the incorporation of new concepts into lines of precedent. The Formal Style allowed for a system of increasing internal consistency at the expense of shaping decisions adequate to solve societal problems. Llewellyn recognized both styles as equally legitimate vis-a-vis law, but criticized the Formal Style as socially and politically inadequate, intellectually moribund, and aesthetically cumbersome and inelegant. In this sense, he is embracing the position here called judicial pluralism. The term 'style' is used by Llewellyn nôt merely to mean "literary quality or tone, but to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need." While this is a bit overblown for our purposes, style here does denote a personal approach to cases as well as a literary tone. Seek Llewellyn, The Common Law Tradition: Deciding Appeals 37 (for quotation), 19-61 (for discussion of style) (1960).

[21]Assuming the case is treated as one of private nuisance, one well-recognized defense arises when the one alleged to be causing the nuisance is conducting an activity of great social worth or value. See Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919).

[22]If plaintiff is easily able to prevent the nuisance, his failure to do so may cut off liability. See Keeney v. Wood Mfg. Co. v. Union Mfg. Co., 39 Conn. 576 (1873); Carroll Springs Distilling Co. v. Schnepfe, 111 Md. 420, 431, 74 A. 828 (1909).

[23]It is sometimes held that "coming to the nuisance", where that nuisance is one in which the public has a major interest, bars liability. See East St. Johns Shingle Co. v. City of Portland, 195 Or. 505, 246 P. 2d 554 (1952); Powell v. Superior Portland Cement, 15 Wash. 2d 14, 129 129 P. 2d 536 (1942).

[24]The difference between trespass and nuisance is historically obscure, but the Restatement of Torts states that the current view is that trespass is an invasion of plaintiff's interest in the exclusive possession of the land, while nuisance is an interference with his use and enjoyment of it. The two are obviously not mutually exclusive. See Restatement, Scope and Introductiory Note to ch. 40, preceding §822 and Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W. 2d 435 (1942).

[25]Traditionally, an action for trespass becomes complete upon entry onto the land, while nuisance begins when substantial harm is done. If D had stopped spraying, but the growth continued, a difference in actions could be significant.

[26]The central role of intention in the theory of meaning is defended in Christopher Peacocke, "Truth Definitions and Actual Languages" in Truth and Meaning 162-188 (ed. Gareth Evans and John McDowell 1976). Many have tried to characterize that role; all have had, at best, limited success. The most ambitious attempt is that of H. P. Grice, who defines the meaning of an expression in terms of the intentions of the majority of individuals who commonly use it, while the meaning a particular speaker gives that expression is defined in terms of the effect he intends to bring about (or the belief he intends to bring about (or the belief he intends to give rise to) in the mind of the listener. See H. P. Grice, "Meaning" in 66 Philosophical Review 377-388 (1957) and "Utterer's Meaning and Intentions" in 78 Philosophical Review 147-177 (1969).

[27]One good illustration of how a deviant model of intention can serve to illuminate a particular type of utterance or statement is that by Gerald C. MacCallum Jr. in his "Legislative Intent" 75 Yale L. J. 754 (1966) reprinted in Essays in Legal Philosophy 237 (ed. Robert S. Summers 1968). MacCallum argues that legislatures are not capable of ordinary intention and so to understand the meaning of statutes, one needs to construct an institutional model that will make sense of what a corporate body could sensibly be said to be doing when it enacts legislation.

[28]This is a completeness controversy, and centers on when, if ever, one can look outside legal forms for assistance in decision-making. Further, if one must go outside legal

forms, does one's decision have as much authority as it would otherwise have?

[29]This is an example within the inclusion controversy, and centers on what ought to be included within the set of legal forms.

[30]This is an example within the ordering controversy, which centers on how inter-formal disputes should be settled. For an example of the ordering controversy in practice, one focused on judicial interpretations of written constitutions, see William O. Douglas, "Stare Decisis" 49 Columbia L. Rev. 735 (1949).

[31]This is an example of a second order ordering controversy, and illustrates how the difficulty in ordering can escalate.

[32]It should not be assumed that individuals keep these distinct when constructing a judicial view, only that they are logically distinguishable.

[33]This is the common picture of early English equity, See William Holdsworth, "The Relation of the Equity administered by the Common Law Judges to the Equity administered by the Chancellor," 26 Yale L. J. 1 (1916) for a defense of this picture. However, even here, given the common law backdrop within England and the small size of bench and bar -- allowing all to know of past cases -- it seems that equity may, from an early time, have looked to past decisions as authority de facto if not de jure. This would suggest the case is important here, as in civil law, despite an orthodoxy that holds the contrary. See Hazeltine, "The Early History of English Equity," in Essays in Legal History 261-285 (ed. P. Vinogradoff) for a discussion of the bearing of common law on early equity. See Charles Dickens, Bleak House (1853) for a notorious caricature of the narrowness and relative smallness of the equity bench and bar.

[34]121 U.S. App. D.C. 315, 350 F. 2d 445, 18 A.L.R. 3d 1297 (D.C. Cir. 1965).

[35]Actually, in the appellate case, two lower-court cases with a common plaintiff but with unrelated defendants were joined. We are here disregarding the other joined

case.

[36]The cases cited were from other jurisdictions. Even Scott v. United States, 79 U.S. (12 Wall.) 443, 20 L. Ed. 438 (1870), which, though a United States Supreme Court case, was not binding on the federal circuits. The dubiousness of the cases was due in large part to relevant case authority within the jurisdiction which rejected unconscionability as a defense in a liquidated damages contract case. See District of Columbia v. Harlan & Hollingsworth Co. 30 App. D.C. 270 (1908).

[37]The statute was the Uniform Commercial Code, enacted subsequent to the occurrence of the instant contract. The relevant section is §2-302 (28 D.C. Code §2-302 (Supp. IV 1965) which provides that a court may refuse to enforce a contract which it finds to be unconscionable at the time that it was made.

[38]There is a secondary disagreement over the failure of the lower court to find unconscionability. The dissent saw that failure as an indication that a finding of conscionability had been made. The majority believed no finding on the issue was made, one way or the other. We shall assume for the purposes of this discussion that the majority is correct.

[39]This is not to say that a computer could not, vis-a-vis legal forms, do as good a job as any particular judge. It just suggests that no single program could duplicate how a judicial system works, even in the matter of 'narrow legal questions.' (However, in stating that it would not duplicate a judicial system, one should not imply that it necessarily would always operate more poorly or acheive less satisfactory results).

[40]This is not, strictly speaking, the way the terms would appear to a logician, but it is the way lawyers would probably define them. Some lawyers do not speak of analogous reasoning, but see statutes as involving deductive reasoning and cases as involving inductive reasoning. See C. K. Allen, Law in the Making 249 (seventh edition, 1964). The terminology is erratic in much of the literature, and this section can be thought to apply to reasoning from case to case, rather than reasoning under a certain tagged category.

[41]Edward Levi, An Introduction to Legal Reasoning 1-2 (1948).

[42]Published in 1979. The matter of reasoning by analogy is discussed mainly on pp. 201-209, although it runs throughout the book.

[43]This type of basic division of cases into two giant categories, those involving discretion and those where the judge is bound, is criticized in Chapters V and VI.

[44]Raz, Authority at 202.

[45]It might appear at first glance that the position taken here is the same as the one held by Dworkin. There are two important differences, however. First, Dworkin believes that the third order is objective and thus analogy will not only reveal a commitment but a truth. Second, Dworkin believes that the analogical process is itself an objective matter, rather than one on which different but equally valid positions are available. See Chapter VI of this thesis for a more detailed analysis and criticism of Dworkin's position.

[46]Authority at 205.

[47]Both the quotations are found in Authority on page 206.

[48]There is a third type of objection Raz actually does make. It is that the kind of position taken here is indistinguishable from (or collapses into) that held by Ronald Dworkin, and is thus defective for the same reasons he believes Dworkin's to be.

[49]He sets out his schema in Authority on pp. 180-189. He applies it to analogies on pp. 202-206.

[50]Part of the difficulty here is that Raz's use of the stroke function ('/') is deviant, and the reader is left to ponder just what he might be intending.

[51]This position is at odds with John Wisdom's well known analysis of analogies, found in "Gods" in Logic and Language 187, 195-96 (first series; ed. Antony Flew, 1951). Wisdom claims that the process of reasoning by analogy does not involve a chain of reasoning.

"The reasons are like the legs of a chair, not the links of a chain." But if one reaches for an analogy, and that analogy fails, one is missing a critical support for one's argument. This can result in more than a tipsy chair, it can result in a failed argument. (Wisdom's argument that analogical discussion is a priori and not a matter of probabilities (a matter of experience) is not being contested).

[52]See Raz, Authority pp. 205n-206n.

[53]Legal fictions are often criticized unfairly. Jeremy Bentham's famous remarks on legal fictions are not atypical. "Fiction of use to justice? Exactly as swindling is to trade." "It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed." J. Bentham, I Works 235, IX Works 77 (Bowring's edition, 1843). Fictions merely allow an alteration of the propositional set. Even by a Benthamite utilitarian analysis, if the positive effect of the change is greater than the negative effects of the disruption and slight ruse, then they can be said to be useful. For our purposes, fictions can be seen as just another form of judicial metaphor.

[54]1 All E. R. 589 (1977). Cited in Raz, Authority at 203.

POSITIVISM AND ADJUDICATION

There is a prevalent idea widespread within the legal profession that complicated theory has only a marginal role to play in discussions of judicial decision-making, for most of the time a judge simply applies the existing law to the case at hand with little room for complicated analysis. Facts may be elusive, styles may vary, cases may defy ready classification: all this makes the ability to apply law to facts more valuable. It is a value readily marketable, and it is squarely the task of the bar. The bar needs to find the law, and apply it to the great majority of cases where it uncontestably fits. Occasionally, the fit is problematic, controversy appears, and judicial discretion is called for. This discretion is limited, though, by the backdrop of the ubiquitous easy cases, and thus one can speak of gaps or leeways where the easy cases run out, and a limited liberty to create new law becomes possible.

This picture has attracted many theorists. One school of thought that has promoted it has been called the 'legal positivists'. It is to this school that we shall turn in this chapter. However, several limitations in our examination need to be made clear. First, legal positivism is a label applied to such unlike writers as Jeremy Bentham, John Austin, T. E. Holland, J. N. Salmond, John Chipman Gray,

Oliver Wendell Holmes, Hans Kelsen, H. L. A. Hart, and Joseph Raz.[1] These writers often had little in common except a distaste for their ghostly opponent, the natural lawyer, and little is to be gained from discussing them as a group. Instead, several points taken from three closely aligned writers within the positivist tradition will be analyzed. These three, H. L. A. Hart, Neil MacCormick, and Joseph Raz have the advantage of sharing many basic ideas and of having revised and improved upon their predecessors. Second, the legal positivists discussed a great deal, from rule-utilitarianism to the structure of norms. Only one small aspect of their work -- the structure and status of higher-order judicial propositions -- will be discussed here. No opinion on the remainder of their work ought to be read into this limited discussion. Finally, the positivists addressed the issue of higher-order judicial propositional status only derivatively and often casually. Thus, some filling out of the positivist picture is needed. In that this will be done throughout this chapter, one should perhaps be speaking of a Hartian or Razian idea, rather than an idea actually held by Hart or Raz.

A prominent legal positivist, Joseph Raz, has attempted to define positivism. He says that it rests on three theses.[2] The first is what he calls the social thesis, which holds that what is or is not law is a matter of social fact. He explains that this means that social conditions are necessary and

sufficient for identifying the existence and content of law. The second thesis is the moral thesis, which holds that the moral value of a legal system or its components is a contingent matter. There is no necessary connection between law and any particular conception of ethics. The third thesis is the semantic thesis, which holds that certain central terms like 'rights', 'duties', and 'guilt' have different meanings in legal and moral contexts. Assuming that such a definition is accurate, why is it important, vis-a-vis a discussion of the foundations of judicial reasoning, to contest such a seemingly benign, if somewhat general, theory?

The reason lies with the content of the social thesis, the thesis Raz correctly sees as basic to positivism. (Something akin to the moral thesis was argued for in Chapter I. The semantic thesis, too, is unexceptionable, as long as two caveats are incorporated into it. First, it does not apply in those societies where law, religion, and ethics are not well differentiated. Second, even in those societies where law, religion, and ethics are well distinguished, there are large areas of overlap among the three. The semantic thesis obviously does not apply to such areas. It is thus a doubly contingent thesis, applying only in certain societies, and in a limited number of situations within those societies). While the social thesis as stated is no doubt liable to different interpretations, the standard ones held by most actual positivists begin by seeing rules as socially sanctioned and the basis for

certain legal obligations. (Arguably, this even applies to John Austin, who, though he spoke of a habit of obedience rather than rules, appeared to mean a kind of habit more binding than that which Hart later stated inheres in the term.) Law is the central notion; rules are the components of law; and some kind of consensus (shared social rules) identifies the particular rules that are pertinent.

The talk of rules and law is quite different from that of propositions and judicial views used here. It is not the positivist's idiolect that is objectionable, although talk of 'law' and 'rules of law' appears to multiply the difficulties just because it tries to bridge the chasm between behavior and justifications for that behavior. The main difficulty is that what talk of rules and law presupposes -- a certain unity of belief relative to the idea of judges' role and ready criteria for determining when rules apply and when they run out based on some consensus -- is just what is here being denied.

Three objections will be made concerning what might be seen as different versions of the social thesis. These notions overlap, but the advantage of examining them by type rather than breaking them into components is that we can look at ideas held by three leading positivists, and try more sympathetically to understand their basic arguments.

1. The Rule of Recognition

In his The Concept of Law, H. L. A. Hart introduces the

idea that all legal systems contain a rule of recognition. Hart says that every legal system is made up of a set of rules that can be identified by reference to a discrete set of criteria, and that what determines that criteria of recognition is a shared acceptance by the officials of that system of the content of the rule-determining criteria. We can identify the criteria through observation: they are a discoverable social fact. Every system has exactly one rule of recognition, although it may be complicated and consist of a related set of separate rules.[3] Hart further states that

> "In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact."[4]

Hart's concept of the rule of recognition is part of a complex scheme tied in particular to the distinction between habit and obligation, internal and external point of view, and primary and secondary rules. These distinctions are not always clear or convincing, and any use of the concept of a rule of recognition would have to include modification.[5] (There are difficulties as to what exactly are the grounds for dividing primary from secondary rules, whether a rule of recognition is necessary for the existence of a legal system,

whether that rule is necessarily primary or secondary. Also, Hart is unclear about what divides the internal from the external point of view. A consequence of this lack of clarity is that he leaves up in the air what constitutes the connection between constitutional law and the law of recognition.) Moreover, Hart speaks only of rules, with the rule of recognition being a master rule. Dworkin's well-known criticism[6] that a rule-based structure neither allows for nor can take account of the legal principles that are an intergral part of judicial decision-making is telling against Hart's formulation of the rule of recognition, and would require a major revision of the thesis.[7] However, assuming all these faults can be remedied, there is still a problem with a Hartian-based formulation of the basis of judicial propositions. This problem is one of locating the source of the rule of recognition.

Hart states that only rules of a certain pedigree are valid. Which rules these are is a matter of social fact: we can look to the officials of a legal system and see what set of rules they employ to establish what rules have the proper pedigree. The set of valid rules can be identified by whatever criteria these officials accept. There is a trivial and a deep circularity to such a test. The trivial circularity, (noticed by MacCormick[8]) is that the valid rules are necessarily determined by reference to the officials of a legal system, but who is the official within a legal system is a matter

determined by reference to certain of the valid rules. If one is genuinely puzzled about the location of legal rules (where one might find their proper application), one might be equally puzzled as to which officials are the proper officials. This would most clearly be evidenced when serious social unrest (such as rebellion or civil war) gives rise to a number of parallel systems of both rules and officials. However, officials may always be located by reference to certain notions of power and coercion--even though Hart is unhappy with collapsing the distinction between laws and orders.

There is good reason, however, to locate officials in this way. One could refer to individuals' holding of power and their use of coercion (or threat of coercion), and then fill in the authority network through some analogue involving staying-power, claims, legitimacy, and loyalty. This would involve collapsing Hart's distinction between laws and officials on the one hand, and orders and gunmen on the other.[9] This is a difficult distinction to maintain in any case. Social phenomena such as vigilante groups, rebels, invaders, warlords, organized crime, political machines, lawful elite-status hierarchies, and de facto anarchy (abandonment of a sphere by a central authority) situations all suggest a blurring of the distinction. Even where the distinction is clear, the officials may have to give orders backed by threats, while an outlaw group may be able to call upon felt obligations (e.g., where an outlawed theocracy operates clandestinely, or where the government is run by people widely felt to be morally pernicious).

