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# Towards the Ideal: Coherence Theories of Judicial Adjudication and the Ideal Law in Hard Cases

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# Towards the Ideal: Coherence Theories of Judicial Adjudication and the Ideal Law in Hard Cases

by

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## Abstract

It will be argued that that methodology developed in this thesis, known as 'ideal law methodology', provides a better alternative to coherence theories of judicial adjudication in adjudicating hard cases. After framing the discussion within the context of Angelo-American legal theory, hard cases, and *stare decisis*, coherence theories of judicial adjudication will be presented and shown to suffer from conservatism. This will be argued to create problems both in unjust and just societies. The ideal law methodology, which is adapted from arguments from Robert Alexy, will be then be presented. The ideal law methodology uses narrow reflective equilibrium to determine principles of a political community, and then determines and chooses the decision with the largest weighted aggregate realization of principles. It will be argued that the ideal law methodology presents a better method for determining hard cases than coherence theories of judicial adjudication by being adaptive to the community's political beliefs and thus avoiding conservatism. A number of objections to the ideal law methodology will then be addressed, both from coherence theories of judicial adjudication and elsewhere.

This thesis is original, unpublished, independent work by the author, Nigel Freno.

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*For Dora.*

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Well when events change, I change my mind. What do you do?

– Paul Samuelson, Meet the Press

## Introductory Chapter

Those nominally familiar with the law – either through experience, exposure in media, or simply common knowledge – are familiar with the phenomenon of judicial adjudication. Judicial adjudication is a key feature of the courts where a judge or the judiciary make decisions on particular cases put forth before them. Judges, in all levels of courts, in justifying their rulings are expected to support them with good arguments and reasons for favoring said ruling (Feteris, 1999, p. 1). Furthermore, it seems *prima facie* true that the acceptability of such a decision is dependent on the quality of its justification (Feteris, 1999, p. 1). Good decisions, *inter alia*, tend to be long lasting and command a particular reverence, while bad decisions are at risk of being vertically overruled and provide fodder for the endless supply of law review journals (Lamond, 2007, p. 705).

One dominant view among philosophers and legal theorists in common law adjudication is that judges ought to make the law as coherent as possible. The doctrine of *stare decisis* already instructs judges to follow past precedents when material conditions are similar, thus dealing with a portion of the cases before the courts. However, even in cases where *stare decisis* does not provide clear guidance such as where the language of the rules or past precedents are unclear, or the rules and precedents involved in the case compete with one another or are absent, this view states that judges still should aim to make the law as coherent as possible. Those who subscribe to this coherence view of judicial adjudication claim that in cases where *stare decisis* does not provide clear guidance, the correct judicial decision is one which is as coherent with existing law as possible. However, such theories are not without their pitfalls. There is a risk in making the law as coherent as possible, in that the law will become stagnant and unchanging. Political communities are constantly moving forward, both in terms of changing and adapting to their

circumstances as well as learning how to be a better community. When the legal system lags behind, it can hold a community back from making meaningful changes.

It is important to take note of philosophers and legal theorists in this domain, as their theories inform how actual judges go about their decision-making process. Lawyers and judges in their legal education learn about various theories of law, jurisprudence, and adjudication and carry those into their legal practice. When these theories are carried into practice, they also carry their pitfalls into practice too – a legal system utilizing these coherence theories can hold actual communities back from enacting meaningful and lasting change. This is a serious problem for those whom justice is denied when they are held back. As such, the need to address shortcomings and problems with theories law is high.

This thesis will argue that in hard cases, judges ought to decide the case in a way which is the best from the standpoint of political morality. In this regard, a methodology will be developed called 'ideal law methodology' to instruct judges on how to determine which available ruling is the best from the standpoint of political morality. It will be argued that the ideal law methodology is a better method for judges to follow in hard cases when compared to coherence theories of judicial adjudication.

This thesis will proceed as follows. First, Chapter II will discuss framing considerations and will mainly cover issues of scope and definition. Chapter III will discuss coherence theories of judicial adjudication in general. Ronald Dworkin's account of law as integrity as it relates to judicial adjudication will be presented as a prominent coherence theory of judicial adjudication. In Chapter IV, a serious problem will be raised against coherence theories of judicial adjudication. This chapter will argue that a problem with coherence theories of judicial

adjudication is that they are too conservative, and that this is a problem in both unjust and just societies.

In Chapter V the ideal law methodology will be introduced. First, following Robert Alexy, it will be argued that the law has an ideal dimension. Once this has been established, a full account of the ideal law methodology will be given. Chapter VI will argue that the ideal law methodology successfully deals with the problem of conservatism. Chapter VI will also respond to objections surrounding ideal law methodology and conservatism. Chapter VII will consist of responding to a number of objections unrelated to conservatism, but which will illuminate various nuances in the ideal law methodology and how it instructs judges to act.

## Chapter II: Framing the Discussion

This chapter will consist of various framing distinctions necessary for the discussion of judicial adjudication to take place. As such, it will be divided into three subchapters. The first subchapter will deal with the nature of adjudication. In this, a number of assumptions will be made to frame judicial adjudication in the context of Anglo-American legal theory. The second subchapter will deal with the nature of hard cases. The definition of hard cases will be presented, as well as two opposing positions on the existence of hard cases. Without choosing or dissolving the distinction between the positions, it will be argued that either position is unproblematic to adopt for the following discussion. Last, concerns about how this thesis will proceed in light of *stare decisis* will be addressed.

### 2.1: On Adjudication

Before a philosophical discussion of nature of judicial adjudication can take place, a justification is perhaps needed about limiting the discussion to judicial adjudication as opposed to adjudication in general. Much of the philosophical literature on adjudication in the law has been solely focused on the judiciary, which has not been without criticism. Hart, in his work *The Concept of Law* and elsewhere, has been criticized for this with commenters noting his inordinate fixture on the appellate judiciary at the expense of discussion of various other administrators – ranging from directors of agencies to police officers (Hart, 2012, pp. 96-99; Kramer, 2018, pp. 76, 112). Thus, one may ask why one should focus exclusively on judicial adjudication, and not a wider class including individuals such as administrators and legislators.

One compelling reason for the focus on judges is that the set of reasons which judges may appeal to may not be coextensive with the set for non-judicial administrators. That is to say there are some reasons which may be good reasons for non-judiciary administrators, but not for

judges and *vice versa*. It is *prima facie* permissible for a legislator to appeal to the fact that a decision or rule would increase the gross national product of their nation or increase the international prestige of their nation as a reason to make a decision. However, such reasons are *prima facie* impermissible to justify a judicial decision (Sartorius, 1968, pp. 173-174). As well, it is *prima facie* permissible for an officer to appeal to the fact that some decision or rule is, as a practical matter, enforceable or not when making their decision. Such a reason is *prima facie* impermissible to justify a judicial decision (Sartorius, 1968, pp. 173-174). Looking ahead, this discussion is not to say whether any kinds of reasons are or should be excluded from administrative decision making. However, given that the set of reasons which judges may appeal to may not be not coextensive with the others, it is prudent to look at decision making as it pertains to each role individually – one should be cautious about taking claims about judicial adjudicators as representative of administrators as a whole.

When discussing judicial adjudication, it is helpful to make precise the boundaries of the phenomenon as much as one can. Following Lucy Williams' delineation of 'orthodox' theories of judicial adjudication, four constitutive assumptions will be adopted to motivate theories of adjudication which follow from or are related to positivist Anglo-American legal theory[1] (Williams, 1999, pp. 1-2). While these assumptions will not be argued for in a strict sense, reasons will be provided to motivate the claim that these assumptions ought to be taken seriously.

The first assumption is that one must take seriously adjudicators' claim that they decide cases relatively constrained by standards relatively determinate of the dispute before them

[1] Williams' analysis takes the accounts of Ronald Dworkin, Neil MacCormick, and Joseph Raz as foundational in this regard, but also includes further authors such as Steven Burton, Joel Levin and Cass Sunstein as supplementary inasmuch they extend and echo the claims of the first three (Williams, 1999, p. 2).

(Williams, 1999, p. 2). Adjudicators are relatively constrained in that there are real constraints with regards to what decisions are acceptable and those which are not. However, adjudicators are not wholly constrained in this regard, as in some cases they do have a limited number of choices available to them.

The second assumption, related to the first, is that the choices made by adjudicators within said constraints are justifiable in principle (Williams, 1999, p. 2). This is due to the judiciary being subject to public scrutiny in the form of public evaluation (Feteris, 1999, p. 6). In some legal systems there is an explicit obligation for the judiciary to justify a decision in the form of a statutory rule[2] (Feteris, 1999, p. 6). However, even in legal systems where the need for public justification is not laid down in a statutory rule, those which function within liberal-democratic political models are expected to give reasons to explain what the law is and how it applies in each particular instance. This follows from the principle of public reason, which entails that citizens are capable of evaluating the justificatory reasons for norms which are enacted in legitimate law (Rawls, 2000, p. 133). Given that the principle of public reason is an arguably a constitutive part of a well-ordered liberal-democratic society, judges ought to make their reasons for particular decisions available to the public in said societies (Rawls, 2000, p. 132).

Third, related to the first and second assumption, that the strategies adjudicators use are constrained to a limited recognizable class (Williams, 1999, pp. 3-4). At this stage, no assumptions will be made about what class of constraints will be applicable to judges.

[2] Such systems include: within the Dutch Constitution, under Section 121, a legal judgement must specify the grounds underlying the decision; in Germany under S 313 (1) of the Code of Civil Procedures, a decision must contain the reasons upon which a decision is based; in Sweden, in the Code of Procedure, a judgment of a court must contain the reasons given by the court for its order (Feteris, 1999, p. 6).

Fourth, it will be assumed that, following from the first three assumptions, that adjudication takes place within the law (Williams, 1999, p. 3). This is to say that judicial adjudication will have little to say on the institutional constraints in which judges make their decisions (Williams, 1999, p. 6). Given that judges work within the law, they are constrained, aside from constraints which delineate them from legislators and administrators, by institutions within the law such as, *inter alia*, rules of precedent, statutory interpretation, evidence, and procedure (Williams, 1999, p. 6). This is not to say however, that these completely determine judges' decisions – such constraints often do not wholly constrain judicial decisions, particularly in the appellate courts (Williams, 1999, p. 6)

Aside from the attempt to engage this project with intellectual honesty, one reason to make these assumptions explicit is to bracket concerns from critical legal studies. Generally, critical legal theorists endorse – or at least do not argue against – the first and forth assumptions, while they generally would reject the second and third assumptions (Williams, 1999, p. 10). By making these set of assumptions explicit, such criticisms are acknowledged but put aside for the purposes of this thesis. While certainly such criticisms are interesting and ought to be dealt with, such criticism fall outside of the boundaries of this thesis.

### 2.2: On Hard Cases

Much of the philosophical interest in judicial adjudication is directed towards so-called 'hard cases'. In *The Concept of Law*, Hart puts forth a conceptual distinction between easy cases and hard cases[3]. Easy cases are ones in which courts are able to deal with fairly automatically – this is to say that there exists a rule formulation, an interpretation of the general language used in

[3] It is of note that Hart never used the terms 'easy cases' and 'hard cases'. A discussion of the concepts can be found in Hart's discussion of discretion and the open texture of law (Hart, 2012, pp. 124-147). Popularization of the term can be credited to Dworkin in his articles *The Model of Rules* and *Hard Cases* (Dworkin, 1967, 1975).

the source law which is habitually adopted – a 'canon' – which makes interpretation 'automatic' (Hart, 2012, pp. 124-125; Spaić, 2014, p. 6). Thus, there is some decisive rational procedure which subsumes the case under a general rule (Spaić, 2014, p. 3). Hard cases, on the other hand, cannot be dealt with so easily. Due the legal language and legal rules not being 'settled'[4], these cases cannot be decided in such a manner (Hart, 2012, pp. 127-128). This leaves a gap in the positive law[5], in which judges must exercise discretion to fill the gap by modifying or creating law (Marmor, 2005, p. 97). A particular case may not be settled in various ways: there may be two or more competing interpretations which are all applicable to some of the proposition of law or there may be two or more competing propositions of law which may be applied to the case[6] (Williams, 1999, p. 47).

However, in defining hard cases as 'unsettled' law as opposed to unsettled positive law, one may worry that such a definition may be overly broad as it includes principles and thus define away the existence of hard cases. As Dworkin notes in "Hard Cases", principles 'underlie' or are 'embedded in' positive law (Dworkin, 1975, pp. 1082-1083). As well, principles can be articulated in such a way that they do does not specify clear conditions for when it is met (Dworkin, 1975, p. 1070). While principles which clearly specify conditions when they are met have a more definitive claim than principles which do not, the distinction between the two is a distinction of degree and abstract principles can be directly applicable to a given case (Dworkin, 1975, p. 1070). Given the fact that in mature legal systems there will likely be a number of laws governing a wide variety of situations, it is plausible that principles which underlie existing

[4] Not being 'settled' – or more aptly 'unsettled' – in this usage is intended to be neutral between whether particular legal language and legal rules are indeterminate, or being indemonstrable or uncertain.
[5] The term 'positive law' is deployed in this thesis, similar to Aquinas, to denote the actual statues or legislation of a given political community. This is, of course, not to be confused with the philosophical position of legal positivism, which holds that there is no necessarily connection (different conceptions of legal positivism denote different types of connections) between law and morality.
[6] This list is non-exhaustive.

positive law can be articulated abstract enough to cover all relevant situations. If that is the case, then it appears that there are no more hard cases as principles 'fill in' all of the gaps in the law.

While the inclusion of principles may 'fill in' gaps in the law, this does not define away hard cases. First, not all principles in hard cases will be weighty enough to be in competition with rules and precedents. As Dworkin notes in "The Model of Rules", while rules may apply in an all-or nothing fashion, which is to say that if the facts a rule stipulates are met and the rule is valid then it is applicable, principles may be applicable to greater or lesser degrees. (Dworkin, 1967, p. 25). As such, principles do not set out legal consequences that follow automatically but only when they are sufficiently weighty (Dworkin, 1967, p. 25). Defining hard cases as unsettled law as opposed to unsettled positive law does not thus automatically define away the existence of hard cases unless it is the case that in each instance of unsettled positive law has a covering principle which is sufficiently weighty; if it is the case that two rules or two interpretations of a rule are in genuine competition, it is not necessarily the case that a principle will be weighty enough to decide the case. In cases where principles are not sufficiently weighty as to be in competition with one another, hard cases will exist.

The further possibility of principles being in competition is plausible and thus presents a new dimension to hard cases: cases where principles conflict with other parts of the law. Since it is plausible that positive law will implicate more than one set of principles or underdetermine principles, different principles which underlie the law may come into conflict. In cases where there are two or more competing rules each rule may implicate different principles or different formulations of a principle, and these may come into conflict if neither clearly outweighs the other. In cases where there are two or more competing interpretations to an applicable rule, such interpretations may be different enough to have different underlying principles. If neither

principle clearly outweighs the other, this may be considered a hard case. Principles can also come into conflict with rules and precedents if it is not clear whether a principle undermines the validity of a rule or precedent or not, which is to say that the rule or precedent is in competition with the principle.

Another important note about hard cases is that not all philosophers or legal theorists[7] endorse the existence of them. A minority of theorists reject the separation thesis, that there is a conceptual separation between what the law is and what the law ought to be. (Marmor, 2005, p. 95). If the separation thesis is true, then there are instances when a judge can simply identify and apply the law (Marmor, 2005, p. 95). However, if the separation thesis is false then a judge cannot simply identify the law, they must also in some sense create it through interpretation (Marmor, 2005, p. 95). Those who reject the separation thesis reject the distinction between easy and hard cases, as all cases require judges to provide an interpretation of the law before applying it.

While this discussion of judicial adjudication takes place primarily within the context hard cases, this discussion does not depend on the separation between easy cases and hard cases. This is because, in collapsing the distinction between easy and hard cases, all cases before the courts are hard cases, in that a judge must undergo some interpretive work to identify the law. In adopting and deploying the linguistic framework of hard cases, this thesis does not take a stance on the truth of the separation thesis as the truth of the separation thesis does not affect whether hard cases exist or not – if the separation thesis is true then there are both easy cases and hard cases, but if the separation thesis is false then there are *still* hard cases but no easy cases.

[7] This list includes, but is certainly not limited to, Ronald Dworkin within *Law's Empire* (1985), Lon L. Fuller's *Positivism and Fidelity to Law — A Reply to Professor Hart* in the Harvard Law Review (1958), and Stanley Fish's *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism* in Critical Inquiry (1983).

As such, this thesis will focus on judicial adjudication in hard cases. For those who accept the distinction between hard cases and easy cases, the following discussion will bracket easy cases as there are already decisive rational procedures which subsumes these cases under a general rule. As such, there is no need to provide another decision procedure. For those who reject the distinction between hard cases and easy cases, this discussion will extend to adjudication of all applicable cases.

One last note on the scope of judicial decisions in hard cases must be made before proceeding. When a judge is in a hard case, they are not free to make a decision regarding any aspect of law. In hard cases judges – like judges in easy cases – are confined to adjudicating the case at hand. It would certainly be objectionable if a judge deciding a tax law case rendered a decision which legislated over unrelated criminal or contract law. Furthermore, it would be similarly objectionable if a judge deciding a tax law rendered a decision which legislated over unrelated tax law. As such, judges are constrained in hard cases to the case at hand and thus the law. Given the nature of hard cases, this confines judges to decisions about the 'unsettled law' at hand, as per the first framing assumption.

### 2.3 *Stare Decisis* and Precedents

In talking about judicial adjudication, it is impossible to ignore *stare decisis*. *Stare decisis* – to "stand by things decided" – is relied upon to manage expectations, bring predictability, and establish a sense of equality in common law systems (Lamond, 2007, pp. 707-709). *Stare decisis* generally interpreted as a doctrine stating that judges should follow the decisions of past courts, referred to as 'precedents', when material conditions are similar (Daly, p. 3). Doctrines are different from principles and policies in that they are a framework of rules and standards which judges operate within and may reason from doctrinal premises to reach an acceptable decision

within the framework (Tiller & Cross, 2005). Before any discussion of hard cases can take place, the limits and applicability of *stare decisis* must be addressed.

In interpreting *stare decisis*, it can be interpreted in either a strict sense or a relaxed sense. *Stare decisis* in a strict sense obliges judges to follow precedents set by courts (Dworkin, 1986, p. 24). In this interpretation, when a judicial decision is rendered, the *ratio decidendi*[8] of the decision is traditionally considered to create a general rule for both the present case as well as future cases (Lamond, 2007, p. 700). When material conditions are similar, the issue before the courts is thus subsumed under the rule created by the precedent. The relaxed interpretation of *stare decisis* obliges that judges only give some weight precedents set by courts but does not oblige them to follow the precedent set by the court (Dworkin, 1986, p. 25). Instead, *stare decisis* creates reasons to follow the interpretations set by said precedents, and judges must follow them unless there sufficiently strong reasons to outweigh them (Dworkin, 1986, p. 25).

Given the context of the discussion is limited to hard cases, some interpretations of the doctrine of *stare decisis* are not applicable. Cases where the strict interpretation of *stare decisis* is applied are not relevant as these are not hard cases – if a precedent has created a general rule which is applicable to the present case, then the case is subsumed under the said rule. Thus, these kinds of cases are considered to be easy cases. Cases in which the strict doctrine of *stare decisis* does not apply – in that there is no relevant precedent – may be hard cases, as long as there is no other decisive procedure which subsumes the case under a general rule applicable. Cases where the relaxed interpretation of *stare decisis* apply are sometimes but not always relevant. In cases where there are overwhelming reasons to decide a case in favor of the precedent, the application *of stare decisis* becomes a decisive procedure which subsumes the case under a general rule

[8] The *obiter dicta* of the decision are generally taken to be non-binding in the way the *ratio decidendi* is (Lamond, 2007, p. 700).

created by the precedent. These kinds of cases are easy cases as the reasons created by *stare decisis* decisively pick out one rule or interpretation to be applied. Cases where there are not overwhelming reasons to decide a case in favor of the precedent, in that there are competing reasons from other sources can be hard cases as long as there is no other decisive procedure which subsumes the case under a general rule applicable. These outside sources can be competing interpretations which are applicable to the precedent or competing propositions of law.

As such, with regards to the doctrine of *stare decisis*, the following discussion will focus on cases where the strict doctrine does not apply, or in cases where the relaxed doctrine applies but there are not overwhelming reasons to decide a case in favor of the precedent. These are cases which can properly be called hard cases.

**2.4 The Frame of Discussion**

This thesis will discuss judicial adjudication within the context of Angelo-American legal theory – which is to say that this thesis will assume: adjudicators' decide cases relatively constrained by standards relatively determinate of the dispute before them, choices made by adjudicators within said constraints are justifiable in principle, the strategies adjudicators use are constrained to a limited recognizable class, and that adjudication takes place within the law.

Furthermore, this thesis will thus proceed by discussing judicial adjudication in the context of hard cases where the strict doctrine of *stare decisis* does not apply or in cases where the relaxed doctrine of *stare decisis* applies but there are not overwhelming reasons to decide a case in favor of the precedent. As such, discussions relating to judicial adjudication in easy cases and cases where *stare decisis* provides a decisive procedure which subsumes the case at hand under a general rule will be bracketed.

# Chapter III: On Coherence Theories of Judicial Adjudication

This chapter will present coherence theories of adjudication. First, a general account of coherence theories of adjudication will be given. Following this, Dworkin's theory of law as integrity as it relates to judicial adjudication will be presented.

## 3.1: On Coherence

Coherence occupies an influential role in many areas of philosophical reasoning. Originating in epistemology, it has branched out to other areas of philosophy including philosophy of science, philosophy of language, and philosophy of law. Coherence is the view that no particular element or set of elements have a privileged class which provides a justificatory foundation for other beliefs (Amaya, 2015, p. 142). More precisely, coherence is generally considered a two-place relation. The first relata of the coherence relation is the 'object of coherence' The object of coherence is the thing or set of things which are to be made coherent. The second relata of the coherence relation is the 'base of coherence'. The base of coherence is the set of things which the objects of coherence are coherent with. The coherence of a set is determined by the proportion of coherence relations which hold between elements of the set.

