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# THE NECESSARY MORAL FOUNDATION OF LAW: A GEWIRTHIAN CRITIQUE OF CONTEMPORARY INCLUSIVE POSITIVISM

## ABSTRACT

*How does law possess the normative force it requires to direct our actions? This seemingly innocuous question is of central importance to the philosophy of law and, by extension, of the very concept of law itself, and it is hoped that this thesis will make a contribution which can further our capacity to provide a satisfactory answer.*

*The argument put forward will be one coming from the Natural Law tradition, in that it claims that the normative force of law has a necessary connection to morality. In order to be successful in this enterprise, two things will need to be demonstrated. Firstly, a commitment to the concept of moral truths is required; secondly, these moral truths must be identifiable through human reason. It will be argued that these conditions are met by Alan Gewirth's Principle of Generic Consistency, which attempts to locate the existence of universally applicable moral norms through a dialectically necessary argument grounded in the truism of noumenal agency. Such an argument, if correct, will demonstrate that a universalised instrumental reason necessarily serves as a categorical imperative to bind all agents to adhere to its absolute and exclusionary requirements against behaviour that would be non-compliant.*

*This has implications for legal theory, in that positive law is a product of human, and therefore agential, activity. If the PGC applies to all agential behaviour, a circumstance might arise in which a rule claiming the status of law might contradict its requirements. This thesis argues that, in such circumstances, the PGC requires agents to deny the normative force claimed by the non-compliant rule, thus demonstrating that  $(R_M x, - \Phi) > (R_L x, \Phi)$ . Contemporary positivist theories will then be critiqued against this claim to establish the extent to which they overcome the necessary link between law and morality thus established.*



The Necessary Moral Foundation of  
Law:  
A Gewirthian Critique of  
Contemporary Inclusive Positivism

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Joshua Jowitt

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A Thesis submitted for the Degree  
of  
Doctor of Philosophy

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Durham Law School  
Durham University  
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*The copyright of this thesis rests with the author. No quotation from it should be published without the author's prior written consent and information derived from it should be acknowledged.*

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*Thank you.*

# Chapter One

## Legal Positivism vs Natural Law – An Overview

*Jurisprudence matters because law matters, and law matters because it figures in our practical lives – in our determinations of what we ought to do and why.’<sup>1</sup>*

### 1 Introduction.

Central to any theoretical study of the normative force of law is the ongoing debate between Legal Positivists on the one hand and Non-Positivists on the other. Legal Positivists would have us believe that there exists no necessary connection between the normative force exerted upon us by law and the normative power of morality; non-positivists would hold that such a connection is not only necessary, but axiomatic to the nature of law itself. The purpose of this thesis is to defend a theory of natural law that identifies the Principle of Generic Consistency proposed by Alan Gewirth<sup>2</sup> as the ultimate source of legal normativity against contemporary inclusive positivism, a purpose that necessitates an opening discussion to establish the classical positions taken in debates between Positivism and Natural Law theory.

This chapter aims to present foundational theories in both of these broad schools of thought. I will begin by discussing the Positivism of John Austin, before establishing why I believe any Positivist theory grounded in his work to be deficient due its failure to identify a suitably compelling explanation as to the normative grounding force of any legal system. From this I will explore the Natural Law theory proposed by Thomas Aquinas, and its impact and influence on subsequent non-Positivist theories. It is worth establishing at the beginning of this work that I am aware of the Janus-faced character of Natural Law theory

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<sup>1</sup> Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001) 70

<sup>2</sup> Alan Gewirth, *Reason and Morality* (Chicago University Press 1978)

as highlighted by A.P.d'Entrèves; that it is viewed as both a historical product of the Western Civilisation from which it can trace its development and terminology, in addition to being considered an exclusively philosophical doctrine which should be viewed as central to human knowledge and therefore universal in its application.<sup>3</sup> I will then move from this initial exploration of the schools to the contemporary debate as to the normative force of law, exploring more recent attempts at grounding Law's normative force in Positivism before establishing the reasons for which I believe these attempts are doomed to failure. I will also explore the extent to which the Positivist/Non-Positivist debate has been historically characterised as a semantic disagreement over the meaning of the word 'law itself'. Such observations have been common throughout history; David Hume observed in 1751 that 'The word *natural* is commonly taken in so many senses, and is of so loose a signification, that it seems vain to dispute whether justice be natural or not.'<sup>4</sup> But I believe these observations to oversimplify what is a genuine disagreement, something I hope will be established in s.4 of this chapter. Once this has been established, I am in a position to suggest that the problems present in contemporary positivist theories can be rectified by reference to a moral content which should be recognised as necessarily present within the concept of Law itself. This being established, the remainder of this thesis will explore the extent to which Alan Gewirth's *Principle of Generic Consistency* can provide this moral core when faced with recent developments within Positivism.