There is, however, a deep circularity (or regress) to

Hart's test for the rule of recognition in an actual society. Hart says that a rule of recognition can be spotted by its internal acceptance by members or officials of a society.

> "The use of unstated rules of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view. Those who use them in this way thereby manifest their own acceptance of them as guiding rules and with this attitude there goes a characteristic vocabulary different from the natural expressions of the external point of view. Perhaps the simplest of these is the expression, 'It is the law that...', which we may find on the lips not only of judges, but of ordinary men living under a legal system, when they identify a given rule of the system.... The first of these forms of expression we shall call an internal statement because it manifests the internal point of view and is naturally used by one who, accepting the rule of recognition and without stating the fact that it is accepted, applies the rule in recognizing some particular rule of the system as valid,.... To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system."[10]

The circularity arises when one inquires what criteria a judge should use in reaching a decision. Putting aside the peripheral cases of hypocrisy and inconstancy, one might take it to be a truism that judges use the criteria they feel that they ought to use. Under this formulation, if judges look to the rule of recognition as a criterion for deciding individual cases, then they must use the criteria they think that they must use. The test is self-referential, and as such, provides no more guidance than if there were no such rule. If we try to unpack the formulation and put the problem in terms of a

single case, we could say that a judge using the rule of recognition decides cases as he thinks other judges would decide them. More precisely, this refers him to the standards officials would use if they were in his position. As the judge is himself the official in the relevant position (ex hypothesi), he is referred to the standards he believes he should use. This leaves him without guidance, and fails to establish that there is an independent set of rules followed by officials that characterizes legal systems, (for how could one, in theory, verify or falsify such a position?). The self-referential aspect of the judge's inquiry remains. He merely uses the rules he uses, without an independent test for establishing whether or not they are 'right', 'correct', or 'appropriate'. Hart admits as much when he says that rules are inadequate to ensure solution of the cases at hand.

> "The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide them accepted after the questions have arisen and the decisions have been given. Here all that succeeds is success."[11]

Hart wishes to limit to 'previously unenvisaged' cases those situations where the individual judge does not employ the rule of recognition to find an answer. But why ought that limitation to apply? Hart would no doubt answer that courts in ordinary cases just do behave as though they are bound (bound usually to follow rules as found in legal forms);

that is part of their taking the internal point of view. Hart sees unenvisaged cases as ones where the courts have a limited freedom to choose among competing formulations of rules, as, for example, where the language of a statute is vague and statutory language becomes a matter forced upon the courts. However, whatever criteria the judge uses to settle the case involving the vague statute are as much a part of a rule of recognition for that judge as the criteria he uses in clear cases. That a judge normally uses a certain set of criteria ought not to lead us to imply that he ought to continue using that set. Once a judge asks himself why he is using the criteria he has been using -- a situation found often, but not exclusively, in previously unenvisaged cases -- reference to past practice alone is no longer sufficient. The rule of recognition itself will not tell a judge whether or not he is right -- when he is avoiding Hart's horror of behaving as though the game of scorer's discretion is being played -- and thus fails to identify the criteria for judgment independently of that judgment. In short, it does not offer the judge guidance.

The well-known American case of Erie Railroad Company v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) illustrates this point. A tort case arising in Pennsylvania, suit was brought before the federal district court under diversity jurisdiction.[12] The (ultimate) question was whether Pennsylvania state or general federal law should apply. On

appeal, the United States Supreme Court held that a direct precedent, Swift v. Tyson[13] which had held that general federal law ought to apply pursuant to Congressional statute[14] in such diversity cases, was applicable but wrongly decided, and state law ought to apply. Swift was reversed, the statute reinterpreted, the case remanded to determine the parameters of Pennsylvania law, and the doctrine of general federal law in diversity cases abolished.

What would Hart say of Erie? At the time the case was pending, there had been a strong case-in-point holding, written by Justice Story (acknowledged to be the leading federal scholar and jurist of the century), and ninety-six years of massive and confirming case law on the matter. It would seem that this is not a 'previously unenvisaged case', nor is it one where reference to the consensus among officials or judges would have successfully forecast a solution. The judges in Erie looked to the existing rule, and found it wanting. Hart might argue either that Erie changed the pre-existing rule of recognition or that it did not. If it did not, then the rule here would be something of the sort that Supreme Court judgments are supreme, and that that court declares the primary rules. However, if the court is not bound, then the need for rule of recognition is gone. That court does what it wishes without restraint. The finality of a judgment becomes equivalent to its validity. If the rule is supposed changed, on the other hand, then consistency is

preserved at the cost of utility. Every overturning and even modifying of a rule becomes cause for changing the rule of recognition, and such a rule becomes merely descriptive of the legal system for a brief duration.

The problem lies clearly with Hart's desire for a single unified rule to explain how a legal system works. In fact, such a rule needs to provide existence conditions for a legal system.[15] Hart fails to see that a society can operate quite well with several rules of recognition vying for ascendancy. The decision in Erie represented a different view of the doctrine of precedent, of the authority of constitutional state decisions, of federalism and the sharing of power, and of statutory interpretation. It was a view at times present on earlier courts, where it was always outnumbered.[16] No single rule of recognition can capture such different views, rooted often in competing political and ethical beliefs, but such diversity is characteristic of legal systems generally.

Hart could claim at this point that, for him, a legal system implies a single rule of recognition, and thus the most that the above argument suggests is that at the time of Erie, several legal systems operated within the United States. In that case, however, the rule of recognition loses much of its explanatory force. One cannot simply look to a given set of officials and automatically secure a rule of recognition, for it is possible for such officials to disagree in basic ways.

Disagreement, then, would not imply no legal system, but several legal systems. All this is far from the tone of Hart's discussion of legal systems. Hart speaks of the possibility of more than one legal system in a society at the same time, in those situations when revolutions or civil wars occur. He speaks of the 'breakdowns' of such systems. This is quite different from the type of variety of normative schemata discussed here. (It is also far afield from the normal use of 'legal system', which, in ordinary language does not extend to the case of many distinct instances within an ordinary society). The pluralist claim is that many different judicial views (or Hartian legal systems) can co-exist and are likely to co-exist within a given society. It is necessary to see why Hart consistently fails to notice this.

The first reason is that he confuses consensus with similarity, a distinction made in Chapter II of this thesis. 'Consensus' was taken to denote an agreement on first and second order propositions due to shared beliefs. This seems to agree with Hart's use of the term, as when he looks to a consensus of officials on which to base his rule of recognition. Of course, in a system such as the one Hart has always before him, modern England, agreement is high. But this is because the similarity of lower-order propositions between competing views is great. Hart sees the seminal cases as marking the boundaries of consensus. Rather, they are better seen as demonstrating the

failure of presumed consensus. One interesting feature of Erie is that it allowed expression of differences on issues that normally might not be allowed to surface. The court held that scholarship could be used to impeach a statutory construction given by a previous final court, that constitutional questions may be discussed even when they had not been briefed by counsel, and that state decisions have a diminished role in constitutional issues, all positions on which there was dissent. If one were determining the law of the United States federal courts in the first half of the twentieth century, and the Erie case had not arisen, one might well have agreed with the dissent as to what the law was (what first and second order propositions were true). Yet the members of the court, in writing opinions prior to Erie, and usually reaching agreement with the members of the Erie dissent, were all along latently holding beliefs opposed to the dissent. There existed intersubjective agreement that a Hartian might easily mistake for true consensus of judicial view.

2. Judicial Discretion

A central point of disagreement between the positivist and the pluralist is the problem of judicial discretion. "Discretion" is a complicated concept and will be taken up at some length in Chapter VI. What we will discuss here is the problem of whether the positivist conception of discretion

is viable; whether it can be made attractive without collapsing into the pluralist concepts.

It might be well to state the competing conceptions. The positivist position (as we are calling it) begins its analysis with a set of rules, unified in origin and consensually agreed upon, as the basis for settling most potential judicial problems. Most cases fall under this set of rules, and are thus easy cases, for once the rules are identified, then solution of the issues within the case is an easy matter. Some cases are not covered by this set of rules, and here discretion must be invoked to settle them. In these hard cases, the judge employs a different method for solution. The pluralist position begins with a judicial view, individually held, unified in theory rather than by origin, and thus possibly eclectic (vis-a-vis other judicial views). Cases are not divisible between those falling under rules and those not doing so. Hard cases do occur, however, when anomalies, contradiction, or unforeseen and distasteful consequences arise from the imposition of the view on individual cases.

As stated, the positivist position is open to a number of criticisms. It seems to ignore the actual decisions of a court: these decisions are written and reasoned in much the same manner in all cases, without regard to a case's difficulty. One sees the same reference to past cases, incorporation of relevant norms, and legal reasoning chains in virtually all cases.

The position, without more, fails to tell us how to recognize a potentially hard case, when the criteria for determining inclusion in the set of hard cases are themselves a matter of controversy. It also fails to give sufficient guidance for the resolution of hard cases. If the social thesis holds, then regarding these cases, there is no answer to the first order judicial questions raised, making judges the double villians as unguided dictators of outcome and confounders of the two-valued logic rules they use to justify their decisions as being legally correct.[17]

Finally, the positivist position allows for neither a continuum of difficulty among cases nor for logically different kinds of difficulty being encountered. Cases are either easy or they are not. Two and only two types of analysis are called for, despite a range of either hybrid types that might benefit from a combined analysis, and despite cases being hard for different reasons - because they are de novo, are controversial, involve a contradiction between existing rules or conflicting past decisions, or fall outside any rules - not necessarily being susceptible to a single type of analysis.

These, and other criticisms,[18] have led to a restating of the positivist position by Professor Neil MacCormick in his Legal Reasoning and Legal Theory.[19] While MacCormick has other aims in the book (he sets out to explain the relevance of practical reasoning to legal theory and 'to advance an explan-

ation of the nature of legal argumentation as manifested in the public process of litigation and adjudication upon disputed matters of law '[20]), he does attempt to make tenable a positivist position on discretion in the face of criticism by Dworkin and others. He does this by setting up a twofold test for judging whether a case is easy. If both criteria are met, a case is easy, and not in need of discretion to resolve it. Meanwhile, the two criteria involve different uses of discretion if they are not met.

MacCormick, in the positivist tradition, begins his analysis with a system of rules, and defines hard cases as those not falling under those rules. However, he adds that if a case falls under a rule susceptible of various interpretations, it too is a hard case.

> "What makes a case clear in law is that facts can (it is believed) be proved which are unequivocal instances of an established rule; but the established rules are susceptible of variant interpretations depending on the pressure of consequentialist arguments and arguments of principle. To be confident in advance that one has a clear case, one must be sure both that it is 'covered' by a rule, and indeed by that interpretation of the rule which is best justified by consequentialist arguments and arguments of principle - whose application will not offend judicial conceptions of the justice and common sense of the law."[21]

The two criteria are intended to be complimentary, despite the wording of the quote. A hard case can either fall outside the rules, or it can involve a controversial rule. That the two criteria can conflict is a problem MacCormick does not discuss.

Let us suppose that a case arises well within existing rules. The rules in this case had been considered susceptible of only one interpretation. This is a paradigm easy case. Such a case might have been thought to be Allegheny College v. National Chautauqua County Bank of Jamestown.[22] The case involved a suit upon a charitable subscription. A promise was made for payment upon the death of the subscriber. The executor refused to pay the balance due, claiming that the transaction was neither a gift nor a valid contract, and the college brought suit. Two well-established rules were relevant to the case. First, a valid gift occurs when the donor has capacity, intention to make a gift, has completed delivery to or for the donee, and acceptance has been made by the donee.[22] Under this rule, Allegheny College did not receive a gift, for no delivery was made. The offeror in the case termed the sum a gift, and it seems to be, under the rule, a failed one. Second, promises made without consideration or detrimental reliance are not enforceable. More specifically, bilateral contracts require an exchange of promises. Under the facts of Allegheny, the consideration was "in consideration of my interest in Christian education, and in consideration of others subscribing", consideration not normally adequate at law. Certainly, no binding promise was made by the college to do some act, as the offer was never accepted; nor was an act done by the college that would constitute performance. It would seem that no con-

tract was made.

If it is clear that the case falls under those two rules, it is equally certain that the rules were not considered susceptible to various (relevant) interpretations. There is no debate about whether 'delivery' is necessary or what it means. There is further no question as to the certainty of 'consideration', or the fact that, under traditional interpretations, it is not met here. However, the court in Allegheny, while recognizing all this, decided in favor of the college. It held that the acceptance of the subscription on the part of the college implied a promise to execute the work contemplated and to carry out the purposes for which the subscription was pledged. The implied promise was held to furnish a sufficient consideration for the subscriber's promise.

MacCormick has two possible responses open to him regarding the Allegheny case. He could say that it is an easy case: it is just wrongly decided. Clear rules were disregarded. There are difficulties in taking this position. The case was decided by a brilliant jurist, Benjamin Cardozo, and has been widely acclaimed[24] and widely followed as persuasive authority in other jurisdictions.[25] More telling, perhaps, is the ordinariness of the decision in modifying a body of case law. A general rule, announced in many past contract cases, had an exception for charitable subscriptions read into it. Reworking of general rules to fit situations unforeseen at the times the rules were

formulated is a general feature of case law. If MacCormick's classification of hard and easy cases is meant to reflect how case law develops, characterizing decisions like Allegheny as wrong leaves a gap in his description. It also leaves MacCormick with a burgeoning set of wrongly decided cases. The consistency principles he invokes throughout his work[26] would force him to either call for sharp and repeated reversals of members of the set of positivist rules, or make him turn his back on the social thesis of recognizing followed decisions, in favor of an embedded body of outlaw decisions.

However, one could classify Allegheny as a hard case.[27] Both the majority opinion and subsequent commentators present novel approaches to resolution of charity subscriptions, and make convincing arguments why such subscriptions ought to be distinguished from ordinary cases of gratuitous contracts or undelivered gifts. Although the language of the bequest was vague and general, it did specify certain limited uses for the money. The majority found the acceptance of the subscription by the college to imply a promise on its part to execute the work contemplated and carry out the terms of the bequest. The college's implied promise was said to be sufficient consideration to balance the subscriber's promise.[28] Other writers have argued that, in such cases, the promises of the subscribers mutually support each other. The subscription contract is thus a bilateral contract between subscribers of which the charitable organization is a donee

beneficiary. This holds despite the fact that the subscribers themselves never bargained. This interpretation would suggest that the case was not covered by the 'consideration' rule. The court's reasoning would argue for the 'consideration' rule applying, but not with its traditional interpretation.

The problem with saying that Allegheny is a hard case is that it seems to allow that any case rationally argued by two sides is a hard case. Past framings of the contract rules laid down general rules for Allegheny, and the court disregarded them. New rules, similar to the old rules, can be formulated, but they are not the same as the old rules.

Reference needs to be made to MacCormick's requirement of consistency, touched on above. He labels this requirement, generally, the 'validity thesis', and claims it is a necessary tenet in any positivistic scheme. This requirement

> "presents law as comprising or at least including a set of valid rules for the conduct of affairs: such rules must satisfy the requirements of consistency, at least by including procedures for resolving conflict."[29]

There is a specific corollary, according to MacCormick, to this rather vague requirement: "Thou shalt not controvert established and binding rules of law."[30] One ought not to disregard rules merely because of policy considerations or desirable consequentialist-determined goals.

The 'validity thesis' affirms the primacy of rules, and establishes the scope of hard case discretion: namely, the

conceptual space between rules. It is quite different in approach from the pluralist position. Rules are expendable for the pluralist. I want to argue first, that the validity thesis is either self-contradictory or trivial, and second, that any attempt to see Allegheny as a hard case results in compromising the 'validity thesis'.