Instead of being ordered and justified in a hierarchical fashion, the elements of the set 'hang together', which is to say that elements of the set provide justificatory support for each other (Amaya, 2015, p. 142). Coherence thus provides a justificatory strategy, where if something (a new element) is sufficiently coherent is it justified in relation to the coherence base. Furthermore, it is taken that that this done in a non-viciously circular way (Amaya, 2015, p. 143).

Gortibolia Rumpkinpumpkin

Various different theories have advanced different versions of coherence. For example, Alexy and Peczenik have advanced an influential theory of coherence where a set is coherent if it sufficiently approximates a perfect supportive structure (Alexy & Peczenik, 1990, p. 131). The term 'support' here is used in a weak sense, in that "the statement [$P^1$] supports the statement [$P^2$] if, and only if, [$P^1$] belongs to a set of premises, *S*, from which [$P^2$] follows logically" (Alexy & Peczenik, 1990, p. 132). The term 'perfect' in perfect supportive structure is its fulfillment of coherence criteria (Alexy & Peczenik, 1990, p. 132). There are a number of different coherence criteria which to judge perfection, which must be weighed and balanced with one another (Alexy & Peczenik, 1990, p. 143). These include the number of supportive relations, the length of the supportive chains, interconnections between the supportive chains, whether elements are 'strongly supported'[9], and others (Alexy & Peczenik, 1990).

Within philosophy of law, coherence has enjoyed a prominent position in theories of judicial adjudication. Pre-theoretically, this is for two broad reasons. The first of which is that the law itself generally exhibits a large degree of coherence. This is to say that the law is – or at least specific fields of law are – often well-expressed, and particular legal decisions, statutes, or principles make sense in the light of the total body of law even if this coherence is varied or unarticulated (Raz, 1994, p. 280). In the same way, specific fields of law are usually not disjointed, fragmented, or contradictory (Raz, 1994, p. 280). This is of course not to make the claim that the total body of law displays coherence, but simply that there exists some degree of coherence – or 'pockets' of coherence – within different branches or fields (Raz, 1994, p. 315).

[9] To say that the statement $P^1$ supports the statement $P^2$ is to say that $P^1$ weakly supports $P^2$ as well as having the following properties: none of the premises are meaningless or falsified; at least one subset of *S* is such that $P^2$ follows logically from it, and all members of the subset are necessary to infer $P^2$ from this subset; each member of *S* belongs to at least one such subset; and $P^2$ does not follow from any subset of *S* at all to which $P^1$ does not belong (Alexy & Peczenik, 1990, p. 134).

Second, the coherence displayed in the law has the appearance of being over-and-above mere consistency. While presumably the law, or more narrowly branches or fields of law, are both logically and linguistically consistent, elements of the law have the appearance of 'hanging together', in the sense of providing some degree of justificatory support to one another. This is so even after acknowledging that the law often arises out of a hodgepodge of norms stemming from conflicting ideologies and the pragmatic necessities of which they arise (Raz, 1994, p. 297). In this way, the law is often viewed as a rational system governing the conduct of affairs in a political community (Raz, 1994, p. 289).

The one main feature which delineates coherence theories of judicial adjudication from other theories of adjudication is the inclusion of coherence of the positive law as a justificatory reason for adopting some judicial decision. In this regard, judges use or are instructed to use coherence of legal norms, rules, standards, doctrines, and principles[10] as justification for their decisions (Raz, 1994, p. 280). The fact that one potential decision is coherent with the law thus is a good reason to adopt that decision. As well, if one decision is more coherent than another, then that decision has a better reason for adoption. Thus, coherence informs or partly informs judicial decisions[11].

The main draw to coherence theories of judicial adjudication is the degree to which these theories safeguard important rules, principle, and decisions. These important rules, principles, and decisions are often used as building blocks for other decisions, in that they are, cited in other decisions' *ratio decidendi*. When such a citation occurs, it is generally to show that the current decision is relevantly similar to the previous decision in some way, such as falling under the

[10] Coherence theories of judicial adjudication characteristically use these as elements of the coherence base, but are not limited to them.
[11] This coherence is separate from any reasons which the relaxed sense of *stare decisis* may provide.

same rule, using the same interpretation of a rule, or relying on the same principle. This not only provides a justificatory connection between the cases by importing justification from the previous cases, but also a coherence connection in that the current decision thus 'hangs together' with the citation.

As such, these important rules, principle, and decisions become safeguarded in the law through coherence. The more decisions cite and rely on previous law, the larger number of coherence relations hold between important rules, principle, and decisions and other positive law. As the number of coherence relations grow, which is to say that the law becomes more coherent with these important rules, principle, and decisions, it becomes harder to overturn them on the basis of coherence. Thus, important rules, principle, and decisions are provided with safety from being overturned.

### 3.2: Dworkin's Theory of Law as Integrity

Dworkin, within chapter 7 of *Law's Empire* and elsewhere[12], lays out the structure of his theory of judicial adjudication. In understanding judicial practice, Dworkin provides a useful metaphor in the chain novel. Suppose that some novelist are part of a writing group and decide to write a *seriatim*, a novel where each member writes one chapter of the book, sends to the next novelist who then has to write the next chapter and then send it off to the next, and so on (Dworkin, 1982, p. 192; Dworkin, 1986, p. 229). Each novelist aims to contribute to the novel by writing their chapter as if the entire book was written by a single author, with regards to what they add as well as, as much as they can control it, what his successors will want or to be able to

[12] *Law's Empire* will be taken as the main text for Dworkin's views on judicial adjudication, while references to Dworkin's other works are intended to support or refine his position. This is for two reasons. The first is that chapter 7 of *Law's Empire* presents the clearest articulation of Dworkin's views on adjudication. The second is that, while one can begin to trace the evolution of Dworkin's views on adjudication from earlier texts, *Law's Empire* represents to a large degree starkly original thought on the matter.

add (Dworkin, 1982, p. 192; Dworkin, 1986, p. 229). Their aim to is make the novel the best it can be construed as the work of a single author (Dworkin, 1986, p. 229).

Making the novel the best it can be in this regard first requires that the novelist interpret the previous sections of the novel written by previous novelists – in Dworkin's words, take up some view about the novel and develop "some working theory about its characters, plot, genre, theme, and point" (Dworkin, 1986, p. 230). This interpretation of the novel cannot appeal to the author's intention, as there is no single author one can appeal to (Dworkin, 1982, p. 193). Of course, there are many possible interpretations that the novelist could take up with regards to the novel in progress, and they must decide which of these is best. First, they must determine what sort of interpretations 'fit' the text – some interpretations of the previous text will make it believable that a single author had written the previous chapters, and some will not be believable at all (Dworkin, 1986, p. 230). This is not to say that an interpretation which makes it believable that the work was written by a single author must fit the text exactly; an interpretation "is not disqualified simply because [the novelist] claims that some tropes are accidental, or even that some events of plot are mistakes because they work against the literary ambitions the interpretation states", but an interpretation must have explanatory power in explaining the bulk of the text as well as explanatory power as to why some sections of the text ought to be discarded (Dworkin, 1982, p. 184; Dworkin, 1986, p. 230). If an interpretation leaves a major event or structural aspect of the text unexplained then it is flawed in that it cannot be believable that a single author wrote it, presumably because a single author would not have written such features carelessly and without purpose (Dworkin, 1982, p. 184; Dworkin, 1986, p. 230). Dworkin states that the novelist will find themselves in this endeavor somewhere between total creative freedom and being fully textually constrained (Dworkin, 1986, p. 234). However, the novelist will find

that with a larger number of chapters previously written that their creative freedom is more constrained with regards to fit (Dworkin, 1986, pp. 232-233).

On occasions a single interpretation cannot be found, and Dworkin states that a partial interpretation – presumably an interpretation which makes only a portion of the previous chapters believable that a single author had written it – must make due (Dworkin, 1986, p. 230). If a partial interpretation is not available, then the novelist will not be able to meet their assignment (Dworkin, 1986, p. 230). However, they may find that not only is there an interpretation which fits the text but multiple do (Dworkin, 1986, p. 231).

In the case of multiple interpretations fitting the text, a second dimension of interpretation must take place in which the novelist must decide what interpretation of the text is best (Dworkin, 1986, p. 231). This requires balancing of two criteria: fit, as discussed in the first dimension, and substantive considerations (Dworkin, 1986, p. 231). Substantive considerations are considerations about what makes the novel the best it can be, and as such are substantive artistic judgements about insight, beauty, realism, and other artistic values (Dworkin, 1982, pp. 184-185; Dworkin, 1986, pp. 231, 233-234). Dworkin states that these judgements are of a general kind, and remain distinct enough to check each other in an overall assessment (Dworkin, 1986, pp. 231-232). Since these are judgements about such topics which the current novelist considers best, they are ultimately "controversial" (Dworkin, 1986, pp. 234-235). However, balancing these two criteria should not be viewed as how far the novelist should depart from the text, for there is nothing which one *can* depart from until there is an interpretation (Dworkin, 1986, p. 238).

Once an interpretation has been settled on, the path to the novelist is clear – one must write a chapter which best continues and extends this interpretation. However, Dworkin is clear

that it is not possible to clearly distinguish between the stages of interpreting the text and adding a chapter guided by the interpretation, as one can move back and forth between interpreting and writing. The novelist "might discover in what [they] have written a different, perhaps radically different interpretation", or find that they cannot write in the tone or theme of the interpretation settled upon, which will lead them to revisit or reject their interpretation. (Dworkin, 1986, p. 232)

From this metaphor, we can determine the structure of his method of judicial adjudication. Dworkin states that judges are both authors and critics, so their role is two-fold – to determine the legal tradition before him, and then determine what he will add to that tradition[13] (Dworkin, 1986, p. 229). In interpreting the law, judges must begin by identifying the what the reasonable consensus is about the relevant legal rules and their justification (See Appendi). This is a necessary as to have an interpretive base for which the judge must draw from – interpretations of something are interpretations of *something*. This entails that judges look to relevant positive law, as well as decisions of other judges who have decided cases which are relatively and materially similar to theirs (Dworkin, 1986, p. 239). 'Relevant' here indicates a tentative local priority of legal rules and decisions, which are rules and decisions directly applicable to the case at hand (Dworkin, 1986, pp. 250-251).

[13] It will be useful to make note of Dworkin's Hercules, an imaginary super-human judge, if simply for greater context. Hercules is super-human in the fact that he has intellectual power and patience to consider all of the relevant facts, laws, and interpretations within a time-frame reasonable to pass judgement within a case (Dworkin, 1986, p. 239). However, Hercules is not super-human with regard to his process, his judgements are made the same way in which regular judges can do so (Dworkin, 1986, p. 265).
Dworkin deploys Hercules as act as a model for judges in understanding how to undergo Dworkin's judicial methodology (Dworkin, 1986, pp. 239, 264-265). In this regard, judges are to follow Hercules – Dworkin's method – to the degree to which they can, given biological and contextual constraints. As this thesis is only concerned with the appropriateness of Dworkin's methodology, one can dispense of Hercules, and thus his critics, without much explanatory loss, given that this thesis is concerned with what judges *should* do.

The judge must then begin their interpretive journey. Dworkin remarks that a careful judge, before deciding on interpretations, "[sets] out various candidates for the best interpretation of the precedent cases even before he begins to read them" (Dworkin, 1986, p. 240). 'Setting out' a candidate here is analogous to developing a working theory of a novel and its characters, plot, etc. (Dworkin, 1986, p. 230). This involves two interpretive phases – first a judge must determine the 'point' of the relevant body of law, by constructing an argument of why that body of law worth pursuing (Dworkin, 1986, p. 66). As the body of law is part of the social practice of a political community, 'point' is made in reference to what the judge as a member of the political community takes to be worth pursuing (Dworkin, 1986, pp. 48, 50). As Dworkin states in *Taking Rights Seriously*, "[i]f a judge accepts the settled practices of his legal system – if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules – then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices" (Dworkin, 1978, p. 105; Guest, 2013, p. 84). Such interpretation may posit multiple values and principles in the law – things worth pursing – as an interpretation may be multifaceted (Dworkin, 1986, pp. 66, 230). As Dworkin remarks "[a judge] will aim to find layers and currents of meaning rather than a single exhaustive theme" (Dworkin, 1986, p. 230). Second, a judge must determine the appropriate scope of the body of law in light of its 'point', whether the 'point' warrants an extension or retraction of the law in some area (Dworkin, 1986, p. 66). This extension or retraction must be sufficiently coherent with the body of law so that the judge is "able to see [themselves] as interpreting that practice, not inventing a new one" (Dworkin, 1986, p. 66).

All interpretations which are not sufficiently textually coherent – which do not meet the criteria of fit – are thus disregarded in this first dimension (Dworkin, 1986, p. 230). Dworkin's

remark about ‘textual coherence’ are telling here, stating that “[j]udgments about textual coherence and integrity, reflecting different formal literary values, are interwoven with more substantive aesthetic judgments that themselves assume different literary aims” (Dworkin, 1986, p. 231). While Dworkin is speaking about the balance between fit and substantive considerations in the second dimension in this passage, fit here is the same as fit in the first dimension, as “the formal and structural considerations that dominate on the first dimension figure on the second as well” (Dworkin, 1986, p. 231). Textual coherence, as the term implies, is coherence with some body of text. Given the interpretive work of a judge in determining relevant law, one can assume that textual coherence is coherence with this body of positive law. The first dimension of the chain novel requires that the interpretation ‘fit’ the bulk of the text – in Dworkin’s words, “flow throughout the text” – judicial decisions must also be coherent with this interpretation (Dworkin, 1986, p. 230).

However, integrity is operative within this first dimension as well, in the requirement that judges interpret the text as if it was written by a single author. Integrity demands laws have more than bare consistency but consistency of rules and principles with principles fundamental to the law (See Appendix) (Dworkin, 1986, p. 219). In requiring that the law be interpreted as if it was written by a single author, decisions that exemplify principles which are not coherent with principles fundamental to the law are also disregarded. In understanding this point, the analogy to personal integrity is useful. For Dworkin, an individual who acts with integrity acts according to convictions that inform and shape their lives as a whole (Dworkin, 1986, p. 166). In integrity of the law, these convictions are taken to be the principles fundamental to the law. In asking whether a single political official – a single author – could have produced the previous legal rules and decisions, Dworkin is providing a method of determining whether such interpretations

conform to integrity (Dworkin, 1986, pp. 242, 263). If an interpretation cannot be seen as being produced by a single political official, then that interpretation cannot exemplify integrity as it would not conform to these fundamental principles.

Dworkin notes, however, that the local priority in determining relevance of the law is not static, but "[expands] out from the immediate case before him in a series of concentric circles" (Dworkin, 1986, p. 250). If a judge finds that there is more than a single interpretation available which fits– that "if neither of two principles [which a judge must choose from] is flatly contradicted by the [body of directly relevant law] of his jurisdiction" – then the judge must expand his criteria of relevance (Dworkin, 1986, p. 250). As law as integrity asks to make the law coherent *as a whole*, it is necessary to step outside of a particular area or branch – in Dworkin's words a "compartmentalization" – of law (Dworkin, 1986, pp. 251-252). This is because the compartmentalization of an area of law itself is subject to interpretation, and judges must ask whether such compartmentalization is justified with regards to its point (Dworkin, 1986, p. 252). Thus, the criteria of fit may apply globally – coherence with the law as a whole – as opposed to locally. However, this is done on a case-by-case basis, looking at each compartmentalization in context and whether it is warranted (Dworkin, 1986, pp. 252-254).

If there is only one interpretation available to a judge at this point, then a judge ought to decide in a way which conforms to this interpretation. If no interpretation fits the bulk of the legal rules and decisions, then the judge must settle for a partial interpretation. Given the use of fit as an exclusionary criterion in the first dimension, one can presume that interpretations which fit to a larger degree are preferable to interpretations which fit to a lesser degree in this regard (Dworkin, 1986, pp. 229-231).

If multiple interpretations are available, then a judge must weigh these various interpretations against each other according to two criteria. Dworkin states that this is quite common, in that "it is hardly plausible that even the strictest threshold test of fit will always permit only one interpretation" (Dworkin, 1986, p. 259). The first criteria, as in the first dimension, is again fit. The second criteria are the judge's substantive judgements about what makes the law the best it can be – which is to say judgements about what provides the best moral justification for state coercion of individuals and groups (Dworkin, 1986, pp. 47, 233-234, 249). The best justification here turns on the judgements about the fundamental values of political morality – not only about what principle is superior or inferior in abstract, but also practical considerations such as which decision should be followed as a matter of fairness (Dworkin, 1986, p. 249). Given that interpretations of law should be multifaceted, one can assume that the considerations Dworkin discusses in the text are non-exhaustive (Dworkin, 1986, p. 230). As these are dependent on the judgements of the particular judge presiding over the case, substantive considerations are "controversial", in that different judges may have different substantive judgements (Dworkin, 1986, p. 259). As interpretation of art places "the reader (or listener or viewer) in the foreground", interpretation places judges in the foreground of the decision (Dworkin, 1982, p. 185). However, this is simply a feature of interpreting law – just as there is room for critics to disagree about what is important in art, there is room for judges to disagree about what is important in the law (Dworkin, 1982, p. 184).

Given that integrity plays a role in fit and seemingly in substantive considerations, in that the best moral justification for state coercion exemplifies integrity, one can ask what the role is of having these as two separate criteria and whether such a division is useful (Guest, 2013, p. 86). For Dworkin, it balances a push and pull away from the current body of law which is present

in the concept of integrity. With regards to pulling away from the current body of positive law, integrity asks that judges make the law the best they can be. While some commenters of Dworkin haver described Dworkin's judicial method as 'filling in the gaps' of the law, this is only partially true. In hard cases, it is true that judges make new positive law where previous positive law was not available by rendering a decision which is binding through *stare decisis* – essentially 'laying down' the law for others to follow (Lamond, 2007). However, as principles in the law are derived from interpretation, and judges are required by integrity to provide interpretations which are coherent with fundamental principles in the law, judges are not 'filling in gaps' of principle but merely following principles already[14] within the law.

Following principles in the law can lead judges away from the body of positive law, however. If judges are tasked with making the law the best it can be, following principles with this aim can lead judges to more readily accept interpretations which ignore larger sections of the text in favour of gains in terms of political morality. In extreme cases, judges tasked solely with making the law the best it can be could accept an interpretation which ignores the majority of the text as to accept an interpretation, and thus make a ruling, which perfectly captures political morality.

However, integrity also pulls judges to follow the body of positive law as, "the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment" (Dworkin, 1986, p. 255). As been noted previously, integrity is operative in Dworkin's concept of fit, requiring that judges make their decisions coherent with the fundamental principles of law. This fact, however, implies further textual coherence in that such principles are derived by applying an interpretation to the positive body of law – if one is

[14] This not to say that such principles are present prior to interpretation, however.

required to be coherent with a principle, one cannot disregard the rule from which the principle derived without undermining said principle.

It is of note here that Dworkin's account of integrity allows for a more nuanced account of textual coherence in this regard, as Dworkin's account does not suppose a one-to one-correspondence of rules to principles. Many rules or decisions within an interpretation may support one principle, or some rules and decisions may imply different principles – recall that interpretations for Dworkin can be multifaceted. As such, integrity does not imply coherence with the entire text, as some rules and decisions can be disregarded without undermining principles. This is supported by Dworkin's remarks that "some lines or tropes are accidental, or even that some events of plot are mistakes because they work against the literary ambitions the interpretation states" (Dworkin, 1986, p. 230). However, there is limited freedom in disregarding parts of the positive law, as disregarding sections of the text erodes the explanatory power of an interpretation – interpretations must explain the text but also why sections of the text were disregarded, and a smaller interpretive base implies a smaller pool of justificatory resources to draw from (Dworkin, 1986, p. 230). The more a judge disregards in his interpretation, the less a judge can claim that they are acting in "good faith to be interpreting his legal practice" (Dworkin, 1986, p. 255).

Furthermore, in "Hard Cases", Dworkin remarks that earlier decisions exert a "gravitational force" on current decisions, in that judges have reasons for following previous decisions (Dworkin, 1975). While Dworkin notes that this gravitational force is partly through adopting a theory of precedent, he also claims that this gravitational force is derivative of fairness, in the principle of treating like cases alike (Dworkin, 1975, pp. 1089, 1090). To the degree that judges strive to include fairness as a component of their decisions, judges have

reasons to make their decision coherence with former decisions if the cases are relevantly similar. If a judge takes it that fairness is a fundamental principle of law, then integrity provides additional reasons for adopting an interpretation that is coherent with the body of relevantly similar past decisions, as this interpretation would be more coherent with fairness. Dworkin notes however that these are only *prima facie* reasons for coherence with past decisions, as there may be good reason to discard such decisions from one's interpretive base (Dworkin, 1975, p. 1096; Dworkin, 1986, p. 230).

Having fit and substantive considerations as separate criteria then is useful in that it instructs judges to explicitly balance these two aspects of integrity which are in tension – judges cannot be said to fully take up law as integrity while neglecting either one of the aspects. In following law as integrity, judges must find the correct balance between following the current of the law and diverting it in a new direction. Given that fit appears singularly in the first dimension, one can say that fit is perhaps overall more imposing in Dworkin's judicial methodology – at the very least judicial decisions must fulfill the requirement of fit to a sufficient degree to be considered. Given Dworkin's remarks about interpretations 'flowing through the text' and providing explanatory power to the text, one can presume as well that the sufficiently threshold of fit is relatively high in the first dimension (Dworkin, 1986, p. 230). However, fit is balanced against substantive considerations in the second dimension, and as such both aspects play a key role in deciding judicial decisions – the correct judicial decision is one which balances fit and substantive considerations correctly.

Given that substantive considerations are formed from judgements unique to a particular judge, it surprises many that Dworkin endorses the view that there is one correct decision for each particular case (Dworkin, 1986, pp. 260-261). Dworkin endorses the view that the best

balance of fit and substantive considerations in the second dimension is the correct decision (Dworkin, 1986, pp. 250, 260-263). This is not surprising, however, if one endorses Dworkin's claim that interpretations can be better or worse than one another. Given that interpretations can be better or worse with regards to the criteria of fit and substance, the best interpretation is one which best jointly satisfies these criteria. However, as substantive considerations can vary from judge to judge[15], each case having a unique judge will have a unique correct answer; in two cases which are identical except for the presiding judge, these two cases may have different correct answers.