According to a straightforward interpretation of the validity thesis, Allegheny violated existing rules and was thus wrongly decided. However, after the decision, Allegheny bacame a basis for further decisions. This would mean that the rule of charitable subscriptions would be altered, but also altered, just as surely, would be at least one rule of precedent. Allegheny would stand for the proposition that exceptions could be carved out of clear and controlling rules when certain (not named) conditions are met. Thus, once Allegheny is handed down and followed, the validity thesis as a rule of the system no longer holds. This indicates the perhaps obvious point that positivism is only a contingent property within a judicial system, and false within certain actual systems. If it is argued that Allegheny does not impair the validity thesis as a second order proposition about judicial statements, it may be asked what counter-example could. At any time, a system can be thought consistent and rules be defined and binding, but 'rules' would here take on a fatal ambiguity. A rule would not be a normative proposition guiding

action, but a proposition that would be impossible to contro-vene. Such an interpretation of the validity thesis renders it of no interest for understanding judicial reasoning.

Hard cases are those meant to be outside disposal by a reference to the validity thesis. Something like the validity thesis is common, as MacCormick points out, to all positivist or rule bound theories. As Allegheny is obviously covered by a rule -- the rule of contract consideration -- then it is a hard case for MacCormick only because interpretation of the rule is difficult or ambiguous. We saw, however, that the validity thesis is not a guarantee that rule-following is sufficient to duplicate the results reached in actual cases. Thus, in settling a hard case, both the rule and the interpretation may always remain open. MacCormick instructs us to use consequentialist arguments to settle hard cases. But these are surely not meant to be purely consequentialist without resort to the judicial rules. If that were so, he would be endorsing a pluralist position of putting judicial view before rules. But if this consequence is to be avoided, MacCormick must find a way to limit the category of hard cases. Some principle of rule-following to define a set of clear cases is not easily formulated, as seen from the fortune of the validity thesis. An appeal to consensus only works as long as the sides agree. The fact that a reasonable challenge arises as to the difficulty-status of a once-considered-to-be an easy case itself

negates the possibility of consensus.

Two final points need to be made. First, there has been an implicit appeal to 'reasonableness' as a concept for assessing how a decision ought to be decided. 'Reasonableness is meant here as a weak concept, sufficient to screen out any arbitrary, trivial, or irrational challenge that might be made to a rule, a case, or a position, but not strong enough to support a theory as to how cases should be classified. As our views change with new political, social, and ethical practices in society, what is or is not reasonable also changes. A more profound look at a position or simple observation of some of the consequences that have arisen from it can also change one's idea of what is reasonable.

The second point concerns starting point. The positivist begins with rules and continues with a way to supplement but not displace these rules. MacCormick suggests consequentialist arguments to supply the supplementation. A pluralist may endorse a consequentialist view, and use judicial rules along with general means/ends analysis to formulate first order propositions. However, the pluralist position uses rules consequentially, while the positivist accepts rules regardless of his opinion of their consequences. If MacCormick is forced to see all cases as hard, he effectively has given up the fundamental positivist premise.

3. The Social Thesis

The positivist tradition has always included an empirical streak. This has been expressed by the statement that law is a social fact. Joseph Raz, in The Authority of Law,[31] explains the social fact slogan.

> "The view of law as a social fact, as a method of organization and regulation of social life, stands or falls with the two theses mentioned. At its core lie the theses that (1) the existence of a legal system is a function of its social efficacy, and that (2) every law has a source."[32]

The first thesis requires things denoted as laws to be those actually obeyed, while the second limits membership in the set constituted by the first thesis to those originating from a certain source. Positivists look to social practices and can thus avoid ephemeral theories or constructs. The sources thesis is essential to locating the correct social practices, to giving certainty to the structure of rules. If one cannot locate the source of the prescriptions on which Raz bases the legal system he describes, then one is lost.

Early in his book, Raz points out that there is a potential ambiguity in adopting the social thesis. One measure of law, say a particular statute or series of statutes, may require that disputes be settled with reference to moral considerations. Moral argument is not a traditional source of law for positivists. Raz calls the thesis that sources may multiply derivatively the weak thesis.

> "The difference between the weak and the strong social thesis is that the strong one insists, whereas the weak one does not, that the existence and content of every law is fully determined by social sources."[33]

Thus, for Raz,

> "a law has a source if its contents and existence can be determined without using moral arguments (but allowing for arguments about people's moral views and intentions, which are necessary for interpretation, for example)."[34]

Raz endorses the strong thesis, and it is this one that we shall examine. He gives two related arguments in its favor. The first is that the strong or social thesis "reflects and explicates our conception of the law."[35] Raz runs through a series of distinctions -- legal expertise v. moral enlightenment, applying law v. creating law, settled law v. unsettled law -- and suggests they are integral to our understanding of judicial systems. The first members of each distinguished set are related. They refer to and help explain both the certainty of law, and the method of investigating legal contests through the use of technical skills. The sources thesis suggests that one looks to certain sources to find this contest. When there is no source, the second member of each distinction comes into play. Raz's second argument is that these distinctions and the conception they support reflect a deep truth, and one ascertainable through exploration of the sources thesis, about the function of the judicial system in society. The argument is this. Societies distinguish between authoritative rulings

and non-authoritative expressions.

> "This marking-off of authoritative rulings indicates the existence in that society of an institution or organization claiming authority."[36]
>
> "Since it is of the very essense of the alleged authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in a justificatory (moral) argument."[37]

Thus Raz wishes to separate what is essential in authoritative (and legal) expressions from what might also (contingently) happen to characterize specific authoritative statements. In so doing, Raz wants to eliminate moral or value considerations from authoritative rulings. His suggestion that the sources thesis reflects ordinary conceptions assumes that ordinary conceptions do not, rather than cannot, include value-laden reasoning within them. The sources thesis is a contingent thesis, falsifiable when societies employ value-laden behavior and label it as such.

A problem about the sources thesis is that it seems to concede too much. Hard cases, however decided, fall outside the normal purview of authoritative decision-making. Raz admits that "the sources thesis makes them (gaps or hard cases) unavoidable since it makes law dependent on human action with its attendant indeterminacies."[38] For these hard cases, he argues there are no correct answers. Presumably, one might settle these cases through resort to value reasoning. Raz points out two instances of such cases, those "where the law speaks with an uncertain voice (simple indeterminacy) or where

it speaks with many voices (unresolved conflicts.)"[39]

If a certain decision is correctly decided, it must for Raz be so because of its agreement with the answer dictated by the source thesis. A hard case cannot be rightly or wrongly decided, but it is left open, exempt from determination by the sources thesis, and capable of being settled through moral reasoning. After the decision of a hard case, does such a case become part of the general body of law and a source of further decisions? It is at this point that Raz is faced with a contradiction. The judicial decision is an authoritative source for future decisions and thus must be obeyed. Yet the decision incorportates illegitimate moral reasoning and stands for, among other things, moral reasoning as allowable in reaching decisions. If allowed, the hard cases serve as a counter-example to the sources thesis. If rejected, the sources thesis does not incorporate the decisions it claims to incorporate.

Raz employs a curious argument in defense of his theory, and one he might reiterate in the face of this thesis's criticism.[40] He claims that it is an essential part of the function of law in society to provide publicly ascertainable ways of guiding one's behavior and regulating aspects of one's social life in conformance with the prevailing authority. The public nature of legal standards prevents members of society from being excused from non-conformity by challenging the justification of the standard. Thus a distinction must be made and enforced between the activity

of extracting from public sources legal standards and engaging in moral reasoning in a limited number of peripheral cases. That part of a hard case which endorses moral reasoning is thus rejected, while stricter rationes decidendi would be allowed to stand.

There are several problems with this (possible) response. It would require a rethinking of the concept of precedent and a reworking of the notion of 'public' to account for all the secret laws and proceedings found in political history.[41] Moreover, it emphasizes the importance of access to authoritative standards when it is conformity to such standards that is important. In a society with rational laws and a rational citizenry, access will aid in making conformity possible, but one can imagine other social situations. A society with many ignorant members may have laws that are designed to reflect their mores and customs, and can thus achieve a high degree of conformity, as with, possibly, a protectorate state governing a backward archipelago. Conversely, we can imagine a repressive regime where highly educated persons routinely and knowingly break the law. If in neither of these situations is fairness achieved, this ought to be irrelevant to the positivist.

There is a different kind of mistake in Raz's hypothetical response. He is suggesting that moral argument is susceptible to a kind of criticism not good against expressions of authority; namely, if the moral argument is shown to be faulty, it

can be challenged. Thus, if moral argument were allowed on a regular basis in judicial decision-making, it would incorporate this vulnerability into the judicial decision. Raz seriously overestimates the invulnerability of authority while arguing incorrectly that value statements are peculiarly more impeachable than other statements. Courts are often wrong in their reasoning. They commit errors in inference, implication, make category mistakes, and adopt faulty premises. The United States Supreme Court decisions holding that tomatoes are not fruit[42] or that women are not persons[43] were acknowledged at the time to be biologically incorrect. The incompetency of the courts, their lack of expertise, did not affect their authority or obedience to either decision. One could challenge the scientific basis of the decision, just as Raz worries that if moral reasoning were allowed, one could attack the ethics of those decisions. Repeated incompetency in reasoning could eventually undermine the authority of the judicial system, but this would occur regardless of whether the incompetency was value-laden, scientific, or logical.

It should be noted in conclusion that the impetus for the sources thesis would be preserved under pluralism. The distinctions between settled versus unsettled law, legal versus moral talk, and creating versus applying law would remain,

though perhaps within a different terminology. The last distinction would be the most altered. As one would not be limited to legal forms, but could draw upon the larger set of third order propositions, then, if one had a sophisticated, non-inconsistent judicial view, one could always find a unique answer to first order questions. However, one could still distinguish, if one wanted, between first order propositions traceable back to legal forms and those not so traceable. Given that vagueness, overdetermination, and inconsistencies would still occur, cases could be considered to be harder or easier. However, when a hard decision requires that such vagueness, overdetermination or inconsistencies be resolved (at least in part), one would not be strictly speaking, just applying law. The shuffling property could be called indeterminacy, but as mentioned earlier, it is a shifting indeterminacy, one whose resolution is an individual matter. One can be inconsistent in first order propositions without the justification of conflicting larger social principles. Thus an easy case could be wrongly decided, and a failure to apply law would occur.

The purpose in criticizing these three positivist ideas -- the rule of recognition, the distinction between binding easy cases and non-binding hard cases, and Raz's social thesis -- is not to suggest that the positivist picture of adjudication is irreparably wrong. Rather, it is meant to suggest that such an approach is difficult, misguided, and unhelpful. The

positivist assumes a unity of belief among the bench that is contingent at best, and false in many societies. By looking at judicial decision-making in terms of individual conceptions of judicial role and view, one is able to explain legal change, while at the same time being able to understand why there is normative regularity in the case law. The judicial pluralist thus is able to reject the positivist assumption that there is a discoverable set of rules that characterizes a society's legal system without abandoning the empirical approach of observation that the positivist cherishes.

[1]Positivists tend to be prolific in their writings. However, the most important works of the authors mentioned, in commitment to legal positivism are: Jeremy Bentham, Of Laws in General (ed. H. L. A. Hart, 1970), Introduction to the Principles of Morals and Legislation (1789); John Austin, TheProvince of Jurisprudence Determined (1832), and Lectures on Jurisprudence or the Philosophy of Positive Law (1863); T. E. Holland, Elements of Jurisprudence (10th edition, 1906); John Salmond, Jurisprudence (1902); John Chipman Gray, The Nature and Sources of the Law (1909); Hans Kelsen, General Theory of Law and State (1945) and The Pure Theory of Law (1967); H. L. A. Hart, The Concept of Law (1961); Joseph Raz, The Concept of a Legal System (1970) and Practical Reason and Norms (1975).

[2]See Joseph Raz, The Authority of Law 37-52 (1979). This definition is a refinement of the picture he presented earlier in Chapter 5 of Practical Reason and Norms (1975).

[3]Hart's analysis is found throughout The Concept of Law. See particularly Chapters V and VI.

[4]Concept at 107.

[5]The criticisms of Hart's theory have been voluminous. Hart himself includes a partial listing in his corrected edition, published in 1967, at pp. 257-258. The muddle in Hart's scheme is exposed clearly in Rolf Sartorius, "The Concept of Law" 52 Archiv fur Rechts-und Sozialphilosophie 161 (1966), reprinted in More Essays in Legal Philosophy 131 (ed. Robert S. Summers, 1971). His view is endorsed here. Joseph Raz attempts to modify Hart's rule of recognition without destroying it, in Practical Reason and Norms 146-148 (1975).

[6]See Ronald Dworkin, Taking Rights Seriously 14-130 (1977).

[7]Both Raz and MacCormick attempt to save the rule against Dworkin's criticism, but it is questionable as to whether their salvation is successful.

[8]See MacCormick, Legal Reasoning and Legal Theory 54-56 (1978). MacCormick labels the problem one of apparent circularity, but he does not adequately explain how to break the circle.

[9]See Concept at 20-21.

[10]Quotations are from Concept at 99-100.

[11]Concept at 149.

[12]Under Article III, Section 2 of the United States Constitution the judicial power of the federal government is extended to controversies between citizens of different states. The defendant railroad was a New York corporation and Tompkins was a citizen of Pennsylvania.

[13]16 Pet. 1, 10 L. Ed. 865 (1842). Actually, the case was reversed only on the jurisdictional issue. It remained as authority for the fact that a pre-existing debt was a good consideration for an endorsement of a bill of exchange, so that the endorsee would be a holder in due course.

[14]The statute was Section 34 of the Judiciary Act of 1789, 1 Stat. 92, now in slightly altered condition 28 U.S. C.A. §1652. Called the Rules of Decision Act, it provided that "the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

[15]Hart states that there are two minimum (existence) conditions for a legal system: valid rules must be obeyed and society's 'rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.' Concept at 113. He explains on pp. 114-120 how a system tends to break down (becomes more or less pathological) to the extent that these conditions are not strictly met.

[16]Judge Field argued against Swift v. Tyson in his dissent in Baltimore and O.R. Co. v. Baugh, 149 U.S. 368, 13 S. Ct. 914, 923, 37 L. Ed. 772 (1893); as did Justice Holmes in his dissent in Black and White Taxicab Co. v. Brown and Yellow Taxicab Co., 276 U.S. 518, 532-536, 48 S. Ct. 404, 408-410, 72 L. Ed. 681, 57 A.L.R. 426 (1928).

[17]Raz defends a three-valued logic -- truth, falsity, and indeterminacy -- as a better way of evaluating judicial statements (The Authority of Law 53-55). Dworking has attacked the viability of such a logic in Taking Rights Seriously 279-290.

[18]For a partial listing of works containing well-known criticisms, see note 5.

[19]Published in 1978 by Oxford University Press.

[20]Legal Reasoning and Legal Theory at page 7.

[21]Legal Reasoning and Legal Theory 277-228.

[22]246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980 (1927).

[23]See In re Greenberg's Will, 286 N.Y.S. 56, 58, 158 Misc. 446 (1936).

[24]See, for example, Arthur L. Corbin, "Mr. Justice Cardozo and the Law of Contracts," 39 Colum. L. Rev. 56, 60, 52 Harv. L. Rev. 408, 412, 48 Yale L. J. 426, 430 (1939).

[25]See Danby v. Osteopathic Hospital Association of Delaware, 34 Del. Ch. 427, 104 A. 2d 903 (1954).

[26]This is sometimes referred to as the 'validity thesis', at other times merely as logical consistency. See Legal Reasoning and Legal Theory 195-228.

[27]MacCormick states that cases move along a continuum from easy to hard (page 228), but in his analysis, cases are hard if they meet certain criteria only, and for such cases, discretion applies and a different analysis than rule-following is called for.

[28]"The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund. The moment that the college accepted $1,000 as a payment on

account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money and hold itself free thereafter from personal responsibility to give effect to the condition," (from the majority opinion of Allegheny). It is unclear what offer is being accepted by this implied promise, however. Certainly, the offeror asked for no such promise, merely performance. Moreover, it seems certain that the college undertook no such open-ended commitment to forever do everything necessary to maintain such a memorial. What if only $.02 had thus far been paid by the late Mary Johnston?

[29] Legal Reasoning and Legal Theory 107.

[30] Legal Reasoning and Legal Theory 195.

[31] Published in 1979, by Oxford University Press.

[32] The Authority of Law: Essays on Law and Morality (hereafter called 'Authority') 152.

[33] Authority at 46.

[34] Authority at 47.

[35] Authority at 48.

[36] Authority at 51.

[37] Authority at 51-52.

[38] Authority at 73.

[39] Authority at 77. An example of an uncertain voice might be product liability law in England prior to Donoghue v. Stevenson [1932] A.C. 562; 1932 S.C. (H.L.) 31; of many voices might be the law of charitable subscriptions in New York State prior to Allegheny College v. National

Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980 (1927).

[40]This argument is found in Authority, Chapter 3.

[41]Raz concedes that not all laws are open. He states that secret laws are possible provided they are not altogether secret. Someone must know their content some of the time.' Authority at 51, n. 9. Every law meets this test as does every putative law. Someone must have known of it to iterate it. A further stipulation saying that secret laws must be known to certain officials only moves the problem back a step. In every society, many individuals and some officials (including judges, as is evidenced from the number of successful appeals which reverse lower-court holdings) are ignorant of legal standards. Further, if moral reasoning is to be considered as a part of judicial reasoning, then, one can be knowledgable of that part of judicial reasoning, in that such reasoning can be duplicated. To a limited extent, this type of reasoning is public, and unable to be kept secret fully.

[42]Nix v. Heddon, 149 U.S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745 (1893).

[43]Bradwell v. State, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873).

TRUTH AND THE RESOLUTION OF JUDICIAL CASES

We have been, up to this point, examining several of the problems inherent in determining the status of judicial statements. Part of the time has been taken criticizing two types of theory which purport to answer the question: what are the grounds for making judicial statements. These theories -- skepticism and positivism -- suggest, respectively, that there are no belief grounds for judicial assertions and that grounds exist according to a master rule socially ascertainable within each society. This chapter will turn to the logic of, rather than the grounds for, judicial statements. This involves several of the same questions refocused rather than an entirely new set of questions.

Judges, lawyers, parties to law suits, and members of the general public all make putative judicial assertions. They say 'this contract is valid' or 'x is guilty of theft' or 'such-and-such state of affairs constitutes tortious negligence'. Regardless of the justification of such statements, some understanding of their meanings may be garnered from an analysis of the individuals' intentions who made them. For example, some understanding may be had of pre-Copernican astronomical statements, even if these statements were often or invariably wrong, by knowing what their speakers intended.[1] Of course, the sense

or meaning of a statement is closely tied to the way it can be found to be or be called 'true' or 'false',[2] but the grounds of assertion are initially based on what the speaker intends to assert.[3] Words that are scientifically false may be aesthetically compelling or brilliantly humorous. Meaning is contextual and context is tied to intention.

In the first part of this chapter, I want to examine a theory that says that judicial assertions are virtually always able to have the predicates 'true' or 'false' applied to them. That is, this theorysuggests that for each judicial question, one and only one right answer exists. When a speaker utters a judicial statement, he has in mind this truth, and judicial argument and discussion can proceed only because there exists an answer to be found. The second part of this chapter will outline a pluralist approach to the question, drawing on the analysis of the theory discussed in part one.

This chapter will defend the position that truth predicates can be meaningfully applied to judicial statements, but not in any simple way. Judicial statements are true or false only in lieu of an individual's own judicial view, and that view is not, in its basic premises, susceptible to bivalent truth-conditional analysis. One can thus make a mistake or be wrong about some assertion vis-a-vis one's commitments, but no proposition is true for a legal system just because it is implied by a theory or master rule that is necessarily valid.

It should be mentioned why no attempt will be made here to discuss judicial statements in the larger context of normative language. Certainly, judicial talk is largely concentrated on rules and rule-behavior, and many writers have found discussion of the normative category useful in their analysis of judicial statements.[4] However, the variety of norms makes any general grouping weak, and perhaps, confusing. For our purposes, it is necessary to keep in mind two distinctions between judicial statements and certain other types of norms. First, judicial statements are conventional while ethical statements, at least arguably, are not.[5] The practices of the community are thus critical to understanding judicial language. Second, judicial statements carry an authority that rules of games, for example, do not. Games often make sense only when seen as voluntary (consensually entered-into) activities. Law is not a voluntary activity, and thus reasons for obedience as well as objections to past interpretations of standards (custom and precedent) are weighed differently than in game situations. In general, the category of normative statements seems to be too broad to be useful here.

1. The 'One Right Answer' Theory

In a series of papers, Ronald Dworkin has developed a powerful theory concerning the meaning of judicial statements.[6]

While that theory involves an evolution in his thinking that allowed for certain alterations and thus inconsistencies when taken as a whole,[7] his theory might generally be stated in terms of the following four propositions:

1) For every actual and potential question faced by a sitting judge, there exists an answer to settle that question;

2) That answer is discoverable;

3) That answer is exclusive;

4) That answer is correct, it is the right answer.

Let us examine these propositions in turn, reconstructing the whole of his theory as we go.[8]

Dworkin's main point in his early papers was that every potential and actual question that a court faces has an answer.[9] His analysis was carried on via a critique of H. L. A. Hart's theory, particularly his theory of discretion. Dworkin claims that the standards employed in judicial reasoning are of two kinds; rules and principles. They are logically distinguishable, in that rules either apply to a particular case or they do not, while principles are weighed one against another. Principles individually do not require a specific outcome, but can modify the course of an argument. Dworkin did not believe that Hart accounted for principles as a standard used in adjudication; thus his (Hart's) model of rules was inadequate. Aside from

being a descriptive failure, it left a Hartian unable to handle hard cases, those not within the purview of rules alone.[10] Principles were Dworkin's tool for settling the hard cases. He said that in those cases, a judge has discretion to reach judgment. This discretion is not mere license. It requires the employment of principled reasoning, and this reasoning always guarantees an answer.

There are great difficulties in denumerating the relevant principles, though strictly speaking, it is unnecessary for Dworkin to do so. One might only be able to locate their sources generally and in an ad hoc manner. By Dworkin's own definition, the sources of the principles are eclectic, as no single pedigree captures them. However, if one is uncertain of the extent of the full set of principles, it is unclear how one can be certain that every possible case is covered within the scope of these principles. The vast number of principles is not of itself a sufficient condition to imply completeness. After all, Dworkin has rejected as incomplete the set of rules that Hart discusses, a set both large and extensive. Yet this latter set is well-known, through inspection, to be incomplete. Without such inspection, it might seem risky to believe the set of principles to be complete, a priori.[11] As principles are tied to particular legal systems, the fact that certain systems have extremely broad and numerous principles is no guarantee that every system will

contain such principles. It is difficult to see how, in theory, such completeness could be insured in advance.

Dworkin's second proposition is that the answer to every judicial controversy is discoverable.[12] This is an epistemological rather than a logical assertion. Dworkin sees the set of principles as both sufficient to solve every potential problem and manageable according to some algorithm for actually using them. Of course, principles play a prominent role for Dworkin only in hard cases. While he never delineates the distinction between hard cases and easy cases, the test he seems to be using is the positivists': if a case falls squarely under a clear rule, then it is easy. While Dworkin denies the existence of a master rule or rule of recognition,[13] clearly rules somehow play a part in ordinary cases, and these rules are ascertainable. Resort to legal forms (past decisions, statutes, constitutions, treaties, edicts, and custom) might be the likely source. While principles always figure in deciding a case, when rules 'run out' or 'leave gaps', principles become the dominant factor.

Not just any principle will do in adjudication. Dworkin outlines a procedure for finding the right principles, and thus arriving at the right answer. He asks us to examine all past legal forms, with their embedded rules and principles. This may involve certain inconsistencies when taken as a whole. Instead of using propositions contained in past forms directly,

one must seek a unifying political theory that justifies the legal forms when surveyed in their entirety.[14] A theory must meet a minimal threshold degree of fit to be considered (although how this threshold is determined is not discussed by Dworkin). Then, if several theories meet this degree of 'fit', that theory which best justifies the whole is the one to be accepted. This theory will locate both the apparent principles that derive from it, and even any hidded principles -- such as the principle guaranteeing a right to privacy in tort law[15] -- that were latent in past decisions or statutes.[16]

There are a number of technical difficulties in this method. A great deal rests on the point at which an easy case turns into a hard one, a point often difficult to locate.[17] Moreover, within Dworkin's theory, there is a case to be made that one could see every decision either hard or easy. As easy cases are those with clear, self-applying rules without interfering principles, it is hard to find a member of this category. Dworkin suggests Riggs v. Palmer,[18] the case of the legatee who had murdered his testator defending a suit to deprive him of the benefits of the will, as a typical hard case.[19] Dworkin begins his discussion by quoting what the court recognizes as the rule applicable in the case:

> "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances

> be controlled or modified, give this property to the murderer."[20]

Both Dworkin and the court give the rule short shrift, but it is a paradigm example of a rule that is clear, self-applying, relevant, and uncontradicted by any other rule. Such a rule should make for an easy case.

The fact that a principle does apply to Riggs, and adequately, in Dworkin's and the court's opinions, disposes of the case, seems to make it, in a different way, an easy case: it mirrors the structure of paradigmatically easy cases. One looks to the relevant standards, be they rules or principles, and simply applies them to the case. One is required to do so, and 'discretion' as a relevant concept seems only to mean that more than rules needs to be considered. Certainly, no special freedom ought to be inferred, nor is any special mental acuity needed. Dworkin's choice of a perfect judge, Hercules, is thus apt.[21] Hercules was a man of great physical strength, the sort of strength that might allow him to labor successfully to examine all relevant standards. His unextraordinary judgment appears to be sufficient to solve any case.[22] The ubiquitousness of standards and their automatic application seems to make all cases easy.

There is a larger difficulty for Dworkin in the demarcation between easy and hard cases. Dworkin's method for constructing a political theory to handle what are, at the least,

controversial cases relies on a large residue of easy cases being available. The two-part claim for the political theory is not that it is equitable, just, or politically efficacious, but that it justifies past cases and statutes. In order for a justification to be measured, there must exist a substantial set of straight-forward easy cases, a condition Dworkin implicitly recognizes, among other places, in his discussion of the gravitational force of precedent.[23] The easy cases, or at least their rationes decidendi, serve as propositions on which the political theory rests. For the theory to get off the ground, to have enough data to draw from, there must be this large set of easy cases. If only a few cases are in that set, theory construction would largely be a matter of political and ethical preferences alone. The few cases available would underdetermine the political theory, such that Dworkin's third proposition would be impossible.

The third proposition states that there is a single, exclusive answer to every judicial question.[24] He advances this proposition through two quite different arguments. The first is the argument from logical negation. While the argument involves symbolic manipulation, it can be stated as claiming that once it is recognized that judicial judgments may be made which allow for truth values being assigned to propositions of law, then it is not possible to restrict the assigned set of

judgments. Thus, for any proposition, to deny that that proposition is either true or false is to engage in a contradiction. (We shall not take up this argument directly as it claims only to be refuting (Hartian) positivism[25] and is, in any case, linked in more accessible terms to the argument from the best evidence and his fourth proposition.) The argument focuses on the difficulty in keeping separate negation within a system of proposition ('it is not true that p') and negation outside such a system (for some system S, it is true that not-S(p)).

What can be considered a component of this first argument, but one we shall consider separately, is the argument from the best evidence.[26] This argument states that once one looks to the relevant rules and principles, one finds a single answer to judicial questions. Even when there is controversy as to the outcome, one looks to the evidence presently available, and that evidence serves as the sole basis for decision. In effect, an answer cannot be denied because of underdetermination, for whatever reasons are listed: these are sufficient. The reason that an answer is guaranteed is due to what Dworkin calls the terms of the judicial enterprise. Parties to a suit are participants in a common enterprise that by its rules requires a single answer. They (the judges) are not given the luxury of waiting until a conclusive line of reasoning is put

forward: they must always decide cases, and they must use the best evidence that they presently have available.

Dworkin collapses the distinction between the external observer to a judicial system and the judge. The distinction would be this: the judge is required by some type of institutional responsibility to adjudicate the cases before him. His duty is to sift the evidence given him and decide the case immediately. The judge must, thus, decide on the basis of the best available rather than the best possible evidence. The external observer, on the other hand, can suspend judgment until a sufficient case is made in favor of certain position. If we hypothesize a situation where a theoretical issue is being discussed, and the evidence underdetermines the conclusion, then no single answer would be assertable by the external observer, although it would be so (assertable) by a theoretical judge. Dworkin, to be consistent, would need to claim that even for the external observer, as in observing he participates in a certain type of answer-requiring enterprise, a conclusion on the question is mandated.

This conclusion is not merely exclusive, though. It is correct. Dworkin's fourth proposition is that 'right' is not an inappropriate predicate to apply to the answers to judicial cases.[27] He suggests that lawyers commonly speak of cases being rightly or wrongly decided, and that they are justified

in doing so, as long as their assertions are grounded in a theory of law (captured in a larger political theory) that justifies the relevant cases and statutes.

> "A proposition of law may be asserted as true if it is more consistent with the theory of law that best justifies settled law than the contrary proposition of law. It may be denied as false if it is less consistent with that theory of law than the contrary. Suppose that this enterprise proceeds with the ordinary success of modern legal systems. Judges often agree about the truth values of propositions of law, and when they disagree they understand the arguments of their opponents sufficiently well to be able to locate the level of disagreement, and to rank these arguments in rough order of plausibility."[28]

Judges thus agree about what they are disagreeing about, and within this common frame of discourse are in fact arguing about what is right and wrong.

Dworkin states that it is common for lawyers to argue about whether a case has been rightly decided, and suggests that for those whose philosophical skepticism resists such usage, a short time spent actually studying law would cure them of their reluctance to endorse a single answer.[29] He says that anyone who studies law will find themselves wanting to assert the correctness of certain propositions, and will feel that these propositions must have a two-ordered truth value. While he does not use the term 'convention', it is the conventionality of judicial statements that gives them their truth-value, and the convention itself requires exactly one answer to every question.

Dworkin is here appealing to a common enterprise, one that all who make judicial assertions must participate in. This, as we saw in Chapter II, is a fundamental error. One can appear to be arguing about a proposition within a common enterprise, but actually be arguing from the perspective of quite different enterprises. This is not because of wide semantic divergencies, for the terms can have similar extensions when used by different parties.[30] Further, the parties to a dispute may believe they are right, that the others are wrong, and that it is the correctness of the outcome that is central to the dispute. Parties' beliefs may, however, be fallible, and the fact that they believe they are arguing about p does not imply that they are arguing about p (rather than conflating p with p'). Some pseudo-arguments imitate real arguments in seeming to focus on a single point, when the parties are using a parallel discourse to advance unalike propositions. (An example of this phenomenon elsewhere can be found in discussions on counter-factuals, which exhibit this characteristic generally).[31]

There is a more fundamental reason why Dworkin's reliance on a common enterprise is misplaced. A common enterprise consists of two distinct sets of standards. The external set is that which organizes the enterprise itself. Included would be the minimum criteria of individuation (such that an enterprise x could be recognized as an x rather than a y) and standards delineating how the enterprise is to be carried out. The set

of propositions that provides answers to judicial questions and allows that whatever solution has the best current evidence in its favor is a member of this external set. The internal set of standards are, here, the set of propositions of law (or put in normative terms, the operative rules and principles). They are answers to the questions that the external standards require to be answered. The discussion in specific cases always centers on members of the internal set. Individuals assert the truth of p, where p is some proposition such as 'this contract is valid' or 'B's activity constituted an attractive nuisance'. That truth is conventional, and is truth-conditiondependent upon the common enterprise. Dworkin uses the symbol L(p) to indicate this. The actual argument does not usually include talk of the enterprise, merely of the internal propositions. If one hypothesized the existence of the series $L_1(p)$, $L_2(p)$, $L_3(p)$,...$L_o(p)$ one could imagine those engaged in controversy regarding the outcome of a case to assume that they are discussing the truth value of L(p), without imagining that competitors (as symbolized by the above series) for the designation of 'common enterprise' exist, or specifying the identity of $L_o(p)$. Let us see how this might occur.

Suppose a case comes before a judge where each side cites a different set of precedents for its authority. Such a case might be one where a landlord P brings suit against his tenant

D for non-payment of rent.[32] D claims that P violated the implied warranty of habitability of the lease by failing to keep a secure lock on the building entrance. The flimsy lock in place was inadequate to keep potential assailants from wandering into the common areas of the apartment house, thus making D's own apartment room unsafe. P claims that the apartment is in a dangerous neighborhood, that D knew this when he moved there, and that he pays less rent because of it. P further claims that D assumed the risk of the dangerous neighborhood in choosing to live in P's building, and that it would be unreasonable of the court to demand that P install better and stronger locks and doors as part of a mental combat against the wiles of potential trespassers and assailants. D counters that an assumption of risk argument has no place in a property action, and points out its novelty. P cites a number of other instances where property law borrowed from tort law certain concepts, and notes that the whole idea of an implied warranty of habitability is itself an example of this borrowing.