Once a judge renders their final decision, they move into the post-interpretive stage. Yet, this post-interpretive stage folds back into the pre-interpretive stage when they or another judge must render a decision in a case which is relevantly similar – the decision previously rendered gets brought into the pre-interpretive base for a new judicial decision.

[15] One is tempted to say that substantive considerations are idiosyncratic among judges, but this would be to ignore that judges exist within political communities and their considerations inevitably shaped by them to a large degree.

# Chapter IV: Coherence and Conservatism

This chapter presents the conservatism objection against coherence theories of judicial adjudication. First, the objection will be presented that coherence theories of judicial adjudication are resistant to change. Afterwards, two case studies will be presented. The first case study is *Gong Lum v. Rice* in the United States under racial segregation, and the second case study is *Minister of Posts and Telegraphs v. Rasool* under the Apartheid in South Africa. Conservatism will be further problematized by presenting the concept of moral improvement, and an analogy will be drawn in this regard between current conceptions of justice with the history of liberalism.

## 4.1: Conservatism

One problem with coherence theories of judicial adjudication is that they are conservative, which is to say that substantial modifications to the accepted coherence set are difficult. Recall, that coherence theories of judicial adjudication determine a correct judicial decision through coherence – strong coherence theories of judicial adjudication regard that the decision which is the most coherent with the existing law is the correct decision, while weak coherence theories of judicial adjudication regard coherence as a one factor in determining the correct decision.

Given this particular fact, coherence theories of judicial adjudication are slow to change. As coherence plays a determining or partial role in a correct judicial decision, decisions which are coherent with the existing law will, all things being equal, have more justification for acceptance than decisions which are not as coherent. Providing added justification to decisions which are more coherent provides added justification for judges to decide cases in favor of previously held rules and principles (Amaya, 2015, p. 58). This is to say that coherence theories

of judicial adjudication are resistant to change[16] in the law, as such change requires that decisions are made against the current body of law. This, over a period of time, will plausibly result in decisions which are coherent with the law being chosen more often than decisions which are not.

Given the stakes within legal decisions – fines, probation, incarceration, and in some places death – the costs of making a wrong decision are high (Amaya, 2015, p. 527). In cases where the law is highly just, conservatism provides additional justification to cohere with the high standard of justice found in the law. However, in cases where the law is less than just, conservatism in law will provide additional justification for upholding injustice within the law. (Amaya, 2015, p. 58; Raz, 1986, pp. 1111-1112).

Given this, one can view conservatism within the law as a kind of defect. If it is the case that legal systems are unjust – or, as in the Hart-Fuller debate, 'wicked' – then judges within coherence theories of judicial adjudication have additional justification to accept decisions which are coherent with this injustice. This will plausibly result in decisions which are coherent with injustice being chosen more often than decisions which are not over a period of time.

This problem comes in a 'strong' and 'weak' version. The strong version of this problem states that such injustice can become intrenched to a degree that coherence with injustice outweighs correction of the injustice, instructing judges to decide in favor of injustice simply because such injustice has occurred before. The weak version of this problem states that coherence views are inefficient in correcting injustice. This inefficiency can be a problem if individuals are affected by this injustice when they need not be; an inefficient unjust system will cause undue injustice to occur during its transition to a more just system.

[16] 'Change' here should be read in reference of the content of the law, and not change in reference to the body of law. Any judicial decision, whether it coheres with the existing body of law or not, introduces a new decision to that body which as not there previously. As such, this kind of change is trivial.

### 4.2: *Gong Lum v. Rice*

One such example of an unjust or 'wicked' legal system[17] was the racial segregation in the southern United States. One notable judicial decision under this system of segregation is *Gong Lum v. Rice* which affirmed educational segregation in Mississippi (Gong Lum v. Rice, 1927). In 1924, Martha Lum, a nine year old child of Chinese decent born in the United States, was excluded from attending a whites-only school in Mississippi on grounds that she was not white (Sutherland, 1955, p. 173). Her father Gong Lum obtained a mandamus order to compel the Mississippi school authority to admit Martha into the white school (Sutherland, 1955, p. 173). This order was reversed by the Supreme Court of Mississippi, and then later went to the Supreme Court of the United States (Sutherland, 1955, p. 173).

By unanimous decision, the Supreme Court of the United States unanimously affirmed the decision of the Supreme Court of Mississippi, prohibiting Martha Lum from attending the whites-only school (Gong Lum v. Rice, 1927; Sutherland, 1955, p. 173). Chief Justice Taft, in delivering the opinion of the court, cited a large number of cases[18] which provided precedent, and thus justificatory support, for educational segregation. Notably, Taft cites *Plessy v. Ferguson*, which upholds the validity of segregation of railway coaches under the Fourteenth Amendment (Plessy v. Ferguson, 1896). Taft makes explicit reference to section 544-545 of *Plessy v. Ferguson* which articulates the 'separate but equal' standard, and in so doing relies on

[17] It is taken as uncontroversial that racial segregation within the United States constituted a serious moral wrong.
[18] The opinion of Taft in this regard, "Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle, without intervention of the federal courts under the federal Constitution. *Roberts v. City of Boston*, 5 Cush. 198, 206, 208, 209; State ex rel. *Garnes v. McCann*, 21 Ohio St.198, 210; *People ex rel. King v. Gallagher*, 93 N.Y. 438; *People ex rel. Cisco v. School Board*, 161 N.Y. 598; *Ward v. Flood*, 48 Cal. 36; *Wysinger v. Crookshank*, 82 Cal. 588, 590; *Reynolds v. Board of Education*, 66 Kan. 672; *McMillan v. School Committee*, 107 N.C. 609; *Cory v. Carter*, 48 Ind. 327; *Lehew v. Brummell*, 103 Mo. 546; *Dameron v. Bayless*, 14 Ariz. 180; *State ex rel. Stoutmeyer v. Duffy*, 7 Nev. 342, 348, 355; *Bertonneau v. Board*, 3 Woods, 177, 3 Fed.Cas. 294, Case No. 1,361; *United States v. Buntin*, 10 F. 730, 735; *Wong Him v. Callahan*, 119 F. 381." (Gong Lum v. Rice, 1927)

and extends the precedent set by it in affirming racial segregation (Plessy v. Ferguson, 1896; Gong Lum v. Rice, 1927). Taft also cites *Cumming v. Richmond County Board of Education* – which itself cites *Plessy v. Ferguson* – which sanctions the segregation of individuals based on race in public schools (Cumming v. Richmond County Board of Education, 1899; Gong Lum v. Rice, 1927). In citing *Cumming v. Richmond County Board of Education*, Taft affirms the validity of racial segregation of schools under the Fourteenth Amendment as an extension of *Cumming v. Richmond County Board of Education* (Gong Lum v. Rice, 1927).

The decision of the court in *Gong Lum v. Rice* was, in large part, decided by connecting the case at hand to previous cases. As such, The Supreme Court relied heavily on the coherence of the previous decisions with the decision to affirm educational segregation. With regards to racial segregation under the 'separate but equal' standard as per *Plessy v. Ferguson*, a decision to racially segregate education was more coherent with this standard than one which denies separate but equal' standard. By invoking *Plessy v. Ferguson*, the Supreme Court makes explicit this connection. As well, a decision to affirm racial segregation of schools is more coherent with *Cumming v. Richmond County Board of Education* than one which is not, and the Supreme Court noted that as well. Given the size of the coherence base of previous cases which are coherent with racial segregation, it is clear Taft's remark that "it is the same question which has been many times decided" indicates that utilizing coherence – reliance on precedent – as justificatory support largely overwhelms any other decision (Gong Lum v. Rice, 1927).

*Gong Lum v. Rice* as such is a starkly conservative decision, relying on existing law to supply the justification for its decision. As the existing law enshrined the morally odious standard of 'separate but equal', the decision in *Gong Lum v. Rice* was supported by its coherence with it. Furthermore, the decision of *Gong Lum v. Rice* was then added into the

existing law thereby reinforcing the 'separate but equal' standard, thus creating a larger barrier for decisions which would go against it, which is to say be incoherent with it. It would not be until 23 years later until desegregation would occur in graduate schools in 1950 as per *Sweatt v. Painter*, and 4 years after that – a total of 27 years later – in 1954 when all schools would be desegregated as per *Brown v. Board of Education of Topeka*.

While celebrating the changes brought about through *Sweatt v. Painter* and *Brown v. Board of Education of Topeka*, one must acknowledge the inefficiency of change caused by the reliance on existing law, including *Gong Lum v. Rice,* during the period leading up to these cases. Given the link between education and poverty, health outcomes, and economic development, denying education opportunity for up to 27 years constitutes a substantially worse state of affairs for individuals within that time-period (Global Partnership for Education, 2020).

### 4.3: *Minister of Posts and Telegraphs v. Rasool*

Another example of an unjust or 'wicked' legal system was the Apartheid in South Africa[19]. The Apartheid was the name given to a legal policy, enshrined by a set of legal rules, which separated individuals based on race, with regard to where they lived, where they went to school, where they worked and where they died (Clark & Worger, 2016, p. 3). As a policy, the Apartheid was introduced in South Africa by the National Party in 1948 and remained until 1994 (Clark & Worger, 2016, p. 3). Historically, however, the policy of Apartheid has legal roots dating back before the official enactment of 1948.

One notable example of conservatism within South Africa leading to the Apartheid is *Minister of Posts and Telegraphs v. Rasool*, which began European and non-European segregation and carried it into the cases which followed it. Within the South African system the

[19] It is taken as uncontroversial that racial segregation within Apartheid constituted a serious moral wrong.

Postmaster-General, a government Minister, was empowered to "establish, maintain and abolish post offices and to supervise and control their services" (Loveland, 1999, pp. 174-175). As well, the Postmaster could, under Act 10 of 1911, "issue such instructions as he may deem necessary for the conduct and guidance of officers carrying out the provisions of the Act" (Loveland, 1999, p. 175). In December 1931, the Postmaster general issued instructions to segregate their service facilities in Transvaal along racial lines[20], dividing them into 'European only' and 'Non-European' (Dyzenhaus, 1989, p. 91; Loveland, 1999, p. 175). An Indian living in Pietersburg named Rasool filed a suit against the office of the Minister of Posts and Telegraphs citing offense of having to share facilities with Africans (Loveland, 1999, p. 175). Rasool argued that the segregation amounted to unreasonable inequality of treatment, forbidden under the 1898 English case of *Kruse v. Johnson* (Dyzenhaus, 1989, p. 91). The decision was upheld in favor of Rasool in a full bench decision of the Transvaal Provincial Division citing under *Kruse v. Johnson*, but subsequently went to appeal[21] (Dyzenhaus, 1989, p. 91).

On appeal, the court ruled against Rasool upholding the racial segregation. (Dyzenhaus, 1989, p. 92; Loveland, 1999, p. 175). A number of judges[22] in their decision cited precedents or

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[20] The South African caste system divided individuals under a number of racial lines. Caucasian individuals of European decent – commonly descendants of Dutch and Huguenot settlers – were referred to as 'European' or 'whites' (Landis, 1961, p. 4). Individuals of non-European decent or are not Caucasian were divided into three different categories: 'African', 'Coloured', and 'Indian' (Dyzenhaus, 1989, p. 54). 'African', sometimes referred to as 'blacks', 'natives' or 'Bantu', were individuals of primarily Northeast Hamitic descent (Landis, 1961, p. 4). 'Coloured' individuals were those of mixed decent of 'European' and 'African', while 'Indian' individuals were those who are descendant from indentured labourers from the Indian sub-continent brought in the 1860s (Dyzenhaus, 1989, p. 54).

[21] The language in question in *Kruse v Johnson* is as follows: "I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn bylaws ... as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought not to be there." (Dyzenhaus, 1989, p. 90).

[22] The judiciary panel consisted of 11 judges.

lack thereof in their decision against Rasool. Justice Beyers, in claiming that segregation does not violate *Kruse v. Johnson* as segregation ran through all aspects of South Africa, cited *Pitout v. Rosenstein*, a 1930 Orange Free State Provincial Division decision in held that it is defamatory to say of a European man that he is a 'Hottentot', a native inhabitant of the Cape (Dyzenhaus, 1989, p. 93; McWhinney, 1954, p. 65). Justice Beyers also cites *Moller v. Keimoes School Committee and Another* of 1911 which defines 'European' as whites and not as individuals born in Europe. Justice De Villiers states that he was unable to find precedent in favor of Rasool as part of his decision, and subsequently rules against Rasool (Dyzenhaus, 1989, p. 92).

The decision of the court in *Minister of Posts and Telegraphs v Rasool* was partly decided by connecting the case at hand to previous cases. As such, The Supreme Court relied heavily on the coherence of the previous decisions with the decision to affirm segregation. In citing *Moller v. Keimoes School Committee and Another*, the Supreme court draws an explicit connection between its decision and that case. This connection however goes beyond demarcation between 'European' and 'non-European'. *Moller v. Keimoes School Committee and Another* settled a question left unanswered by the Cape Board School Act of 1905, which segregated 'Europeans' and 'non-Europeans' (Loveland, 1999, p. 134). The Cape Board School Act of 1905 made schooling compulsory for European children, but not non-Europeans. The Gardenia School District admitted only whites to its state schools and did not provide state schools to accommodate non-whites (Loveland, 1999, p. 93). Mr. Moller was classified as white, and his wife Mrs. Moller was the daughter of a white father and a Coloured mother (Loveland, 1999, p. 134). Mr. Moller's children were thus denied entry into the Gardenia School District's state schools on the grounds of race (Loveland, 1999, p. 134). Mr. Moller petitioned the Cape

provincial decision for an order to admit his children, which was refused (Loveland, 1999, p. 134). Mr. Moller subsequently petitioned the Appellate Division (Loveland, 1999, p. 134).

In a unanimous decision of the court, the court ruled that the term 'European' should be construed in terms of skin color, as opposed to intellectual or cultural capacity (Loveland, 1999, p. 135). In giving his decision, Chief Justice De Villiers cites the 'deeply rooted' prejudice within South Africa, and considers it inconceivable that Cape Parliament would have passed legislation which did not establish separate schools for white children – that statutory interpretation required that courts assume explicitly maximize rather than minimize racial intolerance (Loveland, 1999, pp. 135-136). In Justice Innes' concurring judgement, he invokes the mischief rule of statutory interpretation to interpret the Cape Board School Act as intending to separate individuals based on skin colour (Loveland, 1999, pp. 136-137)

As a consequence of citing *Moller v. Keimoes School Committee and Another*, *Minister of Posts and Telegraphs v Rasool* draws a coherence connection between the decisions of these two cases. A decision to exclude Rasool from the whites-only post office is more coherent with the previous decision of *Moller v. Keimoes School Committee and Another* than allowing him to use of the facility, as both decisions uphold the policy of racial segregation where a decision against segregation would be less coherent (Landis, 1961, p. 2). The court also explicitly denoted that a lack of precedent – coherence with previous cases – for alternative decisions played a role in their decision. In that, the court make clear that coherence played a role in their decision, that alternative decisions did not have the justificatory support of previous cases.

As well, *Minister of Posts and Telegraphs v Rasool* is noteworthy in its relation to other cases, particularly in *Rex v Abdurahman* and *Rex v Lusu*. In both in *Rex v Abdurahman* and *Rex v*

*Lusu*, the court resisted furthering the policy of racial segregation by denying separate and unequal treatment by upholding the standard of separate but equal treatment.

*Rex v Abdurahman* involved separate but unequal treatment of different designated races. Under Act 22 of 1916, parliament empowered the railway Administration to separate railway cars for individuals of different races and made it a criminal offense not to follow such segregation (Dyzenhaus, 1989, p. 107; McWhinney, 1954, pp. 66-67). As such, officials designated the first-class coaches as European only, with the rest of the compartments non-European (Dyzenhaus, 1989, p. 107). However, Europeans were not confined to the first-class coaches, and could move between coaches freely (McWhinney, 1954, p. 66). Abdurahman was charged for entering and occupying a coach reserved for Europeans (Rex v Abdurahman, 1950).

In its unanimous decision, the court decided in favor of Abdurahman in that the accommodations on the railway were separate – which was valid under the statute – but unequal (Dyzenhaus, 1989, p. 108). The court distinguished this case from *Minister of Posts and Telegraphs v Rasool* in that even though the segregation of the post offices on racial grounds, the service was comparable (Dyzenhaus, 1989, p. 108). However, in the case of Abdurahman, there was no first-class coach reserved for non-Europeans (Dyzenhaus, 1989, p. 108). The court relied on *Minister of Posts and Telegraphs v Rasool* to provide precedent for upholding the separate but equal standard (Rex v Abdurahman, 1950)

*Rex v Lusu* was also a case invoking separate but unequal treatment of different designated races. Lusu, a non-European, had been charged with entering a European only waiting room in a rail station under a 1949 amendment to the Act 22 of 1916 (Dyzenhaus, 1989, p. 110; McWhinney, 1954, p. 67). This amendment allowed the railway Administration to segregate facilitates for designated races which were “expedient” (Dyzenhaus, 1989, p. 110). The

magistrate declined to convict Lusu as the facilities provided to non-Europeans were substantially unequal (Dyzenhaus, 1989, p. 110). The government appealed claiming that the statute gave the Administration "unfettered discretion", even when such discretion resulted in unequal treatment (Dyzenhaus, 1989, p. 110).

The court ruled in favor of Lusu, citing both *Minister of Posts and Telegraphs v Rasool* and *Rex v Abdurahman*, upholding the standard of 'separate but equal' set by these two cases (Rex v Lusu, 1953). As the division of facilities involved substantial inequality, it failed the Kruse interpretation as set out in *Minister of Posts and Telegraphs v Rasool* (Dyzenhaus, 1989, p. 110).

Looking at both *Rex v Abdurahman* and *Rex v Lusu*, one notes the ability for coherence theories of judicial adjudication to maintain what little justice there may be in a wicked legal system. *Minister of Posts and Telegraphs v Rasool* provided extra justification for denying the standard of 'separate and unequal', a standard which is morally odious. However, in noting this, one must also note that *Minister of Posts and Telegraphs v Rasool* played a pivotal role in maintaining segregation in South Africa. Both *Rex v Abdurahman* and *Rex v Lusu* did not deal with the question of whether segregation based on race is itself unreasonable (Dyzenhaus, 1989, p. 111). This is because *Minister of Posts and Telegraphs v Rasool* already answered that such segregation is reasonable within its decision to permit racial segregation. As such, while *Minister of Posts and Telegraphs v Rasool* provided grounds for judges to deny furthering South Africa's program of racial segregation, one cannot forget that the decision to allow racial segregation itself constitutes a moral wrong – while it was used to prevent a worse state of affairs, it still licensed racial segregation.

Furthermore, since *Minister of Posts and Telegraphs v Rasool* allowed the South African government to maintain its policy of 'separate but equal', *Rex v Abdurahman* and *Rex v Lusu* plausibly further entrenched such a policy. Both of these cases denied the 'separate and unequal' standard by relying on cases which explicitly endorse the policy of 'separate but equal'. As such, the decisions in these cases provide further precedent in favor of the 'separate and equal' standard. *Rex v Abdurahman* cited *Minister of Posts and Telegraphs v Rasool*, *Rex v Lusu* cited both of these cases for upholding the 'separate but equal' standard (Rex v Lusu, 1953; Rex v Abdurahman, 1950). Thus, even though *Minister of Posts and Telegraphs* denied the 'separate and unequal' standard in South Africa, it allowed the 'separate but equal' policy of racial segregation to be further entrenched within the legal system.

### 4.4: Coherence and Moral Improvement

One can see how coherence theories of judicial adjudication can both entrench unjust rules, principles, or policies in law and reduce the efficiency of change of such laws. This becomes a problem within unjust legal systems, as unjust laws can prevent needed change to the legal system.

The conservatism problem is not confined simply to unjust legal systems, however. This problem is amplified by the recognition that political communities, by virtue of their members, are subject to moral improvement. Moral improvement, or moral progress, occurs when a subsequent state of affairs is better than the preceding one, or when right acts become increasingly prevalent (Jamieson, 2017, p. 170). As an increasing number of individual members increasingly perform actions which are better or right, a political community is said to undergo moral improvement through aggregation of the moral improvement of its members. This is

notable when members of a political community come to recognize previous injustices which were not recognized before.

Theories which underpin political institutions and philosophy of law are not immune to such moral improvement either, as the history of philosophy shows. Locke's conception of slavery in *Two Treaties of Government* or Kant's views on race in "Of the Different Races of Human Beings", "Determination of the Concept of a Human Race", and "On the Use of Teleological Principles in Philosophy"[23] are clear examples of how philosophy is not immune to moral improvement. While these authors have made important contributions to furthering moral progress in their respective philosophical fields, it is clear that moral further progress has been made since these works.

A more systematic example of from the history of philosophy is liberalism and the feminist critiques which have targeted its moral blind spots. Early modern liberal thinkers, such as Rousseau in the *Social Contract*, advanced the idea that the foundations of the civil state rest on reason. In forming these foundations on reason, reason was generally only attributed to men only, as women were seen as having a diminished capacity for reason (Zerilli, 2015, p. 357). As such, while these theories are notable in terms of moral progress by providing a basis of political equality and affirming the moral rights to members of the political community, they fall short in terms of full inclusion in the political community.

A number of authors have criticized these characterizations of women, with notable examples being Mary Wollstonecraft and John Stuart Mill. Mary Wollstonecraft, within *A Vindication of the Rights of Woman*, challenges the idea that women are less rational than men

[23] One notable quotation from Kant from "On the Use of Teleological Principles in Philosophy", "[Native Americans are] too weak for hard labor, too indifferent for industry and incapable of any culture—although there is enough of it as example and encouragement nearby—ranks still far below even the Negro, who stands on the lowest of all the other steps that we have named as differences of the races" (Kant, Louden, & Zöller, 2007, p. 211).

(Wollstonecraft, 2014). In her critique of Rousseau, she attributes ascriptions of women as 'emotional' as a matter of gender convention as opposed to an innate difference (Wollstonecraft, 2014, p. 38; Zerilli, 2015, p. 357). Mill also opposed characterizations of women as less than rational, and attributed custom, a lack of educational opportunities, and the psychology of male power for the apparent difference in rational capacity (Zerilli, 2015, p. 358).