The proposition being disputed is whether or not assumption of risk is a valid defense in a property suit to a claim of breach of warranty. The dispute will focus on certain precedents and the appropriateness of analogical argument from tort to property (or possibly contract). It seems to be a controversy about the truth of p, much in the same way as two

geologists might argue about the truth of some proposition, q, that dated a piece of shale. However, Dworkin admits that p, unlike q, is not a proposition that can stand alone (outside the rules of the enterprise). It is true or false in lieu of the external rules that define $L(p_o)$.[33] Do P and D necessarily agree on the definition of $L(p_o)$?

It is certainly true that they agree on many of its general features. Let us suppose, however, that they disagree on how limited analogical reasoning ought to be, on whether categories such as property, tort, and contract are indicative of isolated concepts that need to be kept separated or are merely shorthand for distinctive groups of cases, and what degree a concept of justice has played in restricting the property rights of landlords. P, who sees the case law as moving toward systemic consistency through reasoning by analogy and denies that ethical notions of justice are an important factor in this movement, has ample evidence for his position. This is not just because the case is easy (with no evidence for D's position, for some evidence does exist) or because the case is hard (for when a new theory of liability or new line of defense is presented, the case is in some ways to be considered easy, for without this novel approach it would be), for the case is, in its disagreement about precedent, quite ordinary. P's evidence is partly a function of the way he defines $L(p_o)$. P believes

that notions of property rights ought to be upheld while incursions of imposed responsibility for the welfare of others ought to be limited. In sifting the ambiguous and inconsistent legal forms, (and as a prior move, judging contenders from the set of putative legal forms), P employs these two (and other) beliefs to construct the set of valid judicial propositions, or in Dworkin's terms, to construct $L(p_o)$. As P's beliefs differ from D's, even if the suit P v. D had never arisen, P would assess the criteria for judging the outcome to a hypothetical P v. D differently from D. His political beliefs might suggest that property rights are paramount in the rights pantheon, while his ethical beliefs might suggest that responsibility for a person's safety ought, in normal circumstances, to rest squarely and solely with the said person. P may see the judicial system as generally supporting him, and treat counter-examples as mistaken aberrations. Finally, he may see systemic consistency as a central tenet of judicial decision making.

P and D seem to be engaging in a single argument, but they are in fact engaging in two distinct arguments. They disagree over the truth of p, the internal proposition which allows an assumption of risk defense to the breach of warranty of habitability claim. They also disagree over what common enterprise or convention ought to be used to settle the question

of the truth of p: should the convention emphasize property rights, inter-conceptual consistency, or judicial deference to the legislature in creating new defenses and claims. Regardless of the outcome of P v. D, this latter question will not be directly decided.

It is now easy to see where Dworkin's argument goes wrong. He is anxious to show that the law of excluded middle is violated when an indeterminate (or third) truth value is allowed in a convention which requires an answer.[34] However, the fact that parallel and similiar conventions can address the same questions and use the same criteria can mislead one into believing a single, authoritative, right, true answer exists, when such an answer exists only within the bounds of an entirely subjective convention.

There is an additional caveat here. It is Dworkin's assertion that a single answer is almost always required by the ground rules of the common enterprise.[35] This is an external claim, or claim about the parameters of the convention or enterprise. (In being 'external' as we have defined it, there is no reason why a judicial view cannot incorporate into its propositional schema the 'external' claims. It is a commonplace of logic that higher-orders may be collapsed into lower ones). It is a contingent claim, but one nevertheless that might be found to be true. For it to hold there must be little dif-

ference between finding an answer to an easy case and finding an answer to a hard case except for physical exertion. Dworkin simply has the judge apply an analogue (either rule-based for easy cases or rule and principle-based for hard cases) to arrive at a decision. Judges and lawyers talk of an answer and an answer is the outcome of adjudication.

Some of Dworkin's critics have felt that for certain cases, while an answer might be offered, it should not have quite the same status as answers in easy, straight-forward cases.[36] Let us put this objection in terms of threshold. Position A states that for a judicial proposition to count as true or right it needs to have a certain threshold of supporting evidence. A judge may have to decide cases by making use of one or another of competing putative propositions, but his averring to one does not make it true. The chosen proposition enjoys a twilight status, in limbo until further evidence is marshalled to either allow it full status as true or knock it down as false. Position B states that such a proposition enjoys the same status as any other true proposition. Dworkin would endorse position B.

There seems to be no logical or conceptual reason position A could not be valid, and there is some evidence that it actually is held and used by some lawyers and judges. For it to be logically viable, one would, among other things, have to assign a different weight to best evidence below-threshold propositions

than to threshold-surpassing propositions. Yet we can see evidence of this kind of distinction in common law precedent. Certain cases are given greater authority than others, while certain doctrines are, despite some case law ennunciating them, considered tentative.[37] Some answers would be right or wrong, while others would enjoy a tentative, best candidate position, awaiting further review. The difference would be in how subsequent decisions were settled. A permanent (or less temporary in a strict continuum classification scheme) member of the set of true propositions would be either determinative or highly persuasive in settling the subsequent decision. A temporarily placed member could be more easily disregarded. Conversely, a temporary 'right' answer could be overruled with less damage to the logic of the entire system.

There is a final objection Dworkin might make to the preceding criticism. We said that truth values would be assigned to judicial propositions only as a function of the convention of judicial reasoning. However, although conventions may be contingent in their construction, the choice of which convention is applicable within a jurisdiction is hardly random. Dworkin might want to argue that there is a correct convention, a common enterprise that is right. What, however, could be the definitive criteria for correctness here? Dworkin rejects consensus when he introduces the use both of moral reasoning[38]

and a theory of mistakes[39] in his theory of adjudication. The moral reasoning component requires that something more than social practices or a majority of beliefs be considered. A theory of mistakes suggests that independent criteria exist apart from judicial pronouncements for what the announced propositions ought to be. This set of criteria means that consensus alone cannot determine the results of judicial controversies, for consensus can be incorrect in meeting the independent criteria. If some set of beliefs rather than consensus is to be the test for convention, the problem remains: which beliefs? The truth or falsity of any proposition within a belief set is irrelevant to its being the correct belief set. In any actual society, no belief set is likely to be true without qualification, and verisimilitude might be a better measure. But even it fails. First, attitudes are as important as beliefs in detailing the parameters of a judicial convention, and these are without truth values.[40] Second, it is not the truth of a belief but the fact that it is held by a relevant individual that gives it its relevance. Beliefs in use form the basis of a convention. This is why Roman Law is nowhere law today while Nazi law was law in Germany between Weimar and the end of World War II.

2. The Logic of Judicial Views

We stated in Chapter II that judicial propositions that

are the result of a judicial view's answering a first order question are able to be judged within the view for their consistency and from outside the view for their rationality. If it is the conventional aspect that is most characteristic of a judicial view at its inception, once a view has been constructed, it must obey a certain non-conventional logic. Put another way, when a convention is being constructed, there is a certain arbitrariness to its components. Once the construction exists, and once it is concomitantly held by some individual, then that individual is, to some extent, committed to the set of propositions involved in answering the original first order question or set of questions. Consistency and identity of view over time demands such a commitment.

The scope of this commitment is a function of the individual view. This works in two ways. First, the degree to which one's past answers affect future answers will vary among views. That is, within a view, there may be a lesser or greater reverence for a conclusion once made. A slight degree of reverence would suggest a view where conclusions are always tentative and subject to review. Third order propositions would be seen as vague and incompletely worked-out. Conclusions drawn from them would have only a slight effect on future determinations based on these (third order) propositions. A high degree of reverence would mean that solutions to previous questions would

be determinative of virtually all future questions within their purview. The second parameter of scope function concerns the degree to which past cases are considered relevant to future decisions. Regardless of how much past outcomes are revered, one can imagine views where they are intended to have more or less relevance to the same or similar cases in the future. A view with third order propositions which emphasize view stability will consider past outcomes more relevant than a view where some other principle (or set of principles) is dominant.

In fact, however, while it is interesting to speculate on the nature and scope of a view and what can be implied from it, this process of individuation of a static view can misrepresent the way actual views behave. The key to understanding the behavior of views lies in understanding the fit between the set of answers a view implies and the set of answers given by individuals and institutions the view takes as authority. The fit is harmonious, for example, when the outcome of a case is just the same as the outcome given by one's judicial view. The tension for the fit will occur when the outcome of the case is not that called for by the view, when, in other words, according to the view, the case is wrongly decided. Let us imagine such a case.

For the sake of familiarity, let us take a case often considered to be wrongly decided, Lochner v. New York.[41] The

issue was whether the New York State limitation of working hours violated the Fourteenth Amendment to the United States Constitution, by infringing the right to freely contract, and otherwise interfering with one's personal liberty. Defendant-appellant Lochner had been convicted of violating the Act by permitting an employee to work in his bakery for more than 60 hours in one week, and had been fined by the state trial court. The United States Supreme Court held that the Act was a violation of the Amendment, and that the paternal aim of protecting certain workers from long hours was too remote a goal to be justified under a test requiring material danger to the public for the state to be able to interfere.[42] The court embraced a social theory which called for governments to be limited to their police powers, and explicitly denied them a role as redistributive agents or correcters of the wrongs of the unimpeded marketplace.[43]

> "It seems to us that the real object and purpose (of the New York law) were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."[44]

Let us suppose that an individual Z, supported a judicial view which, prior to Lochner, disapproved of judicial invali-

dation of economic regulations.[45] At the same time, Z had a high regard for the decisions of the Supreme Court, and Supreme Court opinions figured greatly in Z's judicial view. Z, ex hypothesi, believes Lochner is wrongly decided, but the fact of Lochner will alter Z's view.[46] That it cannot remain as it was is clear. If Z rejects Lochner, the third order position which mandated respect and authority for the Supreme Court will be altered. If Lochner is accepted, then those propositions which (taken together) suggest that the courts ought not to strike down economic regulations must be changed.

This point can be made more generally. A wrongly decided case must invariably involve alterations in a judicial view. This is because any case is a legal form, and forms figure in view construction. A view bereft of the input of legal forms becomes a political theory only randomly likely to be related to any actual judicial system.

One question that might be thought to arise is this: as a view is constructed to work out answers to new first order questions, does it remain the same view. We can see that if one individuates a view at a given time, it is likely to be similiar but not identical with its predecessors and its successors. Identity is fleeting while similiarity through view continuity is both likely and measurable.[47]

This does not appear to be Dworkin's theory on the matter,

although his theory has some difficulty when encountering wrongly decided cases. Returning to Lochner, let us suppose that there exists a great deal of evidence for Z's position, and furthermore, that Z has engaged in a Herculean labor in constructing a political theory prior to Lochner. Z's political theory was selected from a large set of worthy contenders, for the legal forms were at once consistent and vague, and a number of theories justified them to some degree.[48] One of the more important principles generated by Z's chosen political theory was one that stated that freedom of contract could be limited by legislation which protects the physical well-being of workers. If Dworkin assumes that Z is correct in his political theory and its implications, the question arises as to what he would recommend that Z do after Lochner. Dworkin's theory leaves him with only two choices.

One choice is to disregard Lochner. It is wrongly decided, aberrational, and the political theory will remain unaffected by it. Such a choice has the advantage of making construction of a political theory a not imprudent matter. The history of Anglo-American case law if rife with decisions that establish bold, new doctrines that were only to disappear shortly after adjournment, never to be followed or iterated again. (Lord Mansfield's dispensing with consideration in ordinary commercial contract cases in Pillans and Rose v. Van Mierop and Hopkins[49] is one well-known example of this phenomenon.) Keeping up with

each new case, especially when such cases can put forth short-lived doctrines, might require more theory-building energy than even Hercules possesses. Even if Lochner were not aberrational (as it certainly was not[50]) but a widely followed precedent, there are reasons for a Dworkinian to disregard it. Dworkin wants moral reasoning to play a critical role in judicial discourse.[51] If the wrongly decided cases generate malevolent principles -- as Lochner may arguably do in endorsing a Social Darwinism coupled with unregulated economic warfare[52] -- then reasoning may occur, but it will not be of the type that Dworkin wishes to label as moral. Finally, given the overall degree of controversy in the judicial arena, there are likely to be a fair number of wrongly decided cases. The chance of dramatic and frequent reversals in the relevant political theory is thus great. Moreover, the reversals may make theory construction virtually impossible. Lochner occurred sixteen years after Riggs v. Palmer. It encouraged the view that society is cut-throat, and that unless explicitly barred by the narrow area of constitutionally permissible legislation, one was allowed to keep one's gains, morally or wrongly attained. Lochner and its progeny struck down laws making the workplace more humane, including laws restricting child-labor.[53] Dworkin suggests principles do not contradict one another, but have different weights in various situations. However, political theories can, in their implications, contradict one another. If Lochner

were to be accepted, perhaps the Riggs principle -- no man shall benefit by his own wrong -- might have to be jettisoned. (The Riggs principle ought not to be read as condemning just criminal wrongs. It does not say that, and it is likely to be applied to cases of acts where no criminal liability attaches because of insanity, the statute of limitations, or a lapsed or a poorly drawn statute, while not applied in negligent manslaughter cases. There is clearly a strictly moral component to it). This would cause an ominous discontinuity between pre- and post-Lochner political theories. If one tried to fashion a political theory in such a way as to allow for Riggs, Lochner, and the other major propositions the pre-Lochner theory demanded, one would end up with a debilitated theory, so circumscribed as to be of little use in providing answers in future cases.

One can see reasons, then, for Dworkin to exclude Lochner or wrongly decided cases generally from one's political theory, or in a different context, from the set of propositions true within the common enterprise. However, such a response has a fatal weakness. It allows the theory to drift from the legal forms indefinitely. The Lochner doctrine lasted about thirty years following the instant case, but it could well have continued undisturbed indefinitely. Many shifts in legal doctrine were never reversed. The individual who refused to agree with the evolution of case from trespass would, if he could somehow

have enjoyed the longevity, have found himself increasingly isolated from the main body of property, contract, and tort law.[54] There is no room in Dworkin's theory for reconsideration of wrong cases once disregarded. If they are undeserving of initial entry into the set of input propositions, repetition of the mistake should have no effect. The only reason why such repetitions would count is because authority of itself would be a factor in the political theory. But such authority can as well reside in the initial decision, as the rather final pronouncement of the Supreme Court demonstrated in Lochner itself. There is also the technical difficulty in discovering what the right answer would be in those intermediate cases after the initial wrongly decided case but before the hundreth affirmation and expansion of that case. When does the political theory shift, and how much does it change? If the initial case is without effect, how much effect has the second case? If two cases have more effect than one, the development of the political theory becomes a function of the random vicissitudes of ongoing litigation. The fact that a series of cases arises at closely spaced intervals and gives courts an opportunity to affirm the mistaken case would be allowed to influence an entire political theory (or common judicial enterprise). The randomness of litigation alone could thus cause one theory to be abandoned in favor of a radically different theory.

Dworkin's second choice would be to embrace the wrong case, to incorporate Lochner into a consideration of future cases. This position has a number of attractions. The political theory would remain tied to actual past decisions and the element of 'commonality' in the common enterprise would be stronger. This latter consideration is especially important, for it allows a residue of agreed upon easy cases to develop which will serve as the starting point for hard case analysis.

The problem lies in incorporating Lochner into a political theory which, without it, has an anti-Lochner outlook and anti-Lochner implications. It may be a Herculean task to square decisions that, if somewhat eclectic, are at least no more than marginally inconsistent. However, squaring p with ~p is impossible, and finding a theory that will allow for Z's political theory and for Lochner requires a degree of individual choice as to what exactly must go and what ought to stay. For example, should the Riggs principle remain? Should certain restitutionary and promissory estoppel propositions advanced in contract cases -- propositions which ensure that contracts must be fairly entered into without duress, with knowing consent, and by parties in similiar bargaining positions -- be exorcised? Should the Thirteenth Amendment to the United States Constitution barring slavery be interpreted so as to narrow the definition of involuntary servitude? Should the separate states be unable to intervene anywhere -- to compel school attendance, to

levy taxes for the support of the arts, to compete against private enterprise in the fields of energy and transportation -- except in matters involving the police powers of public safety and health? Once the decision has been made to alter Z's pre-Lochner political theory, the grounds for inclusion and exclusion of propositions can be circumscribed by rationality, but given the initial contradiction, they cannot be definitively characterized.