Contemporary theories of liberalism after Wollstonecraft and Mill have taken this critique and have adapted their theories to meet it, recognizing women's rationality and thus including them as members of the political community. Rawls explicitly states the equality between men and women in claiming that "adult members of families and other associations are equal citizens first: That is their basic position. No institution or association in which they are involved can violate their rights as citizens" (Rawls, 2000, pp. 160-161; Zerilli, 2015, p. 365). Furthermore, Rawls, within *A Theory of Justice*, has been praised for his 'veil of ignorance' in providing a position from the standpoint of everybody as opposed to nobody (Zerilli, 2015, p. 365).

Even contemporary liberal theories such as Rawls' are not immune to criticism, however. Rawls' claims, that a liberal conception of justice will allow for a gendered division of labor "provided it is fully voluntary and does not result from or lead to injustice" has drawn much criticism (Rawls, 2000, p. 161; Zerilli, 2015, p. 366). One notable critique against this position is that it uses voluntariness as a test of injustice which is inadequate when considering that even voluntary divisions of labor may comprise gender equality (Zerilli, 2015, p. 366).

Future theories of liberalism will plausibly be even more fine-grained than current theories, in that they will mostly likely be able to reasonably accommodate contemporary liberal feminist critiques. In recognizing the fact that there is still work to be done on contemporary

liberal theories and philosophical theories in general – by acknowledging that criticisms against contemporary theory is legitimate – it is useful to place contemporary theories in historical context. Past theories provided gains in terms of moral improvement but have been shown to be deficient in certain areas. As such, one can draw an analogy between past theories and contemporary theories: both sets of theories provided gains in terms of moral improvement from their predecessors, and both sets of theories have their critiques. Past theories were able to take in critiques and adjust and modify to accommodate their theory and thus make moral improvements. This will be certainly the case with contemporary theories: that philosophy is not as just and as moral as it can be, and that there will be moral improvements

As such, recognition of moral improvement imports the problems of unjust systems to current systems. Even in what we take to be moderately just systems, there is a potential for moral improvement not only in correctly injustices, but recognizing what injustices there are to correct. Coherence theories of judicial adjudication are conservative, which is to say that substantial modifications to the accepted coherence set are difficult. As such, even when coherence theories of judicial adjudication uphold justice within a legal system, it provides support for the rules and principles taken to be just *at that time*. This provides difficulty when moral improvement takes place within a political community, as the coherence base for the previously held rules and principles supports the outdated rules. While not always insurmountable, it can slow the rate of moral improvement within a legal system, which can have serious outcomes on individuals living within that system.

# Chapter V: Ideal Law Methodology

This chapter will present ideal law methodology as a method for judges to use to decide which alternative they ought to choose in hard cases. The chapter first begins with brief delineation of different concepts of law and how they traditionally relate to different theories of law. Next, various arguments from Robert Alexy will be presented and repurposed to establish that one can understand the concept of ideal law. The last subchapter will then outline the ideal law methodology as a method for judges to use to decide hard cases.

## 5.1: Distinctions and Brief Remarks

Ronald Dworkin, in *Justice in Robes*, articulates four different senses in which the term 'law' is used and deployed (Dworkin, 2006, pp. 1-5). Dworkin distinguishes between taxonomical concept of law, which classifies particular norms or standards as legal or non-legal; the sociological concept of law, which names and distinguishes a particular institutional structural; the doctrinal concept of law, which states what the law requires, forbids, permits, or creates; and the aspirational concept of law, which is used to define an ideal concept of legality (Dworkin, 2006, pp. 1-5, 223).

While Dworkin's main target within *Justice in Robes* is the doctrinal concept of law, he articulates various intersections between the doctrinal and the aspirational concepts of law – what the law *is* and what the law *should be*. He articulates what he sees as various instances of law depending on what it should be, such as the interpretation of ambiguous or vague statues, constitutional restrictions limiting the scope of valid law, and a judge's interpretation of past judicial decisions (Dworkin, 2006, p. 6). In these instances, the aspirational concept of law informs the doctrinal of law.

Certainly, those who make particular claims about what the law should or should not be make reference to this aspirational concept of law. Claims about whether extreme injustice undermines the validity of law implicitly reference a way the law should be, and the claim that legal argumentation is a special case of general practical argumentation makes clear reference to the acceptability of moral argumentation in a legal context (Alexy, 2017, pp. 329-339). Yet, many claims about legal validity or legal argumentation have been advanced without reference to this ideal dimension at all (Feteris, 1999; Gardner, 2001).

Those who are grounded in the natural law tradition, or who endorse an interpretivist view of the law grounded in morality or some subset thereof, tend to build in some concept of what the law should be into their theory – the ideal law, the best possible legal system, is positive law which is coextensive with the relevant laws or principles of morality, except for necessary deviations for instrumental reasons, such as, *inter alia*, efficacy to the law and determination of the law[24] (Alexy, 2017, p. 332). Thus, laws or legal systems can be better or worse inasmuch they are closer or father away from this ideal law, and subsequently should aim to be moving towards ideal law. However, legal positivists *prima facie* need not endorse any conception of an ideal law. As legal positivism need not endorse any necessary connection between law and morality, there is no conceptual necessity to introduce the concept of ideal law as the law can be explained with social facts.

This is noteworthy as the following arguments are intended to show that one can understand the ideal dimension of law regardless of whether one endorses legal positivism or natural law theory. However, one should note that the inclusion of the ideal law does not necessarily denote a failure of legal positivism. This is because the inclusion of the ideal law

[24] This does not imply the further claim that whatever is not coextensive with the ideal law is not valid law. Most natural law theorists tolerate some degree of injustice outside of the necessary deviations for instrumental reasons.

does not imply any necessary conditions of legal validity; even if there is an ideal dimension of law, the requirement that the actual law be coextensive with the ideal law – a requirement that laws must be to some degree sufficiently moral – is not necessarily included.

### 5.2: Towards Understanding the Ideal Law

It is the aim of this subchapter at present to show that there is an ideal dimension of law and its relation to the concept of law. This is generally referred to as the Dual Nature Thesis (Alexy, 2010; Alexy, 2017). An ideal dimension of law defined by two aspects: that it is *ideal* and it is a *dimension* of law. To be a dimension of law is plausibly to be an aspect or facet of law, in that it is one part of the law. Ideal here is defined as the way the law should be from the standpoint of morality. Using Dworkin's terminology, the aim is to show that the aspirational concept of law is necessarily included in the taxonomical concept of law (Dworkin, 2006; Wang, 2016). Any further reference to 'the concept of law' will thereby mean the taxonomical concept of law. This will be done by explicating two arguments developed by Robert Alexy, what will be referred to as the Strong Argument from Correctness, and the Bandit System Argument. While, unfortunately, both of these arguments fail as Alexy presents them, adjustments to these arguments can be made to show that the ideal dimension of law is derivable the concept of law. Thus, a Weak Argument from Correctness be put forth to argue that is not conceptually impossible to include the ideal dimension of law into the concept of law. The Bandit System Argument will show that it is possible to conceptualize and thus to understand the ideal law.

The purpose of presenting arguments regarding the understanding of the ideal law is to legitimize discourse around an ideal dimension of law. If it is the case that there is no connection between law and morality or the connection between law and morality is an impossibility, then any discussion surrounding an ideal dimension of law, the aspirational concept of law, or the

intersection between morality and the concept of law would amount to a category mistake. This would include using the ideal law part of a methodology for adjudicating hard cases. Certainly, legal positivists, namely exclusive legal positivists, would be hostile to the inclusion of the ideal law and may possibly reject that it is possible to talk of an ideal law at all. Thus, it is necessary to establish that such a discourse is legitimate before arguing about the ideal law and its use in judicial methodology.

Robert Alexy, in various works, argues for the Dual Nature Thesis or components of the Dual Nature Thesis – that moral elements are necessarily included in the law, and this inclusion amounts to an ideal dimension (Alexy, 2003, 2010, 2013, 2017). Moral elements here are plausibly interpreted as some limited class of morally appropriate concepts. Moral elements are to be contrasted with social-factual elements, which are defined by Alexy as social efficacy – plausibly interpreted in the Kelsenian sense as generally being followed by the population – and authoritative issuance, the existence of norms establishing norm-issuing authority (Alexy, 2003, pp. 3-4; Marmor, 2016).

Alexy makes one additional refinement to the Dual Nature Thesis by distinguishing between the internal point of view and the external point of view[25] – the perspective of one

[25] It is of note here that the distinction originally presented by Alexy within *The Argument from Injustice* is that between observer's perspective and participant's perspective (Alexy, 2003, p. 25). As the name suggests, an observer to a legal system stands outside of the legal system, both in attitude and even potentially in jurisdiction. According to Alexy, this distinction is closely related to the distinction between the external and internal points of view respectfully, however direct correspondence between these distinctions is not possible, according to Alexy, because of the ambiguity of Hart's distinction (Alexy, 2003, p. 25). In this, Alexy simply points to MacCormick's response to Hart in an appendix to MacCormick's *Legal Theory and Legal Reasoning* titled "On the 'Internal Aspect' of Norms" – although unfortunately Alexy does not elaborate any further on why the distinction is ambiguous (Alexy, 2003, p. 25; MacCormick, 2003). MacCormick's complaint is that Hart's distinction between 'internal' and 'external' aspect of norms collapses, as any rules or standards or norms must be in terms of the internal point of view (MacCormick, 2003).

Setting aside whether MacCormick's criticism of Hart is accurate, it is not clear what advantage Alexy's distinction has over Hart's. While Alexy's distinctions make a clear parsing between those inside of the legal of the legal system and those outside, it accepts 'bad men', individuals who accept a law simply out of threat or sanction by the law, as internal to the law (Shapiro, 2006, pp. 1156-1157). However, it does not seem to be the case that bad men are in a position to adduce a good or correct decision of the law, as they cannot legitimately criticize other's

outside of the legal system and the perspective of those who participate in discussion of what is commanded, permitted, forbidden, or to what end the particular legal system confers power (Alexy, 2003, p. 25). Those taking the internal point of view are marked by practical attitude of rule acceptance to the legal system; someone takes the internal point of view towards a social rule when they accept or endorse some convergent pattern of behavior as a standard of conduct (Hart, 2012, pp. 56-57; Shapiro, 2006, p. 1159). Thus, the internal point of view refers to a specific kind of attitude held by those who accept the legitimacy of the rules (Shapiro, 2006, pp. 1157-1163). As well, those taking the internal point of view can legitimately criticize other individuals, and themselves, for failing to conform to the rules (Shapiro, 2006, p. 1162). Furthermore, this criticism is deemed to be grounded in good reasons (Shapiro, 2006, p. 1162). This is not to say, however, that those taking the internal point of view accept the rules as *morally* legitimate, but only that they are disposed to guide and evaluate conduct in accordance with the rules (Shapiro, 2006, p. 1157). Taking the external point of view consists of failing to take the internal point of view towards law, by failing to take a practical attitude of rule acceptance to the legal system (Shapiro, 2006, pp. 1157-1163). This can be done by either taking an attitude of nonacceptance, or by failure to take a practical attitude – thus taking a 'theoretical' attitude – towards the law by simply describing or making predictions about how members of a group regard and respond to the law (Shapiro, 2006, p. 1160).

Looking ahead, this is important to note the distinction between the internal and external points of view this separates sources of legitimate and illegitimate criticism of the ideal law.

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failure to conform to the law – if a bad man believed it possible to escape punishment in disobeying the law, he would regard himself free to disobey, and furthermore would not criticize anybody else for disobeying (Shapiro, 2006, p. 1167). Certainly, within this perspective, it does not seem correct to say that any legal decision has come to a good or correct answer (Alexy, 2017, p. 324). Hart's internal point of view distinction avoids the bad men perspective, as the internal point of view is characterized as both practical, in the sense that it is a viewpoint of an insider to the law, *and* accepts the rules (Shapiro, 2006, p. 1160).

Individuals who take the external point of view do not necessarily need to include moral elements to understand the law. However, as the ideal law is how the law should be from a moral standpoint, a moral understanding is necessary to fully understand the ideal law. As such, individuals must take the internal point of view to understand, and thus possibly criticize, the ideal law.

Alexy admits that the Dual Nature Thesis fails from the external point of view. Given the distinction between internal and external points of view, each viewpoint has different reasons permissible for them to make claims about the law; those taking the internal point of view adduce arguments on behalf of what they deem to be a good or correct answer, and those taking the external point of view adduce arguments about how legal decisions actually made (Alexy, 2017, p. 324). This point stems from the recognition that those who take the internal point of view and those who take the external point of view stand in different relations to the law, and thus have recourse to different explanatory resources.

In this, Alexy considers a case concerning Section 2 of the Eleventh Ordinance of the Reich Citizenship Law, November 25th 1941 (Alexy, 2003, pp. 5, 29). This ordinance stripped emigrant Jews of their German citizenship on grounds of their race (Alexy, 2003, p. 29; Bartrop & Dickerman, 2017, p. 1115). In 1968, a case came before the Federal Constitutional Court of Germany in which the court had to decide whether to restore German citizenship of a Jewish lawyer who had emigrated to Amsterdam before the outbreak of World War I (Alexy, 2003, pp. 5-7; BVerfGE 23, 98). As this individual was missing and presumed dead as of May 8th 1945, the restoration of German citizenship as per Article 116, Paragraph 2 of the Basic Law of Federal Republic of Germany was ruled out (Alexy, 2003, p. 6; BVerfGE 23, 98; Article 116 II GG). His heirs appropriately applied for a certificate of inheritance, but this certificate was refused May

8th, 1962 on the grounds that the applicants were not entitled to inheritance due to the deceased's lack of German citizenship. (Alexy, 2003, p. 6; BVerfGE 23, 98). As the deceased did not have German citizenship as per the Eleventh Ordinance of the Reich Citizenship Law and was not eligible to have citizenship restored per the Basic Law of Federal Republic of Germany, the law stated that the deceased was not a German citizenship, and subsequently inheritance could not be applied for (Alexy, 2003, p. 6; BVerfGE 23, 98; Bartrop & Dickerman, 2017, p. 1115; Article 116 II GG). However, the decision of the court ruled *contra legem*, that the stripping of citizenship as per the Eleventh Ordinance of the Reich Citizenship Law constituted a sufficient degree of injustice and as such the deceased never lost his citizenship in the first place (Alexy, 2003, pp. 6-7; BVerfGE 23, 98). In justification for this decision, the Federal Constitutional Court of Germany claimed that "[o]nce injustice is committed, which clearly violates the constituent principles of law, it is not justified by the fact that it is applied and followed" (BVerfGE 23, 98).

Alexy asks the reader to consider the Eleventh Ordinance of the Reich Citizenship Law within the German National Socialist legal system between 1942 and 1945 from the from the perspective of an observer outside of the system of law, such as a jurist or legal scientist, travelling abroad who is writing a report for a law journal in his home country. From this perspective, Alexy suggests that the proposition (1): "*A* has been deprived of citizenship to German law", printed in the law journal in the home country of the jurist, can be understood without further context, but the factual proposition (2): "*A* has not been deprived of citizenship to German law" would not (Alexy, 1989, p. 174; Alexy, 2003, p. 29).

While Alexy does not provide justification for this claim, it has strong intuitive weight given the plausibility of the internal and external distinction. Proposition (1) would be easily

understood by somebody outside of the National Socialist legal system, in that there is an applicable valid law which deprives citizenship to some particular class of people, and such a law is being applied to the particular case of *A* – a socially efficacious law was authoritatively issued, and subsequently *A* was deprived of citizenship according to the law. As such, only factual information is to the law is required to understand proposition (1) (Alexy, 2017, p. 324).

Proposition (2), without further context, seems odd or is at odds with an external understanding of law in that some law is applicable, socially efficacious, and was authoritatively issued, yet it was not applied in the particular case of *A* – having a purely factual understanding of the law does not seem sufficient to understand why the relevant law was not applied in this case. Proposition (2) would require further context beyond the fact that there is a law and it is being applied; as there is no legal mechanism applicable to undermine the validity the Eleventh Ordinance of the Reich Citizenship Law, justification to some 'extralegal'[26] mechanism – such as the type of claim cited by the Federal Constitutional Court of Germany– is required (BVerfGE 23, 98). Understanding proposition (2) would require that one go beyond a factual discription and take some particular normative stance to the law; one would need to make normative claims such as "the law ought not be applied in this case", or "it is wrong to apply this law", and such claims are deemed to be grounded in good reasons (Shapiro, 2006, pp. 1162-1163).

Given that proposition (2), not proposition (1), correctly states the outcome of the 1968 case, Alexy adduces that the inclusion of moral concepts is not necessary to understand the law

[26] There are various senses in which something may be 'extralegal', which turn, of course, on what is meant by the term 'law' and included in it. As the claim made by the Federal Constitutional Court of Germany was grounded in a concern for the correct balancing of moral and legal norms – the Radbruch formula – a legal positivist may classify this decision as extralegal in the sense that it drew sources outside of the body of positive law when there was no legally valid norms which allowed for this (Ausbürgerung I, 1968; Bix, 2011). Those who grounded more so in the natural law tradition may not see the decision by the Federal Constitutional Court of Germany as extralegal at all, since such moral considerations are part of the law already. The term 'extralegal', thus deployed, is intended to be neutral between these different conceptions of law – 'extralegal' here is used as a proposition or principle outside of the body of law, regardless if it such proposition or principle built into the concept of law.

from the external point of view[27] (Alexy, 2003, p. 29). As such, Alexy argues for the Dual Nature Thesis within the internal point of view[28]. Concequently, all further reference to the Dual Nature Thesis will be from the interal point of view, unless otherwise specified.

In arguing for the Dual Nature Thesis, Alexy presents two different arguments: the Strong Argument from Correctness, and the Bandit System Argument[29]. Recall, the Strong Argument from Correctness is intended to show that it is conceptually necessary to include the ideal dimension of law into the concept of law, while the Bandit System Argument attempt to will show that it is normatively necessary to include the ideal dimension of law. Conceptually necessity is defined here, as implied Alexy, in terms of analyticity in which the truth of the claim depends upon the meanings of its constituent terms (Alexy, 2003, p. 21).These arguments will be presented in their respective order, as the possibility of the truth of the Bandit System Argument relies on the truth of the Argument from Correctness.

Alexy, in various different places, argues for the stronger version of the Argument from Correctness to attempt to show that there is a conceptually necessary connection between law and morality (Alexy, 1989, 2003, 2007, 2010, 2013, 2017). This is to say that the concept of morality is necessarily entailed in the concept of law. It is of note that present purpose of using Alexy's argument is different from the one in which Alexy deploys it. The use of the Strong Argument is deployed by Alexy to show that legal positivism cannot be true, while the present use of Alexy's argument is intended to be neutral on the truth or falsity of legal positivism.

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[27] This certainly is not to claim, however, that understanding of the law is sufficient from the external point of view, only that an understanding of the law from the external law does not necessarily include moral elements.
[28] While it is sufficient for the purposes of this paper to claim that there is no conceptual necessity between law and morality from the observer's perspective, Alexy goes on to convincingly argue that inclusion of moral; elements is conceptually impossible from the external point of view (Alexy, 2010, pp. 29-31).
[29] While Alexy presents the Bandit System Argument in favor of understanding the connection between law and morality from the external point of view (observer's perspective) the argument ultimately fails in ways it does not from the internal point of view (participant's perspective).

In arguing for the Strong Argument from Correctness, Alexy presents a thought experiment (Alexy, 1989, 2003, 2010, 2013, 2017) Suppose some state *X,* where a minority of the citizens of this state oppress the majority. The government of this state, run exclusively by the minority, would like to draft a new constitution for this state. While the minority would like to continue to oppress the majority and reap the benefits of such actions under the new constitution, they also have a desire to be honest and open about their behaviour in this regard. The constitutional assembly thereby adopts proposition (3): "*X* is a sovereign, federal, and unjust republic," as the first article of the constitution. Alexy argues that something is wrong with proposition (3), in that the framers of the constitution give rise to a performative contradiction by adopting it (Alexy, 1989, 2003, 2010, 2013, 2017). A performative contradiction is a contradiction between a speech act which presupposes something and something denied by the content of that very speech act (Sieckmann, 2007, p. 191). As such, proposition (3) is a relevantly similar to the statement "The cat is on the mat, but I do not believe it", in that it is a contradiction between what is said and what is implicitly claimed in the statement. (Austin, 2000, p. 48; Alexy, 2003, p. 38; Alexy, 2010, p. 169). Presupposed by Alexy's argument are two claims: that whoever asserts something lays claim to truth or correctness of their assertion – hence Alexy's naming of the Argument from Correctness – and that this claim to truth or correctness implies a claim to justifiability (Sieckmann, 2007, pp. 190-191). Thus, Alexy claims that proposition (3) amounts to a conceptual deficiency – an absurdity (Alexy, 1989, 2003, 2010, 2013, 2017). This absurdity lies in the contradiction of proposition (3) and the implicit claim made in the act of framing a constitution, that framing a constitution is a just action (Alexy, 2017, p. 315).

This argument by Alexy, unfortunately, relies on problematic assumptions about the purposes of intentional actions. It seems to be the case that Alexy's claims that that whoever asserts something lays claim to truth or correctness of their assertion is an instance of a more general claim that agents who act intentionally make an implicit claim that their action is correct or appropriate, and such an act is backed by justification; those who make genuine assertions, in contexts where their claim is to be taken seriously, takes them to be true and believes them to be justified (Raz, 2007, p. 26). Thus, if an agent acts intentionally, and is proven and understands to have acted inappropriately or in a way they should not have, then ought to be rationally convinced they have made a mistake (Raz, 2007, p. 28).

Assuming *arguendo* that Alexy's claim that there is a performative contradiction with (3) and the implicit claim made in the act of framing a constitution is sound, this claim does not entail a necessary connection between law and morality. As Raz points out, a claim to justifiability does not determine which standards of justification apply – different activities in different contexts determine which standards apply (Raz, 2007, p. 28). In contexts where assertions of law address moral considerations, such as limiting a state's ability to infringe on citizen's moral rights by framing a constitution, then the justificatory standard is plausibly interpreted as a moral one. However, it seems plausible to claim that, even if it is the case that the law is generally concerned with questions of the correct distribution and compensation[30], it does not follow that the that justice is necessarily the correct standard to apply, as there may be competing concerns (Alexy, 2017, p. 315; Wang, 2016, p. 295). Thus, Raz argues that's Alexy's argument is a *non-sequitur*, as this is not sufficient to show that justice is necessarily the correct standard to apply, "[i]f the law is committed to standards of justice this follows from the nature

[30] Alexy considers justice as "nothing more than the correctness of distribution and compensation" (Alexy, 2017, p. 315).

of law, not from the nature of purposeful activity" (Raz, 2007, p. 28). As such, it is not the case that there is a conceptually *necessary* connection between law and morality rooted in a claim to correctness.

While Raz appears to be right in this claim, it is important to note Alexy's claim that the law is generally concerned with questions of the correct distribution and compensation. Justice is a moral concept, and if it is the case that the law is concerned with questions of the correct distribution and compensation, then it is the case that morality is not necessarily excluded from being the correct standard. As Raz notes, "it is a conceptual point about the law that it can be morally evaluated as good or bad, and as just or unjust, just as it is a conceptual fact about black holes that propositions like 'this black hole is morally better or more just than that' make no sense" (Raz, 2007, p. 21). Presumably, this is because the scope of the law largely intersects and overlaps with the scope of morality, and as such moral evaluations map onto the law in some meaningful way. Given this, there does not seem to be grounds to claim that a connection between law and morality is conceptually impossible, and that is the correct standard in some cases.

As such, it seems like the correct way to classify the connection between law and morality is as a conceptually *possible* connection. While certainly Raz's criticisms are correct in noting that the Strong Claim to Correctness does not show that there is conceptually necessary connection between law and morality, Raz's comment that "[i]f the law is committed to standards of justice this follows from the nature of law" points to a needed examination of the nature of the law (Raz, 2007, p. 28).

Within *The Argument from Injustice*, Alexy presents the Bandit Argument, in an attempt to show that there is a conceptually necessary connection between a legal system as a whole and

morality (Alexy, 2003, p. 31). As with the Strong Argument from Correctness, Alexy's version of the Bandit System argument is intended to show that there is a conceptually necessary connection between law and morality as to show the falsity of legal positivism. In the Bandit System argument, Alexy identifies three different kinds of social orders: a senseless order, a predatory order, and a governor system (Alexy, 2003, p. 32). For Alexy, what distinguishes a senseless order and a predatory order from a governor system is a particular claim to correctness to which the governor system lays claim, thus distinguishing it as a legal order (Alexy, 2003, p. 34)

Suppose a senseless order in which some group of people, henceforth referred to as the subjects, who are ruled by a band of desperados who rule by force, and any exercise of force is allowed by the desperados to maintain conformity to the rules. The subjects do not have any rights, and do not have claim against this unrestrained exercise of force. Except for the permissory norm allowing every exercise of force, there is no general norm. The desperados issue commands to individuals to be carried out and the subjects must obey under threat of unrestrained force. As there is no general norm governing the permissibility of issuing commands, these commands are always changing, sometimes contradictory, and sometimes impossible to carry out.

Alexy defines a senseless order as a social order which exists when a group of individuals is ruled such that the rules are not discernible nor a long-term pursuit of a purpose by the ruled is possible (Alexy, 2003, p. 32). It is also the case that when subjects obey, they do so solely put of fear (Alexy, 2003, p. 33). As such, Alexy claims that the social order is not conceptually a legal system (Alexy, 2003, p. 33).

Now suppose the senseless order becomes a predatory order by a shift in the desperado's organizational structure in that the desperados organize themselves into a gang of bandits. The purpose of the desperados forming into a bandit gang is to maintain systematic exploitation of the subjects, including maintaining the subjects as to be suitably used for exploitation. Suppose that the primary source of income for the bandits is killing the subjects as to harvest their organs. The purpose of the exploitation is clear to everyone, as the bandits make no effort to cover up their activities. As such, to maintain a high quality of organs to harvest, the bandit gang forbids smoking, drinking, and violence towards one another among subjects. As these rules do not establish rights among the subjects, the gang of bandits have no obligation towards the subjects.

Alexy takes it that the shift from a senseless order to a predatory order happens in the introduction of a command hierarchy, proscriptions on the use of force, and the introduction of a long-term pursuit of a purpose by the ruled (Alexy, 2003, p. 33). Alexy notes that while the prevailing internal norms governing the behavior of the gang of bandits may amount to a legal system, the predatory system as a whole is not (Alexy, 2003, p. 33).

Suppose now that the predatory order is not particularly expedient with regards to organ harvesting, and so the bandit system develops into a governor system. The bandits decide to become governors of the subjects, and as such continue their exploitation of their subjects through a rule driven practice. The practice of organ harvesting is justified through claims that it serves a higher purpose, such as the development of the people. While the practice of organ harvesting is still present and possible at any time, the act of organ harvesting is punishable if not done so in a certain form – such as a unanimous decision of a group of three of the governors – or if they are not publicly justified by an appeal to the claim that it serves a higher purpose.

With the transformation to the governor system, Alexy claims that the predatory order has shifted from a non-legal system to a legal system – while the particular system may be "extreme", it is not conceptually excluded as a legal system (Alexy, 2003, p. 34). Alexy claims that this is the case because the practice of the governor system advances a claim to correctness, as every legal system necessarily does (Alexy, 2003, p. 34). A legal system, for Alexy, is demarcated by two criteria: that rulers' actions are guided by a system of rules, and that there is a claim that their practice is justifiable (Alexy, 1989, p. 177; 2003, pp. 33-34; McIlroy, 2013, p. 75). That rulers' actions are guided by a system of rules entails that the rulers themselves are bound to the rules of the system and are liable for breaches of the rules. A claim that their practice is justifiable entails that such rules are to be justified by sufficiently good reasons, and this justification is public.

In reference to previous Raz's criticism of the Strong Argument from Correctness, simply a claim to correctness is not sufficient to show that there is a conceptually necessary connection between law and morality. However, one is now in some position to evaluate "the nature of law" as to determine whether a moral justificatory standard applies to the law's claim to correctness. As Alexy furnishes his Bandit System argument with criteria which demarcate a legal system from a non-legal system, presumably these criteria – either being individually or jointly sufficient – which sets the moral justificatory standard for law's claim to correctness.

With regards to the criterion that rulers' actions are guided by a system of rules, this does not seem to be sufficient to set a moral justificatory standard to the law's claim to correctness. Alexy states that this criterion sets a moral justificatory standard by being, "a claim that is addressed to all", in the sense that the laws claim to be accepted by all who are affected by them (Alexy, 2007, p. 49). At first glance, this appears to be a claim that legal systems, as a conceptual

necessity, embody some degree of fairness in that all individuals are equally bound to follow the law. In this regard, a moral justificatory standard applies to the law's claim to correctness as this feature of law is both necessary and a moral feature.

However, this claim to fairness is far less plausible in systems which themselves are grossly unfair. Suppose the governor system which Alexy presents, but further suppose that this system has a two-tiered sentencing structure. In this two-tiered structure, those part of the class of the governors receive extremely light sentences disproportional to their offences, and those part of the class of the subjects receive extremely harsh sentences disproportional to their offences. Members of the governor class, in breaking any law of the order receive as punishment a firm talking-to and nothing more. Members of the subject class, in breaking any law of the order receive as punishment an immediate organ harvesting resulting in their death. As well, these punishments and sentencing structure are publicly justified by an appeal to the higher purpose of the order. Within this governor system, it is the case that the rulers' actions are guided by a system of rules, as they are liable for breaches of the rules. Yet, intuitively, this system does not embody any fairness, as it is clear that the system is structured around two different classes of laws which do not apply equally. Even though this system is grossly unjust, one is hard-pressed to claim that this additional feature of a two-tiered sentencing structure shifts the governor system from a legal system to a non-legal system, given the acceptance of the governor order as a system of law previously. As such, the fact that that rulers' actions are guided by a system of rules is not sufficient to claim that a moral justificatory standard to the law's claim to correctness.

With regards to the claim that their practice is justifiable, this does seem to be sufficient to set a moral justificatory standard to the law's claim to correctness. However, such a claim

does not further entail that legal positivism is false but does allow for the possibility of understanding the law from a moral standpoint and thus understand the concept of the ideal law.

Recall, a claim that their practice is justifiable entails that such rules are to be justified by sufficiently good reasons, and this justification is public. In this, Alexy's distinction between the predatory system and governor system is illuminating. As Alexy states, the predatory order does not raise a moral claim to correctness, as a claim is not accepted by all of the members of the group, namely the subjects. (Alexy, 2007, p. 49). Suppose that Alexy is correct in stating that the predatory system's claim to correctness, plausibly self-enrichment, is not addressed to the subjects as they are not enriched by the actions of the order (Alexy, 2007, p. 49; Raz, 2007, p. 27). Recall, that within the governor order, the practice is organ harvesting is justified in that, "everyone is told that this practice is correct because it serves a higher purpose" (Alexy, 2003, p. 33). Yet this seems to some degree no different than the predatory order as the practice is publicly put forth as justified to the subjects, albeit the practice is not actually justified. This intuitively does not seem to set a moral justificatory standard to the law's claim to correctness as simply putting forward a justification of the practice which does not actually justify it; putting forward a bad justification intuitively does not set a moral justificatory standard to the law's claim to correctness, regardless of whether it is public or not.

In recognizing this failure, this is not to deny, as Raz notes, "a conceptual point about the law that it can be morally evaluated as good or bad", only that publicly justifying a practice does not set a moral justificatory standard to the law's claim to correctness. It is, intuitively, the actual justification itself – the 'higher purpose' which Alexy's governor's claim – which set a moral justificatory standard; regardless of whether it is made public or not, this 'higher purpose' which the rules are to be justified which set the morally judicatory standard.

Alexy's Bandit System argument in this regard furnishes one with more than the Strong Argument from Correctness. Within the Strong Argument from Correctness, even if particular legal acts or laws claim justifiability, a moral standard are not necessarily the correct standard to apply. Within the Bandit System argument, moral standards do seem to be the correct standard to apply with regards to legal systems as a whole because legal systems do make claim to a 'higher purpose' to justify the actions of the system. This is not to say, however, that such claims are justified or must be sufficiently met for laws to valid – the fact that legal systems make a claim of moral justifiability does not seem to entail that such a moral claims must be met for laws to be legally valid, as additional arguments must be presented[31]. However, it is of note that legal systems do operate with a 'higher purpose', regardless of whether it is justified.

In understanding this, one can begin to understand the law from a moral standpoint. In understanding that the governor system's justification of the practice is actually unjustified[32] from a moral standpoint, one can begin to form an understanding of how such a practice *could* be justified by presenting counterfactual systems of laws as to justify the practices of the system given the system's 'higher purpose'. Furthermore, as moral states of affairs can be better or worse than one another, this leads one to the understanding that some systems of law are better or worse than each other relative to the 'higher purpose'[33]. Given this, it is possible to understand what the ideal law is – that the ideal law is conceptually a system of law which is the *best* system of law from the standpoint of morality. It is possible to understand the ideal law through reflection of counterfactual situations.

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[31] Within the *Argument from Injustice*, Alexy does not present additional arguments in this regard, but takes it that the Bandit System argument is sufficient to show that legal positivism is false.

[32] With regards to Alexy's example, it is assumed that large-scale organ harvesting of the citizens for profit presents a sufficiently large moral wrong as to not be justifiable is most, if not all, societies.

[33] Even if it the case that no systems of law are justified with regards to the legal system's 'higher purpose', this does not entail that some systems of law cannot be *more* justified than others.

### 5.3: Ideal Law as Methodology

Ideal law, as the name suggests, has two main features: that it is 'ideal', and that it is 'law'. Ideal law is 'law' as it describes some set of laws. This is, of course, not to suggest that the set of laws described is an *actual* set of laws held by an existing legal system, nor that it is a set of laws held by any legal system in the past. However, ideal law does describe a possible set of laws which could possibly be held by some particular legal system. Ideal law is 'ideal' inasmuch as it describes a set of laws which are the *best they could be*. As the term 'best' indicates some evaluation of the law relative to some criteria, this leads to the further question of what the criteria is to determine the best law.

The criteria for the evaluation of law is maximization of the legal principles of an appropriate political morality for a political community. Political morality here is defined in terms of a normative conception of political actions – actions which have non-negligible effects on political outcomes – and concepts, such as justice or fairness. As such, political morality is a subset of morality. As political morality here will be used in the context of the legal system, the scope of political morality is further constrained to legal principles. Legal principles are the subset of political principles which the law has legitimate domain over[34]. Thus, legal principles here are different from the Dworkinian usage of legal principles, which refer to principles constructed from existing legal rules (Dworkin, 1967). A political community is defined as a community in which political action between members is both possible and necessary (Rawls, 1999, p. 109). Since the context of the discussion is the laws by which the political community live under, a further restriction will be made that the members of a political community for ideal

[34] The issue of the appropriate limits of law, and thus the boundaries of what counts as a legal principle, is outside the scope of this discussion and thus will be bracketed.

law methodology is one which is under jurisdiction of the law. Thus, members of a political community who are outside of the jurisdiction of the law are to be excluded.

As determining the ideal law requires maximization of the legal principles of an appropriate political morality, the first step is to determine what is an appropriate political morality for the political community which the law has jurisdiction over. Without determining an appropriate political morality, it will be unclear what principles are to be used as a criterion for evaluating law or determining what the ideal law is. Determining the principles of an appropriate political morality is undertaken through narrow reflective equilibrium, identifying beliefs about politically relevant[35] action states of affairs within a political community systematizing them.

The qualifier 'appropriate' in the phrase 'appropriate political morality' is intended to designate the set of acceptable conceptions of political morality for a political community. It is outside the scope of this thesis to lay claim to whether there is an objective political morality, no set political morality (as political morality is a subset of morality, this tracks the debate on whether there is an objective morality or there is not – moral relativism). However, as long as each political community has an acceptable conception of political morality for it – whether it be a single objective one or not – the phrase 'appropriate political morality' will be meaningful and ideal law methodology can proceed[36].

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[35] Politically relevant circumstances are circumstances of a political community which shape political outcomes of said community. What is relevant thus turns on what is considered a political action. This may range from a relatively small subset of actions under a formal system such as Rawls' *A Theory of Justice*, to all actions which thus fall under the slogan "everything is political". Questions regarding what constitutes a politically relevantly circumstance will be bracketed, as they are outside the scope of this thesis.

[36] For clarity, this thesis will proceed as if there are no constraints on reflective equilibrium. However, this thesis will make no comment on whether there is an objective morality or not, only that the ideal law methodology is compatible with both. If there is no objective political mortality, then any political mortality which is resultant of narrow reflective equilibrium qualifies appropriate. If there is an objective political morality, whatever it may be, then the set of acceptable resultants of reflective equilibrium will be constrained. Constraints may be reasonably interpreted as being excluded, in that beliefs which are incoherent with the appropriate political morality are excluded from reflective equilibrium.

If there is a plurality of acceptable political moralities stemming from one or more moral principles, it seems plausible that the set of acceptable political moralities would be limited to those which sufficiently conform to

The use of reflective equilibrium here is not to supplant or impose a moral system on the political community. Like Rawls, the use of reflective equilibrium is to provide a set of principles which would lead one to form the community's beliefs with their supporting reasons were the community as a whole to apply these principles conscientiously and intelligently (Rawls, 1999, p. 41). It is intuitively true that there may be a diversity of political beliefs within a political community, and that mere aggregation of these beliefs may not amount to a belief set which is coherent nor contradiction-free. The need for reflective equilibrium is thus to provide a set of principles which systemize the beliefs of the political community which individually or collectively may be defective, incoherent, or contradictory (Rawls, 1999, pp. 44-45).

This method of narrow reflective equilibrium first identifies a community's initial beliefs about political actions and states of affairs as they relate to the community's political morality, such as insider trading – a particular action – being unjust, or the redistribution of tax dollars through employment insurance – a state of affairs – being unfair (Cath, 2016, p. 214). Such beliefs are be 'considered judgements', in that they are rendered under conditions favorable to the exercise of political morality, as to remove beliefs that "are likely to be erroneous or to be influenced by an excessive attention to our own interests" (Rawls, 1999, p. 42). Then, an initial set of theoretical principles is supposed to account for and systemize the content of the initial beliefs which are assumed to be true (Cath, 2016, pp. 214, 215). As there may be conflicts within the set of initial beliefs and conflicts between the initial beliefs and theoretical principles, these are identified and a reflective process of moving back and forth between these two sets is

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the moral principles. For example, if one was a consequentialist, one might expect that the set of acceptable political moralities would be limited to those which benefit the political community overall. If there is a single political morality which consists of a set of rules, it seems plausible that the set of acceptable political moralities would be limited to those which conform to such rules. For example, of one was a Kantian, one might expect that the set of acceptable political moralities would be limited to those which sufficiently mark out right actions.

undertaken to eliminate, add to, or revise the members of either set until both sets are coherent and cohere with each other (Cath, 2016, p. 214; Rawls, 1999, pp. 18-19). The resultant of narrow reflective equilibrium will be henceforth referred to as the political community's 'political morality'.

One consequence of this view, as it utilizes narrow reflective equilibrium of a political community's political beliefs, is that what constitutes ideal law can vary between political communities. As differing political communities can have different initial beliefs about political actions and states of affairs, this can result in different sets of principles being generated through reflective equilibrium.

A brief note on principles is perhaps necessary here. The construction of principles is done by looking at the ways principles guide behaviour to solve particular legal problems members of the political community – purposive agents – may have. A legal problem in this sense is a problem of performing an action which the law has legitimate domain over in accordance with political morality. To borrow from Dworkin, one may consider the action of murdering to acquire an inheritance, as per *Riggs v. Palmer* (Dworkin, 1967, p. 23). A principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime" prohibits agents from engaging in actions which fall under said principle (Dworkin, 1967, p. 23). Principles differ from legal rules in that they do not apply in an "all or nothing" fashion[37] as legal rules do (Alexy, 2000, p. 295; Dworkin, 1967, p. 25). Principles, by contrast, do not purport to set out conditions for their application but instead provide reasons in acting in accordance with the principle (Dworkin, 1967, p. 26). As such, principles can be seen as optimization

[37] This is not to deny that rules can haver exceptions. However, an accurate statement of the rule would provide a complete list of exceptions (Dworkin, The Model of Rules, 1967, p. 25).

requirements, in that they are norms which generate reasons to realize them to the greatest extent possible given countervailing legal and factual concerns, and that they can be realized to greater or lesser degrees (Alexy, 2000, p. 295). As there are multiple senses beyond a financial sense which an induvial can 'profit' or 'take advantage of', individuals have reasons to not engage in all actions which violate this principle, and intuitively have stronger reasons to not engage in activates in which they 'profit' or 'take advantage of' more.

It may be useful to contrast the construction of principles in narrow reflective equilibrium with Dworkin's construction of principles, discussed chiefly in "The Model of Rules". In this, Dworkin claims that principles are to be constructed[38] from the set of already existing legal rules.

Positive law does not come furnished with principles in the same way that it is furnished with legal rules, statues, decisions, and the like; to use Dworkin's terminology, legal rules and the like come with a 'pedigree' – an identifiable and appropriate source – that legal principles do not (Dworkin, 1967, p. 17; Shapiro, 2017, p. 7). As well, legal principles are not an explicit part of positive law, in that one cannot 'look up' a principle as one does with a legal rule. Thus, one cannot simply reference a principle the same way one does a legal rule – one must construct principles from the positive law. Dworkin's construction, in using already existing legal rules, is foundationalist in nature as the base for construction is largely static[39].

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[38] Dworkin in "The Model of Rules" uses the language of identifying principles (Dworkin, 1967). It would be a mistake to interpret Dworkin as claiming that we *find* principles in the law, as this does not fit with his remarks about the law elsewhere. As Dworkin says *in Law's Empire*, "[l]aw's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past" (Dworkin, 1986, p. 413).

[39] It would be uncharitable to interpret Dworkin here as saying that the set of already existing rules is wholly static, as Dworkin is certainly aware that there can be bad laws, and they ought to be excluded. Dworkin's remarks on interpretation here are helpful, "He cannot adopt any interpretation, however complex, if he believes that no single author who set out to write a novel with the various readings of character, plot, theme, and point that interpretation describes could have written substantially the text he has been given. That does not mean his interpretation must fit every bit of the text. It is not disqualified simply because he claims that some lines or tropes are accidental, or even that some events of plot are mistakes because they work against the literary ambitions the interpretation states. But the interpretation he takes up must nevertheless flow throughout the text; it must have general explanatory power,

While this is useful in describing the principles which may *already be a part of law*, these principles would not be adequate to be used as a criteria for identifying ideal law as they would always identify the current law as ideal. Even if legal rules were given their best interpretation, this does not guarantee that resultant principles derived from them describe an ideal system – the current law may overextend itself or may underextend in certain areas, or certain areas of law may be overly or underly concerned with particular values, or may already rely on principles which may not wholly conform to or capture sufficiently principles of political morality.

Thus, the subset of legal principles from the set of principles resultant of narrow reflective equilibrium serves as the criteria for the evaluation of law[40]. (Alexy, 2000, p. 294; Alexy, 2002, p. 47; Kumm, 2007, p. 133). Any sets of laws which maximally realize principles given countervailing legal and factual concerns are considered to be the best laws from the standpoint political morality.

Maximally realizing principles is defined in terms of a weighted aggregate realization of principles. The aggregate realization is the aggregation of individual realization of principles. Generally, when more principles are realized then there will be a larger aggregate realization and when principles are realized to a larger degree then there will be a larger aggregate realization. Weight of a principle is determined by the importance of a principle in systematizing the resultant belief set of reflective equilibrium. Importance is determined along two different criteria: uniqueness and proportion. Proportion is determined through the proportion of beliefs the principle systematizes within the resultant equilibrium belief set. A principle which systematizes a relatively larger proportion of beliefs of the belief set will be more important than

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and it is flawed if it leaves unexplained some major structural aspect of the text, a subplot treated as having great dramatic importance or a dominant and repeated metaphor" (Dworkin, 1986, p. 230)

[40] This claim is not intended to imply the further claim that this amounts to a moral truth, as per footnote 39.

a principle which systematizes a relatively smaller proportion of beliefs of the belief set. Uniqueness is determined by examining the domain of the principle with regards to the resultant belief set and determining to what degree other principles share that domain. A principle which shares its domain with few principles will be more important in systematizing the belief set than a principle which shares its domain with many principles. In determining maximal realization of principles, weight modifies the realization of a principle; a principle which is weightier will count for more when determining the aggregate realization of principles.