One might wish to claim that the narrowest interpretation, involving the smallest degree of change for the initial theory, ought to be advanced. The strictly narrowest change, however, would limit Lochner to its facts. Then Z's old theory would apply except in the case of bakers working exactly sixty hours in New York City in contravention of New York State legislation. This will not do, clearly. The question as to whether Lochner upsets (or does not) notions of contract, due process, involuntary servitude, and states' rights then remains. One certainly cannot suspend judgment until post-Lochner cases settle (for the courts) the scope and reach of the initial decision. It is just for the purposes of being able to give or judge a given solution to post-Lochner cases that the theory is formulated. Moreover, for Dworkin, there is always (at all places and times) a right answer based on the theory.[55] Waiting until the dust clears from the imposition of a seminal case allows for an impermissible hiatus.

The problem Dworkin has with wrong cases is a function of the tie between political theory and the legal forms. The intuitive image evoked by the mention of 'political theory' is one of a grand scheme in the style of Plato, Hobbes, Montesquieu, Marx, or Rawls. The political theory Dworkin has in mind is of necessity more detailed, more practical, and more mundane than these. It cannot develop apart from the exigencies of court cases, and must become highly circumscribed as it attempts to square the variety of these cases. It is really supervenient on the holdings of the cases and statutes.

The pluralist perspective largely avoids the problems of the wrongly decided case by allowing for a distance between legal forms and judicial views. Z may handle Lochner by assigning it a tentative status, by limiting it to a narrow holding or by altering his view. He is not committed to any one strategy a priori, nor does Z himself necessarily know what his post-Lochner view will be without some reflection. In part, this is due to the inexact determination of the judicial view by the set of third order sources of propositions, and in part to the question-originating workings of the propositional set. We shall look at these, briefly, in turn. One consideration or caveat needs to be brought forward first. That is, any particular view may be more or less efficient and more or less rational. If a view were very inefficient, it would waver continually as new cases came

forth, forcing constant and major reevaluations. If it were irrational, it would incorporate these cases without attempting any theoretical maneuvering to avoid systemic inconsistencies. No right answer exists for view manipulation in the face of troublesome cases, only better or worse (from the perspectives of efficiency and rationality, as well as ethics and politics) strategies.

When Z is constructing his pre-Lochner view, he notices that the case law is inconsistent and conflicting. The case law and other legal forms, of themselves do not yield the basis of a consistent theory. However, Z notices further complications in this already unsettled picture. Many of the cases are themselves based on previous legal forms. The correspondence between previous forms and justified decisions is not one-to-one, but often many-to-one. Yet the many are themselves not always consistent. Thus, in sifting the legal forms, one might want to include the holdings of the justified decision, but one would be forced into a choice over selection of the proper justifying legal forms. This is an example of overdetermination, a phenomenon run rampant in many judicial systems. Another complication involves the fact that other sources of propositions -- political, ethical, social, and prudential -- are likely to be inconsistent and overdeterminative of many of the results of past hypothetical cases. That such other factors as political ideas and preferences are unlikely to be

fully worked out for individuals is hardly surprising, considering their difficulty and vastness. As a counterpoint to this overdetermination is the fact that many cases arise in which the individual appears to be unable to use his existing propositional set. This underdetermination is not the same thing as gaps in the law, for a view is reconstructed anew around the initiating judicial question, and an answer is guaranteed without a change in the decision procedure (discretion versus non-discretion). It is, rather, that the fact of underdetermination causes the individual to rework his view, by further empirical research and conceptual stretching. An answer may appear using what appears to be old concepts, but these concepts have been changed in their reworking to solve the instant case.

The imprecise determination recognized as a constant in the life of a judicial view makes it subject to constant change. The wrongly decided case will result in just another instance of the reworking of the view, a reworking that gives a certain tentativeness to the view generally. As consistency in all things is not a necessary proposition that governs view behavior, the wrongly decided case can be accomodated by allowing it as just another complication.

Inconsistency cannot remain if a judicial view is to be considered to be rational, but the fact that judicial views function around first order questions works to rid the views of inconsistency. A concept of judicial role is used to answer

the issues that actually arise during adjudication. Z can be faced with answering a problem concerning substantive due process and the rights of states to regulate the workplace after Lochner, a possibility he may well never have imagined before Lochner. Yet such a possibility would have been apparent if he had worked out every detail of his pre-Lochner view. For, in that view, Z weighed heavily United States Supreme Court decisions, and that court logically could do what it empirically actually did: assert Lochner. Z worked out his view largely around the actual questions that had been raised by previous cases.

The status of judicial propositions comes to this. A first order proposition can be true or false within a view, if that view allows for a two-ordered logic, as virtually any rational view will. However, not only is the view itself conventional rather than objective, any particular individual is likely to alter the set of propositions within the view as new questions arise, and as the sources of third order propositions change. Continuity rather than identity is the individuating property that is relevant. As views jettison more and more cases (or other legal forms), they do not become, at some point, wrong. No error is being committed, but they become less attractive as choices for understanding, predicting, and judging judicial reasoning. However, the acceptance or rejection of a judicial view is a matter of individual choice.

This results in inevitable conflict between views, but such conflicts reflect deeper divisions in societies, and allow an outlet for societal tensions by allowing for the use of a shared institution for settlement. We shall now turn to the workings of this process in several specific historical settings.

[1]See Thomas S. Kuhn, The Copernican Revolution: Planetary Astronomy in the Development of Western Thought (1957) for a discussion of pre-Copernican and post-Copernican language.

[2]This idea can be traced back to Frege's notion that truth-values are the referents of sentences. "How does a thought act? By being apprehended and taken to be true." Gottlob Frege, "The Thought: A Logical Inquiry" in Philosophical Logic 38 (ed. P. F. Strawson, 1967). See generally Michael Dummett, Frege: Philosophy of Language 152-203 (1973).

[3]The role of intention in a theory of meaning is widely discussed. The best known work is that of G. E. M. Anscombe, Intention (1957).

[4]The works of Hans Kelsen (General Theory of Law and State (1945), The Pure Theory of Law (1967)), Alf Ross (On Law and Justice (1958)), and Joseph Raz (The Concept of a Legal System (1970), Practical Reason and Norms (1975)) are typical, prominent examples of this phenomenon.

[5]It is a matter of some controversy whether moral statements are objective. However, even those who deny the objective status of ethical statements admit that a case can be made against the conventionality of ethics. Even such a prima facie argument against most judicial statements is not possible. The two most convincing writers who challenge the objectivity of ethics are John Mackie, Ethics: Inventing Right and Wrong (1977) and Gilbert Harman, The Nature of Morality (1977).

[6]The most important of Dworkin's papers are collected in Taking Rights Seriously, published in 1977. Generally, any paper published elsewhere that is collected in that work will be cited to the book only. (It will hereafter be referred to as TRS.)

[7]The only shift in Dworkin's theory relevant here is his early belief that one source in the form of a master rule could not capture all standards needed in adjudication, to his position that such a source can be found in a political theory. Whether this latter position is actually precluded

in his early papers, discouraged, or just not discussed is a matter of scholarly exegesis irrelevant here.

[8]The theory being reconstructed is Dworkin's theory of the status of judicial statements. In his work, this theory is mingled with his theory of rights, his larger theory of adjudication (which is both normative and descriptive) and his political and ethical positions. The particular theory extracted here may, in being stripped of the related theoretical impedimentia, not be one Dworkin himself would wish to accept.

[9]These early papers include "Judicial Discretion," 60 J. of Phil. 624 (1963); "Wasserstrom: The Judicial Decision," 75 Ethics 47 (1964), reprinted as "Does Law Have a Function?", 74 Yale L. J. 640 (1965); and "Is Law a System of Rules", 35 U. of Chicago L. Rev. 14 (1967), reprinted as Chapter 2 of TRS 14-45.

[10]Dworkin assumes that cases where the rules are clear are easy cases. He says, for example, "But if the case at hand is a hard case, when no settled rule dictates a decision either way, then it might seem that a proper decision could be generated by either policy or principle." TRS at 83.

[11]Since the time of Godel's Theorem, it has become commonplace that many axiomatized systems are incomplete. Dworkin's assertion that this legal system he postulates, with its rules and principles, is complete cannot, without some proof, be accepted as true. See Ernest Nagel and James R. Newman, Godel's Proof (1959) for a philosophical discussion of the limitations of consistent axiomatized systems in generating truths.

[12]Dworkin's main discussion of the discoverability of answers to judicial questions is his chapter entitled "Hard Cases" in TRS 81-130.

[13]This is the thrust of his argument in "The Model of Rules", in TRS 14-45.

[14]There is a central ambiguity in Dworkin's theory. Dworkin speaks both of principles found directly in cases (such as the unjustly-gained benefits principle of Riggs v.

Palmer) and principles that are implied by the political theory. These sets of principles may potentially conflict. The principle of Riggs, for example, is unlikely to remain as broad in a political theory that must be based on cases where contract breachers, accused criminals improperly arrested, adverse possessors, negligent defamers protected by free speech legislation, sellers of real property whose sales pitch is geared to the doctrine of caveat emptor, and tortious governments operating under the cloak of sovereign immunity all benefit well and regularly by their own wrongs.

[15]The argument for an embedded, implicit principle guaranteeing a right to privacy being lodged in the American common law of torts was put forth initially in Samuel Warren and Louis Brandeis, "The Right to Privacy", 4 Harv. L. Rev. 193 (1890).

[16]Dworkin discusses this in TRS 118-120.

[17]This point was discussed at some length in Chapter V of this thesis.

[18]115 N.Y. 506, 22 N.E. 188 (1889).

[19]TRS 23-45.

[20]TRS 23; Riggs v. Palmer, 115 N. Y. 506, 509 22 N. E. 188, 189 (1889).

[21]TRS 105-130.

[22]For an account of the laboring Hercules and his adventures, see Robert Graves, The Greek Myths:2 100-206 (1955).

[23]See TRS 110-123.

[24]This claim is made in TRS 81-130, 279-290 and in "No Right Answer?"in Law Morality, and Society: Essays in Honour of H. L. A. Hart 58-84 (ed. P.M.S. Hacker and J. Raz (1977). He allows that rarely that answer will be a tie

between two competing positions, but those occasions will be extremely rare, and virtually non-existent in advanced legal systems. There is also the

> "possibility that the political theory that provides the best justification for the settled law is for some reason entirely neutral...We must also concede the theoretical possibility that two different political theories, which suggest different answers to that question, for some reason each provide exactly as good a justification of the settled law as the other."

Law, Morality, and Society at 83. Such possibilities will be discounted for purposes of the analysis here, as they are not counted except as asides in Dworkin's own treatment.

[25] Raz does have a rebuttal against the argument in Authority 53-77. While I am not entirely persuaded by Raz, I am sympathetic with his conclusions, for reasons that do not lie within the scope of this thesis.

[26] Dworkin labels it a refutation of the argument from controversy. See "No Right Answer?"in Law, Morality and Society 76-84.

[27] This point is put forward in TRS 81-130, 279-290; and in "No Right Answer?"in Law, Morality and Society 58-84.

[28] TRS at 283.

[29] TRS at 283-284.

[30] It is not clear that even for a Dworkinian, extension would remain the same for those using the same terms within a common enterprise. Certainly, different intentions would have to be allowed. Similarity rather than identity would be sufficient to allow for direct disagreement under Dworkin's model.

[31] See David Lewis, Counterfactuals (1973) for a discussion of this problem.

[32] This example is entirely hypothetical and ought not, despite its amalgam of a number of viable common law doctrines, to be considered legally tenable in any jurisdiction.

Moreover, it assumes that no legislation governs the rights and duties of the parties.

[33]As a point of symbology, the subscript in the phrases 'L_o (p)' and 'L(p_o)' is used to indicate just where the controversy lies. In 'L_o(p)', we are discussing competing legal enterprises, in 'L(p_o)' differnet propositions within a given enterprise. The difference is meant to show emphasis, and in all cases, the complete terminology is '$L_o(p_o)$' for all propositions in all legal enterprises.

[34]In fairness to Dworkin, I must add that his claim is limited to positivists (as represented by Hart in The Concept of Law) and the arguments he thinks they might make.

[35]Dworkin states:

> Each of these judgments about the truth value of propositions of law is one that a judge might sensibly make, under certain conditions, within the ground rules of the enterprise. Suppose a judge thinks that the case for a theory of the relevant law that makes the defendant liable for economic damage is exactly as strong as the case for a theory that frees him from that liability. The rules of the enterprise, as so far described, acknowledge that situation as a theoretical possibility; and if that possibility is realized, then judges cannot, under these rules, assert either proposition as true or deny it as false. In any particular hard case, therefore, a judge may sensibly make, for that case, the same judgment as the philosopher seems to make for all hard cases."

TRS at 284. Dworkin goes on to say that such ties are extremely rare.

[36]This is not their terminology, but it reflects the crucial distinction Hart, Raz, and MacCormick want to maintain between easy and hard cases. See, generally, Chapter V of this thesis.

[37]Part of the reasoning behind the numerous and complicated techniques for handling past cases can be tied to this idea. See Karl Llewellyn, The Common Law Tradition: Deciding Appeals 62-92 (1960) for a description of the differential treatment of past cases in American jurisdictions.

[38]See TRS 123-130.

[39]See TRS 118-123.

[40]See Chapter II of this thesis for an elaboration of this point.

[41]198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). Among those who believed the case to be wrongly decided were the four justices in dissent. A summary of the criticism of Lochner appears in P. Murphy, The Constitution in Crisis Times 70-82, 99-110 (1972).

[42]The relevant portion of the Fourteenth Amendment of United States Constitution reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The test used in the so-called substantive due process cases was a 'means-ends' test. A statute was invalid in cases where the state interfered with the general right of an individual to be free in his person and in his power to contract his labor unless it had a direct relation to an appropriate and legitimate end. Needless to say, the test was extremely vague.

[43]This policy is discussed and criticized in A. Paul, The Conservative Crisis and the Rule of Law (1969); B. Twiss, Lawyers and the Constitution: How Laissez-Faire Came to the Supreme Court (1942).

[44]Taken from the majority opinion of Lochner v. New York, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

[45]A discussion of the case against Lochner can be found in Laurence H. Tribe, American Constitutional Law 456-473 (1978).

[46]There is an argument in American Constitutional law that count pronouncements on constitutional matters have a

diminished or no effect on stare decisis, as any authority residing in the cases would diminish the authority of the written constitution. This position was most forcibly made by Justice William O. Douglas in "Stare Decisis" 49 Columbia L. Rev. 735 (1949). It has not found favor elsewhere and has been firmly rejected in the courts. See Cooper v. Aaron, 358 U.S. 1 (1958). It will not be considered as viable in this paper.

[47]The view of identity here is the same as the one put forth by Derek Parfit in his papers "Personal Identity" in 80 Philosophical Review 3-27 (1971), reprinted in The Philosophy of Mind 142-162 (ed. Jonathon Glover, 1976); and in "Later Selves and Moral Principles" in Philosophy and Personal Relations 137-169 (ed. Alan Montefiore, 1973). The position endorsed is that of Parfit's complex view of identity, that a thing identified is just the sum of its properties, and in losing some of them, becomes less of that thing as a matter of degree. No one thing is essential for identity. Views over time are thus the same only as a matter of degree.

[48]The ambiguities and vagueness of constitutional law are well-known. See Chapter VII of this thesis for further discussion and illustrations.

[49][K.B.] 1765, 3 Burrow 1663, 1669, 97 Eng. Rep. 1035. For a discussion of this case, its implications and demise, see C. H. S. Fifoot, Lord Mansfield 129-134 (1936).

[50]Lochner's predecessors include the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873); Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 22 L. Ed. 455 (1874); Munn v. Illinois, 94 U.S. 113, 24 L. Ed. 77 (1877); and Allegeyer v. Louisiana, 165 U.S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832 (1897). Its successors include Adair v. United States, 208 U.S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436 (1908) and Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240, 59 L. Ed. 441 (1915).

[51]See TRS 123-130.

[52]The Social Darwinian aspect of Lochner is discussed in Laurence H. Tribe, American Constitutional Law 438-446 (1978). It was famously stated in Justice Oliver Wendell Holmes' Lochner dissent. "The Fourteenth Amendment does

not enact Mr. Herbert Spencer's Social Statics." 198 U.S. 45, 90, 25 Sup Ct. 539, 49 L. Ed. 937 (1905), (Holmes, J. dissenting).

[53] In Hammer v. Dagenhart, 247 U.S. 251, 38 Sup. Ct. 529, 62 L. Ed. 1101 (1918), the Supreme Court held that Congress could not prohibit interstate commerce in the products of child labor. The court said that the purpose of attempting to raise the minimum age for children working in mines and manufacturing was constitutionally impermissible.

[54] Case developed from trespass on the case, itself an offshoot of the ancient writ of trespass. From case came modern Anglo-American negligence and contract law. The development of case is traced through original sources in C. H. S. Fifoot, History and Sources of the Common Law (1949), though some of his actual conclusions are now considered to be suspect.

[55] This statement is subject to the limitations discussed in note 24.

POLITICAL CONSEQUENCES OF PLURALIST ADJUDICATION

This thesis has argued for a non-standard approach to an examination of judicial reasoning. It suggests that first order judicial questions rather than a unified system of norms offer a starting point and that personal views rather than rule-systems furnish answers to the questions. I want in the first part of this final chapter to show just how this procedure works on a single legal problem, while in the second part to suggest briefly that pluralism is a theory that furnishes clues as to why judicial process and judicial reasoning have worked so well so often.

First, however, it needs mentioning that the idea of a pluralist analysis, in that it has existed in different guises, has always been confined to discussions of constitutional law. There is a belief held by some that every constitution has an extra-legal origin, and that constitutional law is not subject to addition or amendment in the same way as other branches of law.[1] Moreover, disputes about the content of constitutional law seem more intractable for a number of reasons: the authority to settle them is itself a matter of constitutional law and further dispute, most of the important questions are never litigated, judges' and officials' views on the subject are often believed to be tied to political allegiances, the area sees wide fluctuations on central questions rather than the constant narrowing of issues apparently produced in other areas of law. Constitutional questions are

perceived to be 'political', and are at times labeled 'essentially contested'.[2]

My only substantial disagreement with this position concerns its exclusivity. The difference between constitutional and other questions is one of degree rather than kind. The more important an issue is, the more likely it is to effect basic change throughout the political system or culture, the more general and universal its application, and the more likely it will be called 'constitutional'. The fundamental nature of constitutional questions rather than their subject matter is often what sets them apart. They should be seen as indicators of different views rather than some special area set apart. Perhaps more instructively, because they are at once controversial and fundamental, their existence demonstrates that any consistent propositional set that includes answers to constitutional questions is apt to be eclectic. Since these basic questions are linked to so many other, smaller questions, slight differences in response can make for very different propositional sets.

1. A Contract Law Illustration

One area of judicial subject matter traditionally thought to be stable is that of contracts. Contracts are by definition freely entered into agreements[3] where certain expectations concerning and reliance arising from the agreement being fulfilled are likely to be present. Unlike a tortfeasor or his victim, a contractor will be involved in the contractual behavior with the

future consequences of his behavior uppermost in his mind. Businesses operate, sales are possible, employment is secure, services are rendered all, in part, because the bargains struck between individuals or groups have, vis-a-vis their enforcement, a certain future. A component of that certainty includes a uniformity of treatment of the contracts by the plethora of courts which act on them. Contract law has traditionally enjoyed a certain uniformity in Europe, to a degree even extended to common law England through courts of law merchant, equity, and the rulings of Lord Mansfield and his successors.[4] In America, it has achieved a unique legislative consistency through the promulgation of first the Uniform Sales Act and then the ubiquitous Uniform Commercial Code.[5] If any domain of propositions should be considered to be secure from widely varying, personally-based interpretations, it would appear to be that of contract law.

Certainly there have been American contract law theorists who have seen the area as clear, unified, and united. Both Oliver Wendell Holmes and Samuel Williston have written on contracts as though a grand theoretical framework could explain all the major ramifications of bargains enforced by the courts, and have argued that such a framework must be definitive and unimpeachable in its interpretations.[6] When the American Law Institute in the 1920's wanted to restate the common law of contracts, it asked Williston to be the document's chief draftman. Williston surveyed the cases, looked to the purposes and results of specific contracts, and formulated the fundamental requirement for an agreement to be considered a valid contract. He said that in order for a contract to be enforcable before the courts, mutal

consideration must pass between the offeror and the offeree.[7]

A small group on the drafting committee, although one that was ultimately successful, believed that some notion of promissory estoppel ought to be included in the Restatement. Led by Arthur Corbin, they felt that reasonable reliance could provide grounds for upholding a contract. Their view was adopted in Section 90:

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

The schizophrenia thus introduced into the document is well-known, and the Restatement is peculiar in that it attempts to unite doctrines from different jurisdictions which share neither sovereignty nor, always, traditions. Moreover, since the drafting of the Restatement of Contracts, the Corbin position has slowly but steadily been accepted both in the jurisdictions and among the legal writers.[8] The disunity and progeny of the Restatement have been widely discussed, as have the merits of the Williston and the Corbin positions.[9] What has somehow been overlooked is the fact that two opposing views regarding members of the judicial propositional set competed for a number of years openly and directly.[10]

Let us put aside the question of whether Williston or Corbin had better evidence for their positions at the time that the Restatement was drafted. Clearly, after the Restatement, and the

publication of Williston's treatise,[11] the cases for some time were divided. Moreover, they divided on the basis of the same precedents, the same scholarly writings, and the Restatement. The issues were divided into neat categories, a fact that disguised the radical nature of the split. Suits were 'on the contract' or 'off the contract', in contract or in restitution, on a promise or on a non-promise estopped, because of consideration arising or reliance occurring. All courts were seen to be allowing suits on the contract when consideration passed, and courts split on matters of reasonable reliance. This neat picture misconstrues what was actually happening, and it fails to tell why decisions in these matters were handed down in the way that they were.

Two views were competing for ascendency in the realm of contract law. Evidence in the form of past decisions existed on both sides. However, any particular piece of evidence was likely to be weighed differently by each side. There was overdetermination, in the sense that, in many prior cases, a number of different views would have yielded the same result. There was underdetermination, in the sense that the prior decisions taken as a group were insufficient to cover many new cases that theorists, and eventually courts, worried about.

What is interesting about the conflict here is that it is not one drawn along traditional ethical or political lines. Contracts are certainly an area not exempt from purely political issues, as cases concerning illegal contracts,[12] irreversible

contracts,[13] one-sided and immoral bargains,[14] and generally the issue of when duress ought to vitiate consent[15] all demonstrate. The Corbin/Williston split is not along the lines of these issues, nor along the fundamental issue of when the freedom to bargain ought to give way to the interest of just results. The conflict could be labeled as one occurring between an interest in achieving legal elegance versus an interest in promoting the fulfillment of reasonable business expectations.

The interest in legal elegance was one that was part of the impetus behind the Restatement itself: the desire to incorporate the diverse elements of an area and bring them together in a unified whole. To achieve the neutrality and objectivity of science was the goal, and ethical terminology was the residue of an outmoded era best swept away.[16] Large treatises were compiled which emphasized fundamental themes, and law was seen to be evolving toward a modern objective state.[17] Holmes, a leader in this movement, wished to cleanse everywhere the law of any trace of subjectivity.[18] In contracts, this meant that a promisee must express his intentions to the promisor solely through the bargain: no later action can make a contract when none had arisen from the parties.

> "It is said that consideration must not be confounded with motive. It is true that it must not be confounded with what may be the prevailing or chief motive in actual fact. A man may promise to paint a picture for five hundred dollars, while his chief motive may be a desire for fame. A consideration may be given and accepted, in fact, solely for the purpose of making a promise binding. But, nevertheless, it is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and

> accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise."[19]

Williston took up this idea of the primacy of mutual assent, and constructed a multi-volume treatise based upon it:

> "Doubtless the law is generally expressed in terms of subjective assent, rather than of objective expressions, the latter being said to be 'evidence' of the former, as, for example, in the so-called parol evidence rule; but when it is established that this is no rule of evidence but rather a rule of substantive law, the whole subjective theory which is sometimes rather ludicrously epitomized by the quaintly archaic expression 'meeting of the minds,' falls to the ground."[20]

Certainly many cases fit within the view articulated by Holmes and Williston; and, given their scientific aspirations and model-building inclinations, they extended the consideration doctrine to its logical limits. They never, in print, asked whether such an extension would be economically advantageous, morally equitable to potential bargainers, or in line with ordinary business practices. These considerations - what might be thought of as the concerns of the largest group of contractors, the business community - were of concern to Corbin. He saw the aggregate of past cases not in terms of movement from the subjective to the objective, but as a series of attempts to service the contracting community. As such, reasonable reliance, a concept of concern to this community, ought, to Corbin's mind, to play a role in settling disputes.[21] Williston had rejected reasonable reliance as a basis for establishing contractual liability, for it fell outside the scope of the bargained-for consideration theory that

he felt served as the basis for the law of contracts.[22] For Williston, the bargain was central. Thus reasonable reliance and subjective assent were linked as possible challenges to the (objective) bargain theory, and both were to be disparaged. Model elegance was of little concern to Corbin,[23] just as the actual practices of the business community were of little concern to Williston.[24]

One might see signs of a larger schism here. Holmes and then Williston believed that, as a general principle, loss must be allowed to lie where it falls. 'Personal fault' was a concept to be kept in the background, in tort as well as in contract. Once such a basic principle was established, moreover, it was necessary to see that it was applied throughout the case law. Objective manifestations rather than the vague machinations of the mind were primary. It is easy to understand the push toward unity of contract law once these principles were established. Holmes and Williston were professional legal theorists. They saw it as their job to pull together the diverse strands presented by prior decisions into an elegant theoretical whole. The judicial process was teleological and a theorist's task was to understand where it was headed. Moreover, any lawyer must make sense of the totality of cases. Analogical reasoning called for the squaring of past decisions, and the various lines of precedent needed rethinking to avoid anomalous discrepancies. The business community, on the other hand, wanted the case law to reflect business practice. They had no interest in conceptual unity and

even less sympathy for it if it interfered with the daily expectations and reliance of trading partners. Businessmen generally wish to be as little burdened by form as possible, and routinely conduct transactions in an oral and incomplete manner, seeing the securing of business expectations and reliance as an advantageous trade-off against theory unity and category tidiness. This example is instructive in the general context of judicial decision-making, for it points to a conflict in beliefs concerning second order propositions that is likely to occur in any society.[26]

Two final points needs to be made, or at least reiterated. Williston and Corbin had quite unalike views of contracts. Together, they demonstrate the scope of the spectrum of views in an area even among individuals who in many ways are similiarly situated,[27] and far from radical. Yet it is clear that, although differences in this area of contract formation were great, not just any view would be acceptable. Any view coul constructed, but rationality imposes severe limits which need to be respected. Views are circumscribed by legal forms -- statutes, decisions, codes, customs, constitutions, treaties, administrative regulations, and edicts -- as well as by the expectations members of a society have concerning the content of judicial decisions. The individuality of judicial views ought to imply no license for mere random construction of those views. The Williston/Corbin debate demonstrates how particular positions are formed around basic beliefs and values rationally held in a society.

The more important point concerns the search for analogues or

master rules to provide answers to first order questions. In the American legal system, one could not say of some proposition p about the definition of or remedies to (broken) bargains that it was true or false. At the same time, for any individual knowledgable about that system (whether judge, citizen, or anthropologist), it was possible to say that if he were asked whether or not p, then for him, p might be true or false. Moreover, once he states (or denies) p, his reasons for doing so become an issue. One can criticize that individual for averring p because of his judicial view, when that view is irrational, impolitic, immoral, uninformed, incomplete, or mistaken in certain of its premises. However, criticism because of failure of that proposition or that view to correspond to some objectively derivable contrary proposition or view is not possible. Responsibility for a decision or its endorsement thus always rests, in large part, with the individual. Answers are not somehow 'there', Platonic entities ready to be plucked when appropriate cases require their use. They are constructed, and as such, are always a function of the higher order propositions that justify them. Answers are thus better or worse. Even where there might be agreement among almost all knowledgable observers about p, it is possible for that support may come from individuals who have different views -- as Williston and Corbin have different views about what constitutes a bargain and how important the bargain itself is in contractual relationships -- no proposition is likely to be unimpeachable. More importantly, no specific source of criticism is illegitimate

a priori in the examination of that proposition. Thus, even where all have agreed on a proposition, if an examination of the judicial view supporting it reveals that the view ought to be changed, then that proposition is similarly liable to change.

2. Constitutional Questions

This thesis has suggested that one can best understand judicial decision-making by using a pluralist analysis to explain the logic and content of actual judicial decisions. It is a commonplace that law and judicial decisions are social phenomena and need always to be analyzed with the greater social picture in mind. I want, therefore, to look briefly at how the pluralist model can (in small part) explain both the prevalence and the popularity of courts as an almost universal conflict-resolution tool in human societies.

Remarkably similar judicial systems are found in cultures with little else so specific in common. Common features of those judicial systems include the idea that both private and public disputes be referred to a third party, that that third party be either chosen or approved by the society generally, that the judge's decision is binding (enforceable and respected by other members of society) and impersonal, and that the standards employed for decision ought to be general, predetermined, reflective of conceptions of justice, and rational. Practice at times falls short of this idea, but what is interesting is how often practice does coincide with the idea, and how widespread historically, geographically, and philosophically the idea is. One enclosed in

some kind of veil of ignorance might not expect such diverse groups as Roman citizens, German burghers, Cheyenne Indian hunters, Scandanavian socialists, Franco fascists, Barotse tribesmen, and Sinapur villagers to share a common ground of such a broad scope.[28]

Agreement on these matters between societies is mirrored by the similiarity of beliefs within heterogenous societies. The fact that impartial courts of law, employing independent judges and objective standards with authority backed by larger political sanctions, ought to be maintained, remains a constant as one moves across the political, religous, and ethnic spectra. A good illustration of this occurs when a coup d'etat or even a (so-called) political revolution takes place. A new leadership with new elite may fashion a program explicitly contrary to that of the previous regime. However, it will commonly allow the judicial system to remain, and will even make claims through that judicial system that what the new government has done is legal under the pre-existing (and continuously prevailing) judicial standards.[29]

It might be thought that this practice of embracing the judicial model and its concomitant historical standards can be explained by the close relationship often perceived to exist between law and ethics, and between authority and morality. The very ambiguity of such terms as 'law', 'right', 'principle', 'wrong', 'droit', 'tort', 'rules', 'murder', 'natural law', and 'criminal' demonstrates the intimate ties between ethics and law.[30] The two areas overlap not only in shared concepts, but often in

the acts they disapprove of, the reasoning -- deontic or consequentialist -- they employ, the goals they seek, and the authority for action each claims. Ethical language is often vague language, and ethical method operates without verification as to truth or observation as to starting point. Because ethics is so conflated with law, goes the argument, the two are extremely difficult to separate and purify. Cases do distill law on an ad hoc basis and careful scholarly analysis can do so on a wider and more ordered scale. Thus, people often embrace pre-existing judicial standards because they fail to completely understand them. They continue to respect the machinery of the judicial process -- judges, advocacy proceedings, sanctions -- even when it is against their interests or contrary to their fundamental beliefs to do so, in part because the real workings of the system are obscured by ambiguous ethical language. (A general ignorance of complicated or voluminous decisions and legislation may also be a factor). Good analysis would clarify this confusion. Judicial function and standards could be better appreciated while poorer ones could be weeded out.

There is some merit to this line of reasoning. The practice of turning to the judicial process to remedy all social wrongs is based in part on a confusion, a confusion rooted in part on unclear and ambiguous language. It would be a mistake, however, to think that certainty is either attainable or desirable. The bulk of this thesis has agrued for the irreducibility of varying views of the judicial process. What I want to conclude, briefly,

is that the differing views are part of the attraction and the attractiveness of the judicial process.

Societies are usually composed of groups with conflicting ideologies, religions, and ethics. Within and among these groups are individuals with derivative, deviant, and variant beliefs and attitudes. Both groups and individuals are in competition for resources and power. Much of this competition is ordered and useful, and the differences benign. However, conflict is ultimately a threat to the social fabric. When there is conflict, the great utility of the judicial process lies in its ability to peacefully resolve that conflict, while the attraction of that process rests in part on the various judicial views that define it. If judicial propositions were clear, precise, denumerable, and consistent, their appeal would be limited to those individuals who agreed with them.[31] If the judicial fog were due merely to confusing language and the conflating of ethics with law, it could be dispelled by diligent analysis alone. The personal nature of judicial views guarantees that such analysis will not be successful. But the analytic failure can be seen as political success, for the ambiguity of judicial propositional sets allows the symbol of judicial process to remain vibrant among competing factions. One's commitment to the judicial system need not necessarily be a casualty of a singly expressed view concerning the content of its standards.