Once a judge is able to identify what counts as a maximally realizing principles, they are in a position to evaluate the various possible decisions within a hard case in terms of gains in the realization of principles. Each possible decision a judge can take represents a possible change in the law: through adding a new precedent to the body of law, but also by either by adding, modifying or voiding rules or past decisions; by providing new interpretation to rules; or by modifying the appropriate scope of a principle[41]. As such, the outcome of each decision represents largest overlapping, yet different sets of laws. Given that each set of laws is different, each set of laws will realize the principles of reflective equilibrium to a different degree, and thus each decision will have its own aggregate realization of principles.

Once each decision is evaluated in terms of aggregate realization of principles, a judge is able to then decide between the decisions. As each decision will represent a different set of laws, each decision will realize different principles to greater or lesser degrees, and as such have a different aggregate realization of principles. Thus, each option will represent the law as possibly becoming better or worse from the standpoint of political morality – decisions which has a

[41] This is consistent with the relaxed interpretation of *stare decisis*. As the relaxed interpretation obliges that judges only give some weight to precedents set by courts, decisions represent a change in the law in cases where there are no overwhelming reasons against the precedent.

higher aggregate realization of principles will be overall a better set of laws from the standpoint of political morality.

At this point, a decision procedure for judges in hard cases proceeds as follows: first, a judge must undertake narrow reflective equilibrium of the political community's political beliefs to establish a set of principles – the community's appropriate political morality – which to evaluate the law. Second, judges must identify the available decisions before them within the constraints of the case and evaluate the gains in the aggregate realization of principles. This is done determining the weight of the principles through examining their importance, which is done by evaluating principles along the criteria of proportion and uniqueness. As principles are optimization requirements, in that they are norms which generate reasons to realize them to the greatest extent possible given countervailing legal and factual concerns, decisions come furnished with reasons for their adoption in that the greater realization of a principle the greater the reason to choose it. The decision with the largest gains in aggregate realization of principles will generate the most reasons to choose it, as that decisions will realize the principles of political morality to the largest degree. Thus, the correct judicial decision in a hard case is the decision with the largest gains in aggregate realization of principles, which moves the law towards the best it can be.

# Chapter VI: Ideal Law Methodology and Conservatism

This chapter shows how the ideal law methodology bypasses the issue of conservativism which affects coherence theories of judicial adjudication. The cases presented against conservatism will then be presented again and reimagined under the ideal law methodology. Afterwards, a number of related objections to this will be raised, that such a solution to conservatism poses a larger risk than conservatism itself. While moral risks are involved with the ideal law methodology, it will be argued that such risks are relatively low.

## 6.1: Conservatism and the Ideal Law

Ideal law methodology does not suffer from conservatism the way that coherence theories of judicial adjudication do. As ideal law methodology does not determine the correct judicial decision by matter of what is most coherent with the body of positive law, previous rules and decisions have no justificatory force in determining new decisions in hard cases – judges are not tethered to previous decisions of the courts inasmuch as they are required to be through the structure and doctrines of the legal system.

Idea law methodology, in contrast, is adaptive to the political beliefs of the community and the moral learning which goes on in these communities. As ideal law methodology does not ask judges to justify their decisions in terms of coherence with previous law, judges are able to make the best decision in terms of political morality regardless of whether that decision is coherent with previous law or not, or the amount of past coherent rules and decisions. Recall, that this is because the justification for a judge's decision comes directly from beliefs about political morality from the political community, systematized through reflective equilibrium.

This method of reflective equilibrium makes the ideal law methodology adaptable to moral improvement of the community. It is not the case that once reflective equilibrium is

undertaken, it is codified and upheld indefinitely. As the ideal methodology calls for a construction of a reflective equilibrium of relevant beliefs about political actions and states of affairs as they relate to the community's political morality, construction of a reflective equilibrium ought to be undertaken or updated in each decision. This is because a community's political morality can change and adapt – orientation towards an ideal law not in line with the political beliefs of the community cannot be said to aim at the ideal law for that community proper. As ideal law methodology is thus adaptive to a community's changing political beliefs, it thus does not suffer from conservatism as coherence does.

### 6.2: Revisiting Cases

It may be instructive to briefly revisit cases which were previously discussed in reference to the problems of conservativism. In this regard, one can construct counterfactual situations where the judges in this case followed the ideal law methodology instead of a coherence theory of judicial adjudication[42].

The first step is to undertake narrow reflective equilibrium of the political community's political beliefs. In both cases, a mix of political beliefs exist regarding race, equality, freedom, and political actions and concepts. A judge must identify and attempt to systematize these beliefs thorough reflective equilibrium; given the particular racial tensions in both cases, the set of initial beliefs are unlikely to be consistent or contradiction-free. However, it is important to recall that the beliefs used in reflective equilibrium are considered judgements, in that they are rendered under conditions favorable to the exercise of political morality, as to remove beliefs

[42] As the ideal law methodology instructs judges to use narrow reflective equilibrium of the community's political beliefs, the judgements rendered under ideal law methodology are indexed to the time and place of which they are rendered. Any account of trying to construct what a judge ought to have done in the past will likely be impoverished as past community's political beliefs are not always available. Thus, the counterfactual information presented will not undergo full use of reflective equilibrium but point to key political beliefs of the community instead.

that “are likely to be erroneous or to be influenced by an excessive attention to our own interests” (Rawls, 1999, p. 42). In this way some beliefs are excluded from reflective equilibrium, those which are not considered judgements. One class of beliefs which are certainly both erroneous and are excessively attentive to one’s own interests are racist beliefs about the superiority or inferiority of particular races[43].

Looking at *Gong Lum v. Rice*, many of the beliefs operative in the case would not pass as considered judgements. Recall that the question at hand in *Gong Lum v. Rice* was the prohibition of Martha Lum, an American citizen of Chinese descent, from attending the whites-only school. In this regard, the generalized belief that there is a meaningful divide between “those of the pure white or Caucasian race, on the one hand, and the brown, yellow, and black races, on the other” would be excluded from reflective equilibrium (Gong Lum v. Rice, 1927). Without such racist beliefs, “[the] question… whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black” is clearly answered in the affirmative as such segregation would thus be made on erroneous grounds (Gong Lum v. Rice, 1927).

The exclusion of this generalized belief and other like it presents an insight of how to systemize the belief set in reflective equilibrium. Beliefs about ‘separate but equal’ facilities for education can be modified through reflective equilibrium to be consistent with other beliefs such as beliefs about “equal protection of the laws, or of any privileges belonging to them as citizens of the United States” and “every… child [being] entitled to obtain an education” (Gong Lum v.

[43] This is taken to be uncontroversial true.

Rice, 1927). Such modification would eliminate the 'separate' from 'separate but equal' and leave behind equality and entitlement to education.

Once the judge has undertaken narrow reflective equilibrium, the next step is to identify the relevant options available to them. For the purposes of this example, it will be assumed that there are three possible judicial decisions available. The first decision, which was the actual decision, will be to deny Martha Lum inclusion into the whites-only school. The second decision is to allow her inclusion to the school on grounds of race but deny individuals of other races. The third decision is to allow her inclusion to the school on grounds that all races should be able to attend the school.

Next, the judge must determine the weighted aggregate realization of the available decisions. The decision to exclude Marth Lum from the school does not maximize the aggregate realization of principles, as it would lower some principles substantially while having slight gains in others. While one could put forth the argument that the exclusion of Martha Lum increased the realization of principles related to the freedom of association of individuals attending of the school[44], this decision would also substantially lower principles related to equality of treatment and equal protection under the laws. The decision to include Marth Lum in the school on grounds of race but deny individuals of other races also does not seem to maximize the aggregate realization of principles. This decision would increase the realization of principles of equality of treatment and equal protection under the law by extending these principles to individuals of Chinese descent. However, such a decision does not seem to be an appropriate

[44] After analysis, this is certainly a poor argument as the actions taken in conjunction with this kind of freedom of association required to enforce a whites-only school is one which clearly encroaches on the rights of others. The freedom to form an organization to promote a whites-only school could possibly be covered under such a right, but the creation and enforcement of a whites-only school would not be. Nonetheless, this argument is one which *could* be put forward, and so it is a useful illustration.

way to realize principles of equality of treatment and equal protection under the law as such a decision still arbitrarily demarcates equal protection between racial groups. (Alexy, 2000, pp. 297-298). As such, it would not realize principles such as equality of treatment to a large degree. The decision to allow Martha Lum to attend the school on grounds that all races should be able to attend the school seems to maximize the aggregate realization of principles. This decision realizes principles equality of treatment and equal protection under the law to an even greater degree than the decision to allow her to attend but to exclude other races, as well as seems like an appropriate way to realize these principles.

Once the judge has determined the aggregate realization of all the available decisions, they are to choose the decision which is has the largest gains in terms of political mortality. As such, the decision to allow Martha Lum to attend the school on grounds that all races should be able to attend the school is the best available decision from the standpoint of political morality, and thus the correct decision which the judge should choose.

In *Minister of Posts and Telegraphs v Rasool* a number of operative beliefs, particularly those expressed by the justices in the case, would not be considered judgements. Recall that *Minister of Posts and Telegraphs v Rasool* involved an Indian living in Pietersburg named Rasool who filed a suit against the office of the Minister of Posts and Telegraphs citing offense of having to share facilities with Africans.

The opinion of Acting-Chief-Justice Stratford that, “If [it were] decided-that a by-law is invalid on the sole ground that it divides the community for the purpose of its operation into White and Coloured, I cannot agree with it, for such conclusion runs counter to accepted principle and good sense” would be excluded, as a divisions based on erroneous racist beliefs would not pass as considered judgements (McWhinney, 1954, p. 65). Once racist beliefs are

excluded, there would be no grounds to divide the community based on colour. Likewise, the opinion of Justice de Villiers that "discrimination, coupled with equality of treatment, as between Europeans and non-Europeans… is not, *per se* and without more, unreasonable" as without racist beliefs such discrimination would certainly be unreasonable and baseless (McWhinney, 1954, p. 65). In reimagining the case, excluding such beliefs reorients the set of political beliefs in *Minister of Posts and Telegraphs v Rasool*. A prominent belief which emerges is equality of treatment, in that without the conjunction of racist beliefs the policy of 'separate but equal' is no longer supported.

As with *Gong Lum v. Rice*, for the purposes of this thesis it will be supposed that there are three possible judicial decisions which can be made in *Minister of Posts and Telegraphs v Rasool*. The first decision, which was the actual decision, will be to deny Rasool use of the whites-only facilities. The second decision is to allow him use of the whites-only facility on grounds of race but continue to deny Africans use of the facilities. The third decision is to allow him use to the facilities on the grounds that no individuals should be excluded on the grounds of race.

The first decision does not maximize the aggregate realization of principles, as it scarifies equality of treatment by further entrenching divisions between different races; in denying Rasool use of the facility, it denies individuals who are classified as Indian the same treatment as those classified as whites. This cannot plausibly be a maximization of principles, as it the gains made by ignoring principles such as equality of treatment come at a steep cost. The second decision also does seem to represent a higher aggregate of the realization of principles, as it extends equality of treatment to those who are classified as Indian. Yet, it does not seem like an efficient way to do so as it continues to arbitrarily deny treatment to those who are classified as African.

The third decision seems to maximize the aggregate realization of principles, as it realizes equality of treatment to a greater degree as it extends equality of treatment to all individuals, not just those classified as a particular race. Furthermore, this seems like an efficient way to do so, as it does not deny equality of treatment to anyone else on racist grounds.

Once the judge has determined the weighted aggregate realization of principles of all the available decisions, they must choose the decision which is maximally realizes the aggregate. As such, the decision to allow use of the facility on grounds that all races should be able to use it maximally realizes principles, and thus the correct decision which the judge should choose.

Thus, one can see how the ideal law methodology can deal with correcting injustices where coherence theories of judicial adjudication cannot. However, what these cases also illustrate is the need for the continued moral learning of judges and the judiciary. While there were clear failures to exclude known racist beliefs from these decisions when they occurred, it is not always as easy to spot injustices which a political community is beginning to recognize. As the previously discussed analogy between moral learning and liberal philosophical theories show, one must be receptive to moral learning when past beliefs are shown to be erroneous or unjust. As these individuals are responsible for systematizing the beliefs of the political community, they should be reasonably able to demarcate beliefs that are erroneous or excessively attentive to one's own interests, whether it be their own or other groups in the political community. While the scope of this thesis is solely focused on judicial adjudication, this fact points to various considerations outside adjudication towards regulating how judges operate, such as ongoing training and informational sessions for sitting judges to make sure that they are able to detect beliefs that are erroneous or excessively attentive to one's own interests which may

not have been identified, as well potential disciplinary action for those judges who willing engage with and perpetuate such beliefs.

### 6.3: Objections to the Ideal Law Regarding Conservatism

In discussing the shortfalls of coherence theories of judicial adjudication and the benefits of the ideal law methodology, defenders of coherence theories of judicial adjudication may feel that the key reason to adopt their theory has been neglected. While conservatism may be an issue in unjust legal systems, the same mechanisms which cause conservatism in the law also protects just and fair rules and decisions from being overturned. While coherence theories may be slow to change, it also stops largescale negative change from occurring. Defenders of coherence theories of judicial adjudication claim that this feature of their theory is what makes their theory the right one for adjudicating hard cases.

A defender of coherence theories of judicial adjudication may further claim that this feature which makes their theory attractive is lacking in the ideal law methodology. As the ideal law methodology does not instruct judges to look backwards at past rules or decisions in the law, the just and fair ones are at risk of being overturned as much as the unjust and unfair ones are.

However, this objection is easily dealt with as it misconstrues the ideal law methodology. The ideal law methodology instructs judges to make decisions which have the largest gains in terms of politically morality, which is to say decisions which maximize the aggregate realization of principles. Inasmuch as important rules or decisions embody the principles of the community's political morality, they are not at risk of being overturned unless they can be improved upon in terms of greater realizing principles. Such changes will only occur to them when improvements can be made through realizing principles. When improvements can be made, the ideal law methodology will instruct judges to change them only for the better by

replacing them with decisions which realize principles to a greater degree. Thus, the ideal law methodology protects important rules and decisions inasmuch as they are worth protecting, and will only overturn such decisions when gains in the realization of principles is possible.

### 6.4: Objections to the Ideal Law Regarding Abandoning Conservatism

At this point, one may object that ideal law methodology, with this adaptive feature, poses a larger moral risk than conservatism. As the ideal law methodology relies on a judge's ability to determine reflective equilibrium to construct a political morality, this requires that judges undertake this task with the utmost care and in good faith. Failure in this task would orient judges away from the ideal law and thus raises the possibility that judges may make *worse* decisions.

From this line of reasoning, two objections can be raised. The first is that the ideal law methodology places judges under too large of a cognitive load to be able to determine which decisions maximally realize principles, and thus the ideal law methodology fails as a methodology which judges can practically use. This failure raises moral risks by judges mistakenly making decisions which may not increase the aggregate realization of principles decisions, making the law worse. The second objection is that this methodology, by removing the fetters of coherence which binds them to the body of positive law, gives judges too much power to shape the law and thus poses a moral risk in judges who do not want to make a decision in line with the community's political morality. This failure raises moral risks through judges enacting decisions which do not increase the aggregate realization of principles in terms of the community's political morality.

It must be conceded that both objections are to some degree correct, in that judges can fail in their task both in terms of failure to make careful decisions as well as acting in bad faith.

However, this does not mean that the ideal law methodology poses a greater moral risk than conservatism. When considering the ideal methodology in practice, there are a number of ameliorative factors which mitigate the moral risks involved.

In terms of a failure to make careful decisions, the ideal law methodology appears to place a large cognitive load on judges in instructing them to undergo reflective equilibrium in each case to determine the ideal law and evaluate the weighted aggregate realization of principles of each decision. However, in practice the cognitive load of such tasks may be mitigated through the use of various heuristics.

In terms of undergoing reflective equilibrium instructing judges to undertake this reflective equilibrium each case seems to place a large cognitive load on judges, particularly considering time and cognitive constraints of the legal system in practice. Certainly, initial determinations of reflective equilibrium may place judges under a large cognitive load. However, instructing judges to undergo reflective equilibrium in each case does not mean that judges cannot use previous constructions of reflective equilibrium as a guide. Once a reflective equilibrium has been constructed, if there has been no relevant change in a community's political morality then the construction can be used again in relevantly similar cases, alleviating the cognitive load on judges. If there has been a relevant change in a community's political morality, then the systemizing the content of the beliefs must be undertaken again. Yet, it is plausible to assume that such reconstruction of reflective equilibrium with the modified set of beliefs will provide a lower cognitive load on judges than the original, as they already know how the majority of the belief set – all of the previous belief set minus the beliefs which were changed – are systematized. This knowledge will allow judges to be able to account for and systemize the content of the beliefs quicker as only a subset of the principles will be affected. Thus, given that

there is not a sudden drastic change in a community's political beliefs, the cognitive load with regards to reflective equilibrium will be relatively small.

Determinations of weighted aggregate realization of principles in judicial decision making – which decision maximizes principles within the law – may also appear to place a large cognitive load on judges, in that they must determine which decision maximizes principles of reflective equilibrium. Given that it is plausible that a political community's beliefs are complex, in that their belief set implies a number of different principles, determinations of which decision maximizes the aggregate realization of principles appear to be cognitively demanding.

However, recall that judges in hard cases have neither total freedom nor are wholly constrained in their decisions, in that they are constrained by the options available before them as dictated by the case. This narrows the set of possible decisions down to a handful of decisions and thus decreases the cognitive load of determining a decision which maximizes the aggregate realization of principles. Furthermore, in choosing from a handful of decisions, judges are not obligated to determine the precise aggregate realization of principles of each decision. Judges must only determine the relative aggregate realization of principles of each decision, and then choose which of these decisions is maximizes principles. As the number of available decisions, even in hard cases, is most likely small, the cognitive load on judges is not overbearing in this regard either.

Here, one may modify the objection, by claiming that it is not the *process* of ideal law theory which places a large cognitive load on judges, it is determining the *outcomes* of the decisions which is impractical. This is to say that determining the weighted aggregate realization of principles of each decision is difficult for judges, as these decisions require judges speculate on concrete alternatives and how each alternative will realize principles. Determining how each

decision will affect the political community places a large cognitive load on judges, thus increasing the risk that the judge make a decision which is decreases the aggregate realization of principles in the law and thus making the law worse. By contrast, the objection goes, while coherence views may provide an inefficient system to correct injustices within the legal system, such risks are known and therefore easier to manage or mitigate.

In response to this, one may look at the way individuals do – or generally think that they should – operate in their capacity as judges. In many legal systems, judges must have previously undergone both extensive education and work experience to be able to be considered for a judgeship. In terms of education, judges generally must already have a degree to practice law[45], as well undergoing further education once appointed or elected to their position[46]. Judges generally also must have sufficient experience within the courts, typically working as an attorney for a number of years (Provincial Court of British Columbia, 2020).

Requiring extensive education and experience to become a judge is intuitively reasonable, given that high stakes within the legal system. One wants judges to have such experience and education as to provide them with all of the training necessary to make good and correct decisions in cases, for without it they may not be able to do so. Part of this education is intended to give judges the understanding of the impact a decision has, as judicial decisions can and do have farther reach than the case at hand as it provides the interpretation of the relevant law until it or the related law is overruled.

[45] In Canada, this typically requires that individuals complete a bachelor's degree, followed by a three-year degree from a Faculty of Law.

[46] This may include additional classroom training, shadowing current judges, and or other skill-building programs (National Center for State Courts, n.d.; Provincial Court of Alberta, 2020; Provincial Court of British Columbia, 2020).

Suppose a hypothetical case in which a judge must decide whether the beneficiary of a life insurance policy is entitled to keep the money through 'unjust enrichment'[47]. Further suppose that the judge rules in the negative, that those who receive life insurance payouts through unjust enrichment are not entitled to them. In this ruling, it would be reasonable to assume that the judge, in making this decision, would have some sufficient understanding of how this ruling would have effects beyond the present case for relevantly similar cases. It also seems reasonable to assume that the judge will have sufficient understanding of what principle underlies their decision and what effect the ruling will have on this principle doing forward. It would be odd or intuitively considered bad judicial practice for a judge in this ruling to state that they have no idea how this would affect other life insurance cases or cases involving unjust enrichment, and that they did not consider it prior to giving their decision.

Again, suppose a hypothetical example of a case before a judge, in which the judge must decide whether right to be tried in a reasonable time extends over how long it takes for a judge to render a decision[48]. Further suppose that the judge rules that the right does extend. In ruling that a right to be tried in a reasonable time extends over rending judicial decisions, it would seem irresponsible for the judge to make this decision while also claiming that they not understand how this would affect judges (themselves included) and how they render decision. It seems reasonable to expect that the judge in this case would have some sufficient understanding of the consequences of their decision and how their decision would have on fellow judges going forward.

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[47] This hypothetical example is drawn from *Moore v. Sweet*, as well as inspired by *Riggs v. Palmer* as presented in Dworkin's "The Model of Rules" (Dworkin, The Model of Rules, 1967; Moore v. Sweet, 2018).
[48] This hypothetical example is drawn from *R. v. K.G.K* (R. v. K.G.K., 2020).

What these examples show is that there is an intuitive expectation that judges should consider situations beyond the case at hand, by considering how this ruling will affect situations relevantly similar to the case at hand. This is because a judge's ruling extends beyond this case to relevantly similar cases, and so a judge ought to be aware of the consequence of their ruling in these cases – recognizing that their decision will set the standard for interpreting the law[49] going forward, judges are expected to consider how such interpretations will affect the political community.

Thus, one may respond to the objection that determining the *outcomes* of judicial decisions using the ideal law methodology are impractical by stating that determining outcomes of judicial decisions is intuitively what is expected of judges – while one may deny that judge must *know for certain* what effect their decision will have, there is an expectation that judges will have some sufficient understanding of how their decision will affect the law and the political community. Given the high stakes of the legal system, judges should expect to have to deal with such matters with their full attention. This is this is why it appears reasonable for judges to undergo extensive education and experience before becoming a judge, to give judges the tools necessary to make such high stakes decisions correctly. It is admitted that this places a large cognitive load on judges, but this does not mean that it is impractical, only that performing judicial obligations cannot be taken lightly.

In turning to the second objection – that ideal law methodology gives judges too much power to shape the law and thus poses a moral risk in judges who do not want to make a decision in line with the community's political morality – is misguided. While it may appear *prima facie*

[49] This is, of course, unless the law changes or the decision is overruled.

that the ideal law methodology gives judges freedom to choose what they think is the best decision, this is actually not the case.

Recall, that the ideal law is any set of laws which maximally realize principles given countervailing legal and factual concerns. These principles are generated from a community's initial relevant beliefs about political actions and states of affairs through reflective equilibrium. As such, the ideal law reflects the best set of laws from the standpoint of the political community. In instructing judges to choose a decision which maximizes the aggregate realization of principles, ideal law methodology instructs judges to choose the best decision from the standpoint of the political community, not the judge themselves. Thus, the ideal law methodology does not instruct judges to make decisions based on their own political morality.

However, one may object at this point that while ideal law methodology does not *instruct* judges to supplant their own political morality in place of the community's, it *allows* them greater freedom to be able to do so. While ideal law methodology may condemn such actions as creating a bad judicial decision, it poses a moral risk as it allows judges greater opportunity to do so because decisions under the ideal law methodology are opaque. Opacity is important, as it allows for others to determine how a judicial decision was made, and to be able to hold the decision maker accountable[50]. Considerations of coherence are clear to the political community, while considerations of ideal law are not.

This objection is also misguided, as determining which principles are to be maximized under ideal law poses the same degree of opacity as determinations of principles in the law. Given that coherence theories of judicial adjudication instruct judges to use principles within their coherence base, ideal law methodology will be no more opaque than coherence theories of

[50] This is given the assumption that the legal system is question justifies its decisions under the principle of public reason.

judicial adjudication. While the method of determining principles is not important for present purposes, it will be assumed that there is a way to do so – as Dworkin showed in "The Model of Rules", judges can construct and draw upon principles and so one can assume that judges do have the ability to do so (Dworkin, The Model of Rules, 1967).

First, determining principles in reflective equilibrium is plausibly just as opaque as determination of legal principles. Just as the relation between principles derived from legal rules and the legal is roughly a kind of 'implication', in that application of the principles would plausibly lead one to develop the set of rules from which the principles were derived, principles derived from beliefs about political actions and states of affairs are 'implied' by these beliefs. As these relations are roughly similar, and that the domain of legal rules and beliefs about political actions and states of affairs are largely coextensive, one can plausibly say that determining principles in reflective equilibrium is plausibly just as opaque as determination of principles.

Determinations of the ideal law are also just as opaque as determination of legal principles, as determinations of ideal law are the inverse derivation. As legal principles are 'implied' by legal rules, the ideal law is the process of developing the set of rules from principles to its fullest extent – a set of laws which are maximally instantiate the principles. As such, the ideal law is equally as opaque as legal principles.

As such, the ideal law methodology is as opaque as legal principles are. Given that the existence and usage of legal principles within the law is largely unproblematic for coherence theories of law, one can state that ideal law methodology does not allows judges greater freedom to be able to do deviate from what the methodology instructs.

## Chapter VII: Further Objections and Replies

This chapter will present with a number of objections to the ideal law methodology and replies to each. There are three major objections which will be discussed. The first objection is that of value incommensurability, that the balancing of principles is not possible. A full response will not be given to this objection, but an initial sketch will be given to lead readers to a way of dealing with this issue. Second, an objection will be raised that the ideal law methodology creates legislative inconsistency. A reply will be given that the ideal law methodology does not cause legislative inconsistency as it accounts for procedural values in law. Third, an objection will be given that the ideal law methodology erodes predictability in law. In this, a reply will be given that the ideal law methodology preserves some degree of predictability, but that predictability is only a *prima facie* good.

### 7.1: Initial Remarks on Value Incommensurability

Here, one can raise an objection to the ideal law methodology, in that such balancing of principles is not possible when determining the aggregate realization of principles, as such principles are incommensurable[51]. This objection states that not only is there no single measure to adjudicate between two or more conflicting values or principles, but that there is no positive relation between them – each value is neither better than one another, less than one another, nor are they equal value[52] (Cath, 2016, p. 4; Raz, 1985 - 1986, p. 117; Smith, 2011, p. 33). As such,

[51] It is of note that this is also an objection for coherence models of adjudication which endorse value pluralism. This covers models of coherence which include both legal rules and legal principles (of which Dworkin and Amaya endorse), and coherence of legal rules whose value is determined partly by the legal principles which they embody.

[52] This is often referred to as 'strong incommensurability' in the literature on incommensurability. As weak incommensurability, that "there is an ordering between [the principles], and that instead of balancing them quantitatively against one another, we are to immediately prefer even the slightest showing on the A side to anything, no matter what its weight, on the B side", does not preclude the possibility of balancing of principles, only strong incommensurability will be discussed (Waldron, 1994, p. 815).

the objection states that these principles cannot be ranked in a lexical order and thus qualitatively different such that no comparison is possible (Smith, 2011, p. 33).

At the level of determining ideal law, the incommensurability objection begins by recognizing that principles can compete with one another – given that value pluralism is true, in that not all values of a given political community are derivable from a single value, and that these values are not lexically ordered, there will be circumstances where principles all cannot be maximised to the greatest degree. In reflective equilibrium, it is certainly the case that there are competing principles. Thus, it is possibly the case that one set of laws will realize one principle more than another, while the other set of law realizes a different principle more than the first. As no comparison is possible between principles, it is impossible to determine which set of laws is better than another. Consequently, if it is impossible to determine which set of laws is better than another, then it is impossible to determine which sets of law are the best. Therefore, the claim that there are some sets of laws which are the best they could be is false, or at least is indeterminate.

While addressing concerns about incommensurability will not be undertaken in full, as any full attempt to do so would require far more space and time than one can allow[53], some preliminary steps will be advanced to ameliorate the issue with regards to ideal law theory. In response, one can disagree with Raz in claiming that incommensurability and incomparability are interchangeable, and thus claim that incommensurability does not entail incomparability (Raz, 1985 - 1986, p. 117). One can concede that principles may be incommensurable but comparisons, and thus balancing, may be possible.

[53] Value incommensurability is a topic of which an entire thesis could be dedicated to – and of course, many are.

The first step in ameliorating this objection is to note that balancing of principles is done not between principles themselves, but concrete alternatives (Broome, 2000, p. 22; Da Silva, 2011, p. 286). Concrete alternatives are limited in scope as to refer to possible states of affairs covered by a set of laws[54]. In the ideal law methodology, principles in themselves are not being compared directly, but different sets of laws in concrete alternatives which principles are constructed from. Thus, principles never exist outside of a concrete situation. This is important to note, as even if values in themselves are incomparable, situations which realize values may not be (Broome, 2000, p. 22).

The second step is to introduce the concept of a covering value. A covering value is a consideration with respect to which a meaningful evaluative comparison can be made (Chang, 1997, p. 5). Coving values may have multiple contributory values – values which contribute to the content of the covering value (Chang, 1997, p. 5). One can say that how well an item does in regard to its covering value is its merit (Chang, 1997, p. 5). In this way, a covering value acts as a criterion for evaluation of a thing or a comparison between things, "[a] bald claim that philosophy is better than pushpin, for example, cannot be fully understood without reference to some respect in terms of which the claim is made" (Chang, 1997, p. 6).

From this, one can provide clarity to the objection against ideal law theory in light of these considerations. The objection can be rephrased thus: two concrete alternatives are incomparable with respect to a covering value if, for every positive relation relativized to that covering value, it is not true that it holds between them[55] (Chang, 1997, p. 6).

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[54] This is not to imply or depend on any sort of metaphysical relation between 'being concrete' and 'being possible'.
[55] As Chang notes, some may interpret incommensurability as the intrinsic merits of the things cannot be compared – while two things may be compared along some covering values, there is no covering value which in terms of their intrinsic merits (Chang, 1997, p. 7). There are two possible interpretations of this claim. In the first interpretation, it is not a claim about incomparability, but a claim about the existence of appropriate covering values (Chang, 1997, p. 7). If such covering values with respect to the intrinsic merits do not exist, then there can be neither comparability nor incomparability, as incomparability must proceed relative to claims about covering values (Chang, 1997, p. 7).

As legal principles are derived from beliefs about political actions and states of affairs as they relate to the community's political morality, one covering value which can be used to compare competing alternatives where principles conflict is their satisfaction of political morality[56]. Satisfaction of political morality is a covering value with extends over all concrete alternatives where a conflict of values exists, as principles are constructed to systematize beliefs about political morality. As such, the satisfaction of any principle will constitute the partial satisfaction of political morality, with the degree of satisfaction being the degree of importance within the system. The satisfaction of a larger number of principles will therefore better satisfy political morality than the satisfaction of a smaller number of principles, and satisfying a principle to a larger degree is better than satisfying one to a smaller degree. As such, whichever concrete alternative better satisfies political morality is the better alternative.

While conceding that this response does not solve the issue of value incommensurability as it relates to ideal law methodology and that further questions can be raised, such considerations hopefully constitute the first steps to ameliorating the problem.

### 7.2: Legislative Inconsistency

While moving towards ideal law at every opportunity would result in a better system of law, practical considerations are necessary to maintain the functioning of the law. Within *The Morality of Law*, Fuller provides the reader of the allegory with King Rex, an inept ruler who makes eight key mistakes in trying to reform the legal system of his country (Fuller, 1969, pp. 33-38). The first failure is a failure to make rules at all, so that issues are decided on an ad hoc

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The second interpretation states that there exists a covering value, but the intrinsic merits of the things are incomparable to said covering value (Chang, 1997, p. 7). This is a claim about incomparability, as it is relative to claims about covering values. The first interpretation will not be addressed in this thesis, but the second will.

[56] Satisfaction of political morality will be taken to be interchangeable with 'rightness' with regards to a situation which falls under the scope of political morality.

basis (Fuller, 1969, pp. 34, 38-39). The following failures are, "(2) a failure to publicize, or at least make available to the affected party, the rules [they] are expected to observe; (3) the abuse of retroactive legislation…; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient [their] action by them; and finally, (8) a failure to congruence between the rules and their announced administration" (Fuller, 1969, p. 39).

Setting aside the question of whether failures of these kinds within a legal system constitutes a lack or erosion of moral obligation of citizens to follow such laws, failures of these kind certainly denote *bad*[57] law (Fuller, 1969, p. 39). It will be taken that this is claim is intuitively plausible. As the allegory of King Rex shows, it is not the content of the laws to which the citizens object, but to *how* the law comes into being, are disseminated and are enforced (Fuller, 1969, pp. 33-38). As such, these kinds of failures are failures not with regards to what the law says or dictates, but failures of the structure of the law – how the law is presented and enforced.

One relevant failure of King Rex was that that the law changed too often – whenever a law was enacted new amendments were added or withdrawn, or the laws themselves came in and out of existence at such a rate as to make his citizens cry out "[a] law that changes every day is worse than no law at all" (Fuller, 1969, p. 37). Fuller names this phenomenon 'legislative inconsistency' claiming that if the law changes too frequently then there is insufficient time for individuals to adjust to the new laws (Fuller, 1969, p. 80). This, of course, leads to a breakdown of the law as citizens cannot keep up with or follow the new laws.

[57] The term 'bad' here is perhaps narrower than Fuller's usage, as it is defined in reference to political morality instead of morality *suis generis*.

One aspect of the ideal law methodology which may be objected to is that it causes the law to change too frequently. By instructing judges to change laws for the better at every turn, this may cause the laws to change so frequently as to cause legislative inconsistency[58]. The objection is that ideal law methodology instructs judges to act in a way that would actually make the law *worse* rather than better. As the ideal law simply intrusts judges to make the law the best it can be, itdoes not provide checks or balances in how judges are to do this, and thus it ignores procedural values such as procedural justice or procedural fairness. Legislative inconsistency is defined in terms of procedural values and thus, the law is made worse off as it only maximizes substantive values but does not account for procedural values. It will be fruitful to deal with this objection in full, as it highlights a key nuance of the ideal law methodology.

The response to such an objection is to show that ideal law methodology instructs judges away from legislative inconsistency, and thus the objection is misplaced. This is by demonstrating that ideal law methodology requires that judges balances procedural values, thus avoiding legislative inconsistency by maintaining a minimal fidelity to the positive law when warranted.

Before a response can be given, one must first make clear the difference between legislative inconsistency and simple changes in the law. The law, intuitively, is often in a state of flux in that laws are created, modified or removed by both those in political office through legislation and judges through rendering decisions in cases before the courts. In the typical

[58] Certainly, the other kinds of failures of Fuller's King Rex are important and thus must be accommodated. However, only legislative inconsistency will be discussed. This is, of course, not to downplay the importance of other kinds of failures. Only legislative inconsistency will be discussed as it is *prima facie* a failure which ideal law methodology is guilty of, and which coherence theories of judicial adjudication most strongly uphold. Thus, by dealing with legislative inconsistency, one can not only come to understand how ideal law methodology deals with legislative inconsistency, but more accurately understand the difference in operation between ideal law methodology and coherence theories of judicial adjudication. Articulating other kinds of failures of Fuller's King Rex is also useful in demarcating legislative inconsistency from other kinds of failures.

operation of the law, such changes usually do not amount to legislative inconsistency as individuals have time to be able to reorient their behavior to conform to the law; it is intuitively implausible to claim that a legislator or a judge causes legislative inconsistency by making any changes to the law whatsoever. Legislative inconsistency arises when the speed of change becomes so great that there is insufficient time for individuals to adjust to the law[59] (Fuller, 1969, p. 80). As such, this objection should only be taken that ideal law methodology instructs judges to change so frequently that individuals cannot adjust to the new laws.

Now, recall that ideal law methodology requires that judges undergo reflective equilibrium of a community's initial relevant beliefs about political actions and states of affairs as they relate to the community's political morality. Through reflective equilibrium, theoretical principles are constructed which account for and systematize these beliefs. Fuller's King Rex allegory is useful here, in that the citizens which King Rex governs cry out against legislative inconsistency (Fuller, 1969, p. 37). This is telling in that it supposes two things: the first is that the citizens have some set of beliefs about legislative inconsistency. It certainly would be odd, in a particularly Moorian sense, for the citizens to denounce legislative inconsistency without such beliefs – to cry out, "a law that changes every day is worse than no law at all, but I don't believe it". Second, that the citizens beliefs about legislative inconsistency evaluate it negatively – that the citizenry think that legislative inconsistency is bad. It again would be odd for the citizenry to cry out, "a law that changes every day is worse than no law at all, but I think that laws changing every day is a good thing". Unless the citizenry highly prize having no laws at all, such a statement is strange.

[59] A question remains of how much time is sufficient time for individuals to adjust to the law. While no answer will be given as it is outside the scope of this thesis (perhaps in the domain of sociology or cognitive science), intuitively the answer partly relies on the political community in question and their ability to adapt to new circumstances.

As such, a community's beliefs about legislative inconsistency are a part of the reflective equilibrium which is used to identify the ideal law, in that there are principles which are generated to account for and to systematize beliefs about legislative inconsistency which judges reference in making a judicial decision. Now, further recall that the best law is one which maximizes of the legal principles of an appropriate political morality for a political community, those being resultant of narrow reflective equilibrium. When thinking about what *laws* are best, this is best described as sets of laws which maximally realize principles given countervailing legal and factual concerns. However, a judicial decision in hard cases not only involves filling in gaps of positive law – deciding which laws, and by extension sets of laws, are best – but also engagement within the legal institution, and thus the structure of law. It is important to remember that a judge renders their decision in a court of law, and the court is part a key component of a legal system. As such, judges must consider not only what is the best law, but also what is the *best way to reach a decision*; judges not only affect what substantive values are within the law by rendering a particular decision – principles which concern the body of positive law – but also procedural ones in *how* they render their decision as part of the legal institution.

Keeping this in mind, in making the law the best it can be, judges must not only balance substantive values but also procedural ones which result from reflective equilibrium; finding the correct balance requires that judges balance not only substantive values but procedural values as well. This involves not merely looking at alternatives and determining which outcome is best, as procedural values may not necessarily be encoded in the positive law[60]. Furthermore, given the restrictions on of scope of judicial decisions, there may not be opportunities to change positive law which deals with procedural values encoded in positive law. This is to say that a judge must

[60] This is simply to say that, within a particular legal system, there may not be any positive law which requires that judges consider or act in accordance with some procedural value or other.

be aware of how they render a decision as much as what decision is rendered. This requires that judges consider and enact these procedural values as to avoid legislative inconsistency, inasmuch as procedural values imply legislative consistency. This is, of course, necessary to account for negative beliefs surrounding legislative inconsistency – making the law the best it can be requires that judges maximize legal principles, which includes procedural principles as well as substantive ones.

Thus, within ideal law methodology, principles governing beliefs about legislative inconsistency are to be considered with other principles in making the law the best it can be. Given this, if a decision to change the positive law would create gains in the aggregate realization of principles in terms of substantive values without sacrificing procedural values, that decision is a viable option for the judge to consider in their judicial decision. As well, if a decision to change the positive law would create gains in the aggregate realization of principles in terms of procedural values without sacrificing substantive values, that decision is also a viable option for the judge to consider in their judicial decision. However, if such a decision would sacrifice procedural values for gains of substantive values, or gains in substantive values for procedural values, the distribution often will not often maximize the aggregate realization of principles and thus would not be the correct decision for a judge in a hard case.

This at times will give the ideal law methodology the *appearance* of making decisions based on coherence. As the decision which maximizes the aggregate realization of principles may be one in which procedural values are maximized, or there are no gains in the aggregate realization of principles to be had, judges may decide a case which maintains the positive law. However, it would be a mistake to justify these considerations on grounds of fidelity to the positive law. As discussed above, decisions to extend the positive law – to not modify or apply

current positive law in where it was not previously applied – are justified solely on grounds of maximally realizing principles; both decisions to change the law and to not change the law are justified on grounds of the realization of principles, which is to say political morality. Thus, any coherence with the positive law which a decision has is justified solely on grounds of the realization of principles, and not on fidelity to the positive law.

One may object at this point, claiming that while such examples show that gains in substantive values can occur in a judicial decision in cases of serious injustice, these are not relevant to the situation of modern liberal democracies – states which one can assume are moderately just. In cases such as the adoption of the Basic Law of the Federal Republic of Germany – adopted in 1949 after the fall of Nazi Germany – where serious injustice prevails, gains in substantive values are clearly maximize the aggregate realization of principles. However, such examples are few and far between and thus gains in principles are also few and far between. One of the main purported benefits in which the ideal law methodology has over coherence theories of judicial adjudication is efficiency of change, and thus considering procedural values in this way minimizes this benefit of the ideal law methodology.

With regards to the fact that gains in substantive values are less frequent in just societies than in unjust societies, this much is to be accepted as the gains which can be achieved through a judicial decision are smaller than those in an unjust society. This is due to the fact that unjust societies are 'farther' away from the ideal, which is to say that the legal systems in unjust societies do not exemplify the principles of political morality of their community to a large degree, and thus bear little resemblance to ideal systems of law. Given that they bear little resemblance, steps taken to improve the law towards the ideal generally[61] make larger gains in

[61] This is, of course, not to ignore the nuances within societies but rather to make a statement about states of affairs generally. Moderately just societies can have substantial injustice in particular areas, and unjust societies can be

political morality – in unjust systems, taking steps to exemplify principles of political morality 'covers more distance' in terms of realizing principles of political morality than moderately just societies which are 'closer' to the ideal.

This points to a way of understanding an 'expected efficiency' of the ideal law methodology with regards to substantive justice, which is to say the rate one ought to expect gains of substantive values with the ideal law methodology over a period of time[62]. In unjust societies where larger gains can be made in substantive values, one should expect to see a greater degree of substantive values being realized through judicial adjudication. Over time, this translates to substantive values being realized to a larger proportion than procedural ones. In just societies where such large gains cannot always be made in substantive values, one should expect to see a smaller gains of substantive values being realized through judicial adjudication over time.

However, this is not to say that this fact minimizes the benefits of ideal law methodology in modern liberal societies. Even in just societies, the ideal law methodology continuously moves towards the ideal law at every possible instance. As such, the ideal law methodology instructs judges to make decisions which maximize the aggregate realization of principles regardless of whether the political community is just or unjust. However, it is intuitively true that there are less instances of injustice to correct as less injustice occurs in just societies, and so situations of injustice come before the courts less frequently in said just societies. This should not be

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surprisingly just with regards to some areas. In moderately just societies in an area of substantial injustice, large gains in substantive values can be made, and thus outweigh to a larger degree legislative inconsistency. The converse applies to unjust societies in areas that are moderately just.

[62] This is assuming the widespread adoption of the ideal law methodology in a judicial system concerning hard cases.

considered to be minimizing the benefits of ideal law methodology, but simply a fact about just societies.

One caveat needs to be mentioned before proceeding. At this point the distinction between those who endorse the distinction between hard cases and easy cases, and those who do not is relevant as this will dictate the proportion of hard cases before the courts. If it is the case that there is a distinction between hard cases and easy cases, then a small proportion of total cases before the courts will be hard cases. As such, the risk of creating legislative inconsistency through judicial adjudication is relatively small. However, if it is the case that there is no distinction between hard cases and easy cases– in that there is only hard cases – then all of the cases before the courts will be hard cases.

This is relevant when discussing an 'expected efficiency' of the ideal law methodology. Even in unjust societies, the ideal law methodology will not instruct judges to change the law so quickly as to create legislative inconsistency. This involves changing the law as a whole at a manageable pace where members of the political community can reasonably adjust to the new laws. Thus, change in unjust societies under ideal law will be quick, but perhaps not instantaneous.