The idea of shared symbols being cherished for different purposes is hardly new,[32] but the suggestion here is that there is

no mistake being committed or illusion sighted when judicial reasoning is seen to rest on competing foundations. The great utility of this idea is that it allows us to see how societal conflict is mitigated. Lack of a single authoritative statement concerning the propositional set allows competing groups to remain loyal to the same political institutions,[33] and to work out their differences through an ongoing court battle (or threat of a court battle). Judicial reasoning is not a transparent method, though. It leaves a mark on any dispute, for conflicts need to be framed in a new language and be carried on under a new set of rules when they come within the judicial process.

Two political examples of potentially belligerent groups employing courts to settle possibly explosive matters of disagreement may be cited. Neither can be considered an unmitigated success for any party in the controversies, nor a victory for any set of ethical beliefs. Each began with first order questions posed within a society where answers reflected widely varying views, and where loyalty to an often frail and mediocre judicial system remained firm.

The first example involves a situation where stability remained during many years of fundamental sectional disagreement. The example is that of the series of questions and cases arising in the years before the American Civil War. The well-known initial issue in a dispute drawn largely along geographical lines involved the concepts of slavery, chattelage, and citizenship. Were slaves citizens in states originally slave-owning, in states

that prohibited slavery, or in states newly formed or still territorial in the American west?[34] The resulting issues included controversy over the scope of the rights of states to regulate chattelage, the power of the states generally vis-a-vis the federal government, and the power of once independent states to withdraw from a political contract (union) they once freely entered into.[35] Some of these question went before the courts -- most notably in Scott v. Sandford,[36] which held, among other things, that Negroes free or slave, were not citizens under the United States Constitution, and thus had no standing to sue in federal courts (which required diversity of citizenship for jurisdiction). Others, including the ultimate question concerning the right of a contracting state to breach or at least terminate a contract of political union, were never litigated. What is interesting about the issues of this time is not merely our own opinion of their ethical validity or the historical process by which they helped to lead to a gruesome war, but their consistency over a seventy year period. These issues were apparent at the time when the United States Constitution was drafted, during the early years of the republic, and through the years of western expansion. A myriad of court cases during this period decided matters in conflicting ways. It was not until 1857 that Scott v. Sandford authoritatively decided even some of the issues, and Scott was held by many to be wrongly decided. Within the American society, the elusiveness of any definitive principle that could be taken as authority allowed the various factions to believe that the

Constitution was on their side; and that whoever and whatever their enemies were, the set of valid constitutional propositions was not among them. Ambiguity allowed the competing sides to live with one another in relative peace and to keep their pride and their loyalty to the government, regardless of its actions. When the South did secede, it was because it felt the government had been captured by individuals without respect for constitutional law. On the other hand, they claimed they (the Confederacy) had acted legally in secession and, more interestingly, they adopted an almost verbatim copy of the original federal Constitution for their own government.[37] Obviously, their judicial view was, even during rebellion, one they felt to be compatible with a correct view of the United States Constitution. The consequence of ambiguity was peace, of certainty, war.

The second example concerns the Pakistan Supreme Court case of Bhutto v. The Chief of the Army Staff and The Federation of Pakistan.[38] Petitioner Bhutto, the deposed Prime Minister, challenged the detention of himself and other leaders of the Pakistan People's Party by the military government, and cited the Pakistan Constitution as authority for his contention. The respondents argued, among other things, that the constitution had been temporarily suspended on grounds of grave military necessity, and that the detention was allowable under valid edicts of the military government that succeeded the normal constitutional rule. Bhutto pointed out that the Constitution did not provide for military government under the doctrine of necessity at all.

Respondents suggested that such a doctrine was either implied within the document or was a standard on a par with the written constitution and was its peer in authority.

Here again it is not the conclusion of the case that is relevant. (In fact, Bhutto lost the decision and ultimately his life in a related capital criminal case against him, while the military government remained firmly in power.) What is interesting is the faith by both parties in the judicial process. It would be possible to maintain that neither party had much choice: Bhutto because he was in jail and the government because of the controversy and uproar concerning his detention. However, both sides recognized the courts to be a vehicle for securing their goals. Both could maintain viable arguments, ones that their supporters were able to rally behind. The military allowed the proceedings and risked defeat. The supporters of the People's Party appeared content to rally behind the detainees and restrict their other activities against the government. In any case, the battle lines were drawn around judicial propositions. Stability through the transition of government was maintained. Such stability would not have been possible if the fundamental principles of Pakistani constitutional law were capable of only one interpretation. At the least, face-saving and the precedent of orderly transition might have been endangered. At worst, rebellion and civil war may have resulted.

This thesis began with the observation that modern societies

have become extremely litigious. As short opinions in scattered cases and ad hoc remedial statutes give way to definite and detailed court pronouncements and codified legislation, court loads have increased rather than decreased. We can see now why more decisions do not necessarily result in fewer future cases. We can also see how a theory justifying judicial authority might be sketched. In conventional social contract theories, the authority given the government is justified by some notion of consent, actual or implied. Under older theories, the members of a society yield personal rights they enjoyed in a non-societal state (a state of nature) in return for the guarantee that others do so, thus ensuring themselves a certain level of personal protection from those others and giving the state certain claims on their behavior.[39] Rawls asked the members to design a just society from a position of ignorance of their own place in that society, and allowed the resulting society a certain moral authority from the consent that can be implied from those members' decisions.[40] Actual societal members have never been consulted let alone consented to the creation of their own societies, while the fact that one is forced to make a decision from a veil of Rawlsian ignorance about the shape of ones' own society throws the fairness of the consent found by Rawls into doubt. The pluralist analysis suggests a much weaker but still apparent justification for a part of governmental authority: judicial authority. Judicial authority has a radical democratic component. Certainly, legal forms cannot be ignored, and corrupt, petty, unjust,

arbitrary, and discriminatory judicial systems exist. However, part of a judicial view includes notions of ethics and personal politics. When one looks to propositional sets within a society, one must notice the contribution of individual segments of that society to their content. To the degree that individual participation marks judicial propositions, that degree of authority may be justified. This is far from consensus, for the existence of disagreement is recognized. It says that since a certain widespread participation is an integral part of judicial reasoning, that reasoning carries some moral justification. Participation permits broad input, much of it voluntary, into the judicial system, as it allows different views to receive a hearing and to influence society's rules.

3. Conclusion

Discussion of the status of judicial assertions has shown us that such assertions are justified through the use of a judicial view, and that as regards truth value, each view is equally true. Equality of truth does not imply equality generally, and individual views are subject to criticisms of other kinds, particularly moral, political, and logical.

Oliver Wendell Holmes once objected to law being thought of as 'some brooding omniprescence in the sky'. In that this thesis has shown that first order propositions are a result of individual view construction, a construction rooted in personal beliefs and attitudes, Holmes' worry has been assuaged. However, the conven-

tional nature of judicial role that is the initial step in view construction belies any thought that judicial views are just a matter of free, individual preferences. One's conception of a judicial role is in large part determined by public criteria. For example, a judge may be thought to be obligated to make use of legislative enactments while not normally able to use the rules of his college fraternity. If there is no brooding omnipresence, there might be seen to be a constant presence, in the form of the shared beliefs within a society.

This chapter looked at several examples of view disparity. In suggesting that judicial pluralism explains how societies with competing factions are held together through the capacity of courts to accomodate competing views, no endorsement of the results of such a process should be implied. Williston's view of contracts and the Southern view of the United States Constitution both allowed great inequities to exist, and perhaps different political institutions would have more readily and easily remedied them. The Bhutto case, moreover, demonstrates the ease with which it is possible for any group to carry out its beliefs under the authority of judicial process. Extreme and terrible examples of this are, unfortunately, everywhere in evidence.

The lesson drawn from pluralist analysis then, is not one that endorses or disparages particular legal systems or the process of adjudication generally. Rather, it is one that suggests that responsibility for judicial judgments lies in large part with the individual. The individual judges what counts as good justification, and reference to legal forms is not itself sufficient.

The judgment contained in the judicial decision may be assessed and criticized just as any judgment would be assessed and criticized, except that a final determination of truth is impossible. This allows us to direct our focus more clearly on the ethical and rational aspects of adjudication, and encourage them to flourish.

[1]Some constitutions, such as that of the United States, require every amendment to undergo special procedures. Others such as the British constitution require only the rarest deviation in regular procedure to accomplish constitutional change, such as a hypothetical increase in the vote needed to enact legislation in Parliament from a majority to unanimity might require.

[2]The term originated with W. B. Gallie, in "Essentially Contested Concepts," in Proceedings of the Aristotelian Society vol. 56 (1955-56); reprinted in The Importance of Language 121-46 (ed. Max Black, 1962). It refers to concepts shared by people with discrepant assumptions that cause them to apply the concepts in conflicting situations. This idea is more fully worked out by William E. Connolly in his The Terms of Political Discourse 9-44 (1974).

[3]The voluntary nature of contract is what sets it apart from similiar relationships which are compelled. This point is well made by Henry Maine, Ancient Law Ch. IX (1861).

[4]For an overview of this development, see Theodore F. T. Plucknett A Concise History of the Common Law 657-670 (5th ed., 1956).

[5]The Uniform Sales Act was drafted in 1906, the Uniform Commercial Code in 1953. The latter was eventually adopted in all fifty states.

[6]Holmes' position is found throughout The Common Law (1881), particularly in Lectures VII-IX. Williston's writings on contracts are voluminous. He was the chief draftman of the Uniform Sales Act and the first Restatement of Contracts. His most important work was his multi-volume Contracts, which came out in 1920-1922.

[7]His formulation in Section 75 of the Restatement of Conracts reads:

> "(1) Consideration for a promise is
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification or destruction of a legal relation, or
> (d) a return promise, bargained for and given in exchange for the promise.
> (2) Consideration may be given to the promisor or to

> some other person. It may be given by the promisee or by some other person.

The proper citation is Restatement of the Law of Contracts (1932).

[8]The cases and writings are too numerous to mention. See James A. Henderson, "Promissory Estoppel and Traditional Contract Doctrine," 78 Yale L. J. 343 (1969); and Arthur L. Corbin, "Recent Developments in the Law of Contracts," 50 Harv. L. Rev. 449 (1937) for a discussion of some of the major cases.

[9]The fullest discussion is found in Grant Gilmore, The Death of Contract (1974), a work which this section draws upon heavily for its historical facts.

[10]The assumption was that the evidence would prove one position or another correct. Gilmore is typical in holding to this assumption.

[11]See note 6.

[12]Such contracts commonly include those concerning gambling, marriage, and prostitution. A more political type of illegality concerns restraint-of-trade cases. See, generally Arthur L. Corbin, Contracts Ch. 79 (1950).

[13]'Irreversible' here is meant to stand for cases of indentured service and slavery, where the right to sell one's service indefinitely is often challenged.

[14]Usury has usually been suspect, but other related types of contracts have usually been left to stand. See, for example, Batsakis v. Demotsis, 226 S.W. 2d 673 (Tex. Civ. App., 1949), where an unhappy court debated and then upheld a contract allowing for a $25 loan in Greek drachmae to be repaid as $2000 in American currency without considering the issue of usury.

[15]The Uniform Commercial Code has made explicit the duress problem for United States jurisdictions. Section 2-302 holds:

"Unconscionable Contract or Clause. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

What is unconscionable is left, typically, entirely open.

[16]Holmes states this policy in "The Path of the Law" 10 Harv. L. Rev. 457 (1897); reprinted in O. W. Holmes, Collected Legal Papers 167-202 (1920).

[17]For an instance of objectivism of law, see the Learned Hand, J. Opinion, Hotchkiss v. National City Bank of New York, 200 Fed. 287 (S.D.N.Y. 1911); for a judicial criticism of this view, see the Frank, J. concurring opinion in Ricketts v. Pennsylvania R. Co., 153 F. 2d 757, 760 (2d Cir. 1946). See Lawrence M. Friedman, A History of American Law 567-595 (1973) for a discussion of the attitudes and beliefs of the era.

[18]Subjectivity here referred to state-of-mind subjectivity, rather than an 'objective' meeting of the minds.

[19]Oliver Wendell Holmes, The Common Law 230 (1881).

[20]Samuel Williston, 13 Contracts 32-34, 36 §153b (1920).

[21]See Corbin, Contracts Ch. 8.

[22]For references to Williston's view of the primacy of bargained-for consideration, see note 20.

[23]Corbin says at one point "that no definition can rightly be set up as the one and only correct definition, and that the law of contract is an evolutionary product that has changed with time and circumstance and that must ever continue to change." For this quotation and

Corbin's views on tidy categories and models generally, see his Contracts §109.

[24]Friedman felt scorn for what he saw as Williston's insularity. He wrote:

> "Samuel Williston built a monumental fortress (1920 - 22) out of the law of Contracts volume after volume, solid, closely knit, fully armored against the intrusion of any ethical, economic, or social notions whatsoever."

A History of American Law 593 (1973).

[25]Businessmen incresingly use standardized contracts, and mail form contracts back and forth without ever bargaining or even agreeing on any single contract, yet acting as though a contract exists. On the so-called battle of the forms see Otto Prausnitz, The Standardization of Commerical Contracts in English and Continental Law (1937); Nathan Isaacs, "The Standardizing of Contracts," 27 Yale L. J. 34 (1917); and S. Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," 28 Am. Soc. Rev. 55, 58 (1963).

[26]One explanation for the distinction between the English national courts and the early law merchant courts might involve this split. For the problem of the incorporation into English law of promissory estoppel, see Central London Property Trust Ltd. v. High Trees House, Ltd. [1947] K. B. 130; and Combe v. Combe, [1951] 2 K. B. 215. These cases are discussed in P. S. Atiyah, An Introduction to the Law of Contracts 86 ff. (2d ed. 1971).

[27]Both were law professors at leading American law schools who spent their lives compiling massive contract treatises.

[28]Insight into Barotse tribesmen can be found in Max Gluckman, The Judicial Process among the Barotse of Northern Rodesia (1955); into Sepapur villagers in Bernard S. Cohn, "Some Notes on Law and Change in North India", found in Law and Warfare 139 (ed. Paul Bohannan, 1967). A study of Cheyenne society can be found in Karl Llewellyn and E. Adamson Hoebel, The Cheyenne Way (1941).

[29]Despite Kelsen's well-known statements about revolutions automatically terminating pre-existing legal systems, there are good conceptual and empirical reasons for

believing otherwise. See John Finnis, "Revolutions and Continuity of Law," in Oxford Essays in Jurisprudence, Second Series 44-76 (ed. A. W. Simpson, 1973).

[30]See H. L. A. Hart, Theory and Definition in Jurisprudence (1953) for a discussion of some of the difficulties imposed when such ambiguities are left unclarified.

[31]It could be argued that a greater number of individuals would acquiesce in those propositions than those who agreed. Timidity and a desire to avoid conflict would account for this acquiescence. However, conformity is not agreement, and offered an alternative, these others would not remain loyal.

[32]One good empirical study of the subject is Thurman Arnold, The Symbols of Government (1935). A more conceptual work is William E. Connolly's The Terms of Political Discourse (1974).

[33]This idea is compatible with the first order political philosophy of factionalism espoused in Montesquieu's The Spirit of the Laws (1748) and A. Hamilton, J. Madison, and J. Jay, The Federalist (1790).

[34]For a detailed legal and historical discussion of these issues, see H. V. Jaffa, Crisis of the House Divided (1959).

[35]Many of the issues, and the lower court cases that split on the solution of many of them, are discussed in an historical context by Eugene Genovese in Roll, Jordan, Roll (1974).

[36]60 U.S. (19 How.) 393, 15 L. Ed. 691 (1857).

[37]For an overview, see Daniel J. Borrstin, The Genius of American Politics 99-132 (1953). For a detailed analysis, see Alexander H. Stephens, Constitutional View of the Late War Between the States (1870).

[38]All facts are taken from the advance sheet opinion, labeled

Constitution Petition No. 1 of 1977.

[39]The two best known contract theorists are Thomas Hobbes, Leviathan (1651) and John Locke, The Second Treatise of Government (1690). Their views are interpreted in a modern reconstruction in Leo Strauss' Natural Right and History (1953).

[40]This is taken from John Rawl's A Theory of Justice (1971).

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