### 7.3: Predictability

One further objection to the ideal law methodology is that it lacks predictability, in that individuals may not be able to form an expectation of how a particular case will be decided. Predictability here is defined in terms of individuals predicting how a judge will make their decision[63]. In the context of the courts, individuals engaged in a case before the courts – both

[63] This is, of course, for the banal reason that any judicial methodology is predictable for any judge who understands how it works, and thus objections of this type are not worth considering. Any methodology which dictates that a judge picks a particular decision is predictable in this sense, and thus both ideal law methodology and coherence theories of judicial adjudication are both are predictable in this way.

litigants and lawyers – in coherence theories of judicial adjudication have some idea of how the law is to decide the case at hand. In the context of hard cases, it is not reasonable that individuals will *know* how the court is to decide because the law is unsettled. However, given some knowledge of the surrounding relevant law individuals can come to form some sort of expectation of how the case will unfold. Given the intuitive plausibility that predictability is a good for the law, the ideal law methodology is said to lack this particular good which coherence theories of judicial adjudication provide.

In a wider context, one can extend predictability beyond individuals engaged in a case before the courts to the general public. Here, the intuition is shifted in that predictability is not a good in that it gives individuals an expectation of how the case will unfold, but something necessary to achieve other goods. Predictability in this wider context is required to guide conduct or coordinate activity of the citizens towards normatively worthy action, and the ideal law's purported tendency towards unpredictability by changing the law for the better at every turn in fact undermines an aim.

Before this objection is tackled, a brief note is necessary to place it in context with regards to ideal law methodology. The ideal law methodology is a methodology for judges to undertake in hard cases, which, recall, are cases in which the law is not settled – there is not an interpretation of the general language used in the source law which is habitually adopted. Thus, as the court in making their decision is providing an interpretation that is to be adopted, there is little in the way of predictability when compared to easy cases. This is not to say that predictability is non-existent, but the degree of predictability one can or should expect is diminished.

It is also of note that one should not confuse predictability for a kind of procedural value, as predictability can be parsed from this. One cannot deny that adhering to procedural values can create predictability within the law by adhering to a particular way of creating or administering law. However, predictability is not something which is part of the *process* of law, which is to say that predictability is not part of a just or fair process – instead, predictability is *resultant* of the process. This is not to say that judges cannot provide or aim for predictability in how they adjudicate cases, only that predictability is not part of the process itself.

In response to the aforementioned objections, such objections fail to consider the extent to which the ideal law methodology is draws from the political community. When judges render decisions which maximizes the aggregate realization of principles, they have in effect made a decision which is more aligned with how the community believes the law ought to be. Recall, decisions which maximize the aggregate realization of principles move the current body of law towards the ideal law through maximizing principles of reflective equilibrium. This reflective equilibrium is determined through relevant beliefs about political actions and states of affairs as they relate to the community's political morality.

As such, decisions made under ideal law methodology can be said to be relatively predictable for members of the political community over other possible decisions which do not maximize the aggregate realization of principles. It is plausible to say that members of a political community have some expectation that the court render decisions which are parallel to, or at least not counter to, the beliefs of the community. This claim is plausible in light of two separate intuitively reasonable claims, that the law has some sort of aim or purpose, and that achieving this aim or purpose is partly context sensitive.

The claim that the law has some sort of aim or purpose is intuitively reasonable, in that the ubiquitous adoption a system of law in almost every society indicates some benefit for adoption of such a system – if adopting a system of law had no benefit to its political community, it would be odd to see the widespread adoption as well as the political community allocating resources for it. It is also of note that the law has some aim or purpose which has been advanced by a number of different philosophers and legal theorists, although this aim or purpose varies among them. The claim that the law has some sort of aim or purpose is also required for the second predictability objection, and thus must be accepted for this objection to be made. The claim that achieving this aim or purpose is partly context sensitive acknowledges that political communities are different, and thus achieving such aims must take account of these difference. One key difference are the political beliefs which the community holds, which informs how the political community goes about achieving the aim or purpose of the law.

As such, it is plausible to say that members of a political community have some expectation that the law, and by extension the decisions which the courts make – is line with the beliefs of the political community. Yet, if this is the case, then decisions which bring the law more in line with the beliefs of the political community will be *ceteris paribus* more expected than those which are not. Thus, ideal law methodology has some degree of predictability.

One caveat are needed here in this, however. The first is that the degree of predictability offered by ideal law methodology is predictability on reflection. As reflective equilibrium is determined through *the community's* relevant beliefs about political actions and states of affairs, the reflective equilibrium may not be identical to an individual's political beliefs. This may occur because the initial set of beliefs differ from individual and community, or that it is not possible to systematize an individual's belief set, and thus some inconsistent beliefs need to be revised or

rejected. Yet, individuals have access to their community's political beliefs as they are a member of the community, and so it is possible for individuals to undertake reflective equilibrium to determine the community's political beliefs.

However, with regards to the goods of predictability, it is only a *prima facie* good, in that the good related to predictability do not outweigh the benefits of making a correct judicial decision. As such, the good of predictability should only be considered when gains in other such values are not present. This can be illustrated though a pair of hypothetical examples where the predictability is represented as a good to be weighed against gains substantive values.

First, suppose a case in which a judge must decide between two alternatives. The case in question is a hard case, and thus the law is unsettled with regards to what ought to be done. In ruling in favor of the first alternative the judge would be changing the lawm but this change would have no effect on principles within the law – the law would be equally as just, but different. In ruling in favor of the second alternative, the judge would be maintaining the current law. In such an example, we can ask whether the judge choose the first or second alternative.

In this example, it is intuitive that the judge ought to choose the second alternative. Since each alternative is equally as just, there are no grounds for deciding between the alternatives on such grounds. However, the second alternative maintains the degree of predictability in the law. Assuming that individuals are aware of and are following the law, there is no need for said individuals to relearn the content of law or adjust their behavior.

Now, suppose a new case in which a judge must decide between two alternatives, where the case at hand involves some injustice within the law – that is to say, under the current law in question, some injustice is done. The case in question is a hard case, and thus the law is unsettled with regards to what ought to be done. In ruling in favor the first alternative, the judge would be

changing the law by correcting the injustice, maximizing principles within the law and thus making the law overall better. In ruling in favor of the second alternative, the judge would not be making any gains nor losses in principles, but instead would be maintaining the current state of injustice. In such an example, we can ask whether the judge choose the first or second alternative.

Intuitively, one thinks that the judge ought to choose the first alternative because the judge would be correcting some injustice in the law. In this regard, it would seem odd for a judge to pick the second alternative by appealing to predictability – that a judge would say, "I know the first alternative would correct an injustice, but the litigants and society at large expect that the law operate in this unjust way and so I ought to rule in favor of the second alternative".

In viewing these two cases, one can see that predictability is a kind of *prima facie* good. In examining the first case, it seems clear that predictability is a kind of good, in that there are cases in which judges may appeal to predictability in choosing between alternatives in deadlock situations. However, in examining the second case, this kind of good is outweighed in the presence in gains of principles, when a judge can maximize principles within the law and thus make the law overall better. It is intuitive that a judge rule in favor principles over predictability, as it is intuitive that a more just state of affairs is more desirable than a more predictable one. Certainly, adjusting to unnecessary change can be difficult to coordinate normatively worthy action, and thus predictability is a good in this sense. However, adjusting to having to a more just state of affairs seems like an acceptable difficulty[64] to adjust to; one would go as far to say that individuals ought to adjust to a more just state of affairs because they are more just.

[64] Of course, *excessive* difficulty may not merit some normatively worthy action. However, as ideal law methodology already accounts for countervailing legal and factual concerns requiring excessive difficulty seems to be already excluded.

## Concluding Chapter

It has been argued in this thesis that the ideal law methodology provides a better alternative to coherence theories of judicial adjudication in adjudicating hard cases. It is a better alternative to coherence theories of judicial adjudication in that it avoids the problem of being too conservative. As such, the ideal law methodology provides a clear method of adjudicating hard cases which is able to avoid conservatism by being adaptive to the community's political beliefs.

This thesis began by setting out a number of different framing considerations. Four assumptions were set forth to frame the discussion within the context of Angelo-American legal theory. These were that one must take seriously adjudicators' claims that they decide cases relatively constrained by standards relatively determinate of the dispute before them, that the choice adjudicators make within said constraints are justifiable in principle, that the strategies adjudicators use are constrained to a limited recognizable class, and that adjudication takes place within the law. This thesis was then placed within the context of hard cases, include but are not limited to cases where there may be two or more competing interpretations which are all applicable to some of the proposition of law, or cases where there are two or more competing propositions of law which may be applied to the case. This is contrasted with easy cases, which are cases where is some decisive rational procedure which subsumes the case under a general rule. It was shown that regardless of whether one endorses the distinction between hard cases and easy cases – whether the separation thesis is true or not – hard cases still exist. Finally, the thesis was placed in the context of *stare decisis*. The discussion of this thesis takes place where the strict doctrine of *stare decisis* does not apply, or in cases where the relaxed doctrine of *stare decisis* applies but there are not overwhelming reasons to decide a case in favor of the precedent.

Following, an account of coherence theories of judicial adjudication as given. A general account of coherence was given as the view that coherence is the view that no particular element or set of elements have a privileged class which provides a justificatory foundation for other beliefs. The element of the set 'hang together' and provide justificatory support for each other in a non-viciously circular way. Coherence theories of judicial adjudication were defined in terms of the inclusion of coherence of the positive law as a justificatory reason for adopting some judicial decision, with the main reason for adoption of this theory was its ability to safeguard important rules, principle, and decisions. Dworkin's theory of law as integrity was presented, in which judges must find an interpenetration of the positive law which is 'fits', which is to say textually coherent and consistent with integrity, then balance fit with substantive considerations. The decision which correctly balances fit with substantive considerations is the correct judicial decision for Dworkin.

A problem with coherence theories of judicial adjudication was raised, in that it was too conservative. What was meant by this is that modifications to the positive law are difficult, slow, or not possible. The examples of *Gong Lum v. Rice* and *Minister of Posts and Telegraphs v. Rasool* were presented to showcase the problem of conservatism in unjust legal systems and the effects it can have on a political community. Conservatism was further problematized through the introduction of moral improvement, which is when a subsequent state of affairs is better than the preceding one, or when right acts become increasingly prevalent. Moral improvement is notable when members of a political community come to recognize injustice. In this, an analogy with theories of liberalism was drawn. Just as past theories of liberal theories came to recognize injustice where it did not recognize it before, current theories of justice may be blind to injustices

and come to recognize them later. As coherence theories of judicial adjudication are slow to change, they will be slow to adapt to such moral improvement.

Afterwards, the ideal law methodology was introduced. The discourse of ideal law was legitimized through repurposing two arguments from Robert Alexy. The first argument was the Strong Argument from Correctness, that claimed the law made a necessary claim to correctness and thus justifiability. However, this argument failed as a claim to justifiability does not determine which standards of justification apply. However, it shows that a moral justificatory standard is possible. The Bandit Argument as put forth by Alexy also fails but shows that through counterfactual reasoning one can imagine the ideal law.

The ideal law methodology was then introduced. First, a judge must undertake narrow reflective equilibrium of the political community's political beliefs. Second, judges must identify the available decisions before them within the constraints of the case and evaluate the gains in terms of the weighted aggregate realization of principles of the decisions before them. The decision with the largest gains in the aggregate realization of principles will generate the most reasons to choose it as that decisions will realize the principles of political morality to the largest degree. Thus, the correct judicial decision in a hard case is the decision with the largest gains in political morality, which is one which maximizes the aggregate realization of principles.

It was then argued that the ideal law methodology successfully deals with the problem of conservatism. As the ideal law methodology instructs judges to use narrow reflective equilibrium instead of past decisions to justify judicial decisions in hard cases, past injustices are not further perpetuated in the law. In this regard, a reimaging of *Gong Lum v. Rice* and *Minister of Posts and Telegraphs v. Rasool* were put forth to showcase how the ideal law methodology would deal with such cases. Two objections were then dealt with. First, that the ideal law does not safeguard

important rules decisions was dealt with by showing that such rules and decisions would only be overruled when gains in the realization of principles was possible. Second, the ideal law posed a number of moral risks by abandoning past decisions. These objections were dealt with and ameliorated by showing that the ideal law does not place an overwhelming cognitive load on judges, as that the ideal law is just as opaque as coherence theories of judicial adjudication.

A number of objections not related to conservatism were dealt with as well. An objection from incommensurability of values was partially addressed by providing initial ameliorative steps to show that comparisons between principles may be possible. An objection that the ideal law methodology instructs judges towards legislative inconsistency was addressed by showing that the ideal law instructs judges to consider procedural values. Finally, an objection that the ideal law erodes predictability in the law was addressed by showing that the ideal law maintains some degree of predictability, but that predictability is a *prima facie* good.

As such, the ideal law methodology is a better method for judges to deal with hard cases than coherence theories of judicial adjudication. In cases where there is no clear path forward, judges should attempt to maximally realize principles in the law, making the law the best it can be.

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## Appendix: Dworkin on Interpretation and Integrity

Dworkin's theory is integrated his concepts of integrity and legal interpretation, and so additional context may be required to fully understand Dworkin's theory. As interpretation is a component of Dworkin's adjudicative integrity – in that it is "relentlessly interpretive" – it will be presented first (Dworkin, 1986, p. 226).

Dworkin's theory of legal interpretation is important for his theory of judicial adjudication inasmuch as it determines the content of the law. As such, before one interprets the law, there is nothing to adjudicate over. It is also important to provide account for Dworkin's theory of legal interpretation as it provides explanation as to where Dworkin's legal principles, which are a key component of his theory of adjudication, arise.

For Dworkin, propositions of law are both descriptive – in that they describe how things are in the law – yet they are also evaluative – express what individuals believe how the law ought to be (Dworkin, 1982, pp. 180-181). Propositions of law are not *merely* descriptive, as there are propositions of law where a description of the facts does not furnish one with full knowledge of the proposition (Dworkin, 1982, p. 180). Dworkin uses an example of whether an affirmative action scheme, which has not yet been tested in court, is constitutionally valid (Dworkin, 1982, p. 180). A full description of the law and its history cannot determine whether the law is valid as lawyers with full knowledge of the constitution and the previous decisions of the courts can reasonably disagree on whether it is valid nor not (Dworkin, 1982, p. 180). Propositions of law are not *merely* evaluative either, as individuals can hold that a particular proposition of law is valid yet ought not to be (Dworkin, 1982, p. 180). In this regard, Dworkin proposes understanding law – and by extension judicial adjudication – through interpretation.

Dworkin offers a general definition of interpretation as "trying to understand something – a statement or gesture or text or poem or painting, for example – in a particular and special way", while showing the thing "as it really is" (Dworkin, 1986, p. 54) Interpretation of legal rules is akin to interpreting works of art, what he calls 'artistic interpretation'. This is distinguished from scientific interpretation – interpretations of things not created by people – and conversational interpretation – interpretation not of what is said but what is meant by people, and thus is purposive (Dworkin, 1986, pp. 50-51; Guest, 2013, p. 72). Unlike scientific and conversational interpretation, artistic interpretation is creative in that is proposes and constructs value for the practice (Dworkin, 1986, p. 54; Guest, 2013, p. 72). Artistic and legal interpretation is an interpretation of something created by people but is distinct from them (Dworkin, 1986, p. 50).

Interpretations, for Dworkin, can be better or worse than one another including a best interpretation. The best interpretation is one which understands the law "in the best light" or "the best... it can be", which is to say provides the best moral justification for 'official' or state coercion of individuals and groups (Dworkin, 1982, p. 183; Dworkin, 1986, pp. 47, 109-110, 190-192). However, an interpretation is not free to simply ignore the interpretive base – the thing which is being interpreted – and so fit, which is roughly construed as fidelity to the interpretive base, is also important (Dworkin, 1986, pp. 54, 66-67, 230-231). Thus, there are two criteria for which to judge an interpretation, fit and justification for coercion (Dworkin, 1986, pp. 231-232).

The 'best' moral justification for state coercion of individuals and groups is found in the idea of integrity. Beginning with the assumption that substantive values in the law are not derivative from one another – for example, that justice is not derivative of fairness and *vice versa* – there can be possible conflicts in value[65] (Dworkin, 1986, pp. 177-178). In such cases of

[65] Dworkin remarks that integrity would not be needed in a utopian state (Dworkin, 1986, p. 176). One should be careful in reading Dworkin here – he is not saying that integrity is needed because of practical considerations. As

conflict, the law ought to not only balance these values, but in a way which exemplifies the law's integrity.

Dworkin contrasts integrity with what he calls the 'Solomonic way', which is to apply 'checkboard' legislation – legislation which settles conflicts by finding compromises within first-order values (Dworkin, 1986, pp. 178-184). These are referred to as internal compromises, as they are compromises internal to first-order principles such as justice and fairness (Dworkin, 1986, p. 179). Dworkin provides examples of such checkboard laws, such as counting three-fifths of a state's slave population in determining a state's representation in Congress (Dworkin, 1986, p. 184). Dworkin states that such compromises are intuitively unattractive, as they treats a community's public order as a good to be distributed and thus denies formal equality, or "equality before the law" (Dworkin, 1986, pp. 178-179, 185). "If there must be compromises because people are divided about justice, then the compromise must be *external* [emphasis added], not internal; it must be compromise about which scheme of justice to adopt rather than a compromised scheme of justice" (Dworkin, 1986, p. 179).

Integrity, as opposed to the Solomonic way, is an independent political virtue which asks that the law, and thus judicial decisions, 'speak with one voice', which is to say that a decision must not only be consistent but also "express a single, coherent scheme of justice and fairness in the right relation" (Dworkin, 1986, pp. 186, 218-219). As such, integrity is not simply bare consistency – logical consistency of rules – but consistency of rules and principles with principles fundamental to the law[66] (Dworkin, 1986, p. 219). Furthermore, integrity requires that judges identify legal rights and duties as if from a single author (Dworkin, 1986, p. 225).

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integrity is a second-order value which provides guidance on how to balance first-order values, integrity would not be needed as individuals in a utopia would already correctly balance first order values. "Coherence would be guaranteed because officials would always do what was perfectly just and fair" (Dworkin, 1986, p. 176).

[66] Dworkin takes these to be justice, fairness, and procedural due process.

Integrity is thus a second-order principle – or in Dworkin's terminology, it is external – as it is a principle about the correct balancing of first order principles.

Dworkin draws an analogy between personal integrity and integrity in law. An individual who acts with integrity acts according to convictions that inform and shape their lives as a whole (Dworkin, 1986, p. 166). Furthermore, Dworkin takes it that it is a moral requirement that individuals act with integrity with regards to important matters. Analogously, Dworkin regards the political community is regarded as having its own personality, and thus is subject to the same sorts of demands that one would make of a moral agent such as acting with integrity (Dworkin, 1986, pp. 167-168) Thus, in the same way that an individual is required to act with integrity in important matters, so is the state, and by extension the law. The law, when it acts (passes legislation, enforces laws, makes decisions, etc.) with integrity it acts from a single, coherent set of principles which are consistent with its fundamental principles (Dworkin, 1986, p. 166). Here, it is important to note that integrity holds within political communities, and not between communities (Dworkin, 1986, p. 185). As such, what integrity demands will vary between political communities. This is because the correct interpretation of a state's laws is derived from the attitude of the political community towards the laws, which will be discussed below.

Returning to interpretation – Dworkin's theory of interpretation has three distinct stages: the pre-interpretive stage, the interpretive stage, and the post-interpretative stage. Dworkin provides an example of rules of courtesy, a set of rules which members of the community follow on a range of social occasions (Dworkin, 1986, p. 47). The pre-interpretive stage involves a reasonable consensus about the rules and their justification, in that they are neither questioned nor varied (Dworkin, 1986, pp. 47, 65-66; Guest, 2013, pp. 66-67). If a rule of courtesy requires that peasants take off their hats to nobility as a sign of respect, at the pre-interpretive stage

members of the community follow such rules without adopting an attitude to the value of the rule (Dworkin, 1986, p. 47; Guest, 2013, p. 70). As such, the pre-interpretive stage provides the tentative content of the practice to be interpreted (Dworkin, 1986, pp. 65-66).

After some time, one can imagine that individuals begin to question the rule of that peasants take off their hats to nobility. Here, Dworkin states that the community has developed a complex interpretive attitude towards the rule (Dworkin, 1986, p. 47). Such attitude is complex because it has two components – that such practice has a 'point', and that the proper scope of the rule is not necessarily the current scope (Dworkin, 1986, p. 47). These two interpretive phases can be distinguished by the kinds of questions they ask: the former asks questions of value and worth, such as 'does taking off your hat to nobility promote respect to social superiors?', while the latter asks questions such as 'nobility include soldiers?' or 'does a bonnet qualify as a hat?' (Dworkin, 1986, pp. 48, 66; Guest, 2013, p. 70). As such, Dworkin notes that these two components of the interpretive attitude are independent from one another, in that one can take up the first component without taking up the latter (Dworkin, 1986, p. 47).

Questions of 'point' ask what interest or purpose it serves – "[a] participant interpreting a social practice… proposes value for the practice by describing some scheme of goals or principles the practice is supposed to exemplify" (Dworkin, 1986, pp. 47, 52). This is not to say, however, that there is a single purpose or value which can only be ascribed to a rule, as such rules or rule-following behavior underdetermines ascriptions of value (Dworkin, 1986, p. 52). Questions of scope ask about restrictions and applications of the rule. This is to understand the point of the rule, and ask whether the rules should be applied, extended, modified, or qualified by that point (Dworkin, 1986, p. 47). Thus, Dworkin claims that taking an interpretive attitude

towards a rule is to impose meaning on the rule – first to see it "in its best light", and then to "restructure it in the light of that meaning" (Dworkin, 1986, p. 47)

The post-interpretive stage is when "[i]nterpretation folds back into practice", which is to say that an interpretation has been settled upon by a community (Dworkin, 1986, p. 48). Thus, the post-interpretive stage 'folds back' into the pre-interpretive stage, providing content to be interpreted again.

Legal interpretation is thus constructive, in that one is trying to construct an interpretation based around the purposes of the interpreter – not the author (Dworkin, 1986, p. 52). Legal interpretation "is a matter of imposing purpose on the object or practice to make it the best in order to make it the best possible example of the form or genre to which it is taken to belong" (Dworkin, 1986, p. 52).