## 2 The Classical Positivism of John Austin

In his collection of lectures published in 1832 under the heading *The Province of Jurisprudence Determined*, John Austin set his intellect towards defining the scope of what law and legal philosophy should concern itself with: 'The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by

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<sup>3</sup> Alessandro Passerin d'Entrèves, *Natural Law; An Introduction to Legal Philosophy* (first pub 1951, Hutchinson & Co., 1970) 14

<sup>4</sup> David Hume, *An Enquiry concerning the Principles of Morals* ( first pub 1751, Oxford University Press 1988) 308

political superiors to political inferiors.<sup>5</sup> Whilst this limitation may initially appear to leave open the possibility that law and morality should be linked (should they be deliberately integrated by political superiors within whose responsibility the creation of law, for Austin, necessarily lies), any such link is starkly rejected towards the end of Lecture V, when Austin holds firmly that:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry...Now, to say that human laws which conflict with Divine law are not binding, that is to say, are not laws, is to talk stark nonsense.<sup>6</sup>

It is clear that even laws which could be considered as morally wrong could still be enforced by political superiors; they would retain the power of law to control our actions, rendering any discussion of their moral validity ancillary. The binding force of law upon us as individuals rests in its instructive nature; ‘Every *law* or *rule*... is a command. Or, rather, laws or rules, properly so called, are a *species* of commands.’<sup>7</sup> Commands are necessarily correlative with a duty; when such commands are made a duty is imposed, and a failure to comply with the duty legitimises the imposition of a compliance–encouraging sanction.<sup>8</sup>

Here, for Austin, rests the origin of law’s normative force. Yet this simplification hides some nuances which deserve expansion. This section will firstly explore Austin’s differentiation between certain classes of law, and their relevance to the science of Jurisprudence. I will then move on to consider Austin’s observations on those situations in which moral and legal obligations may coincide, before exposing the contradictions inherent within Austin’s examination.

## 2.1 Identifying True Law

For Austin, it is inherent within the very definition of Law that true law, law properly so called, be set by political superiors to political inferiors. Yet this is

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<sup>5</sup> John Austin, *The Province of Jurisprudence Determined* (first published 1832, Wilfrid E. Rumble ed. Cambridge University Press 1995) 18

<sup>6</sup> *ibid* 157-158

<sup>7</sup> *ibid* 21

<sup>8</sup> *ibid* 22

not the only species of Human Law whose existence he recognises. In addition to such command-based theories of law, we have a second type of Human Law which is set by those who are not politically superior to ourselves. Examples given by Austin here include standards of behaviour or action which impose obligations on us by custom or the necessity of social conformity, such as honour or fashion. Although we may refer to these obligations with legal terminology, such as an honour *code* or the *laws of fashion*,<sup>9</sup> they are to be seen as different to law properly so called because they do not emanate from those who are politically superior who would be in a position to impose a compliance-inducing sanction in the event of non-compliance.<sup>10</sup> They are more properly referred to as positive moral rules improperly so called.

Austin appears to suggest that our failure to adequately distinguish these two types of Human Law arises from a mere linguistic confusion; whether or not an obligation is created by a Human Law properly so called or from something which closely resembles, but is different to true law, can be determined by reference to the criteria above. For example, the *laws of motion* would fall into the latter camp, as:

We say that the movements of lifeless bodies are determined by certain laws: though, since the bodies are lifeless and have no desires or aversions, they cannot be touched by aught which in the least resembles a sanction, and cannot be subject to aught which in the least resembles an obligation.<sup>11</sup>

Yet, by Austin's own concession, within this definition of law necessarily emanating from a political superior, we should also exclude International Law from the purview of Jurisprudence;<sup>12</sup> this would strike the modern reader as an odd exclusion to make, one which arbitrarily and artificially limits the definition of law to a concept much smaller than that to which we would recognise as complete and comprehensive. We must therefore examine the reasons why

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<sup>9</sup>ibid 123

<sup>10</sup> ibid 125

<sup>11</sup> ibid 149

<sup>12</sup> ibid 19 - 20



Austin has delineated his definition at this point, and ask ourselves whether we truly believe that he is justified in doing so.

## 2.2 The Moral Aspect of Law

As Austin's words contained in the quotation to be found in the introduction to s.2 demonstrates, Austin holds that the question the merit or demerit of a law is an utterly different question from that which asks whether a law exists. As I have summarised in s.2.1, the existence of Law for Austin rests on the existence of a command, supported by a sanction, issued by a political superior. Any comparison to be made between this law and an assumed standard, such as morality, is not a question of the validity or applicability of that law.

Austin concedes that the 'science of ethics' has two branches; positive law (legislation) and positive morality (morals).<sup>13</sup> Yet despite their similarities, he insists upon the stark and absolute separation of the two questions. This is partially due to his belief in the difficulty posed by attempts to identify an objective moral standard against which the law's merit or demerit may be compared. This is something he holds as self-evident:

The respective moral sentiments of different ages and nations, and of different men in the same age and nation, have differed to infinity. This proposition is so notoriously true, and to every instructed mind the facts upon which it rests are so familiar, that I should hardly treat my hearers with due respect if I attempt to establish it by proof.<sup>14</sup>

When Austin therefore comments that "There is no broad sun destined to illumine the world, but every single man must walk by his own candle."<sup>15</sup> he rests his positivism on what he holds to be the inescapable fact of moral pluralism. As no objective and universal moral standard can be said to exist, it would make a nonsense of the concept of Law to hold that such a standard would be a central to it.

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<sup>13</sup> *ibid* 113

<sup>14</sup> *ibid* 89 - 90

<sup>15</sup> *ibid* 90

This is not to say that positive moral rules properly so called cannot exist. Such rules should merely be distinguished from law as they can be distinguished on two criteria:

1. They are imperative law or rules set by men to men.
2. They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights.<sup>16</sup>

Furthermore, such positive moral rules should in turn be separated from Divine Law. Austin holds that such law is worthy of being described as law proper, 'as they are *commands* express or tacit, and therefore emanate from a *certain* source.'<sup>17</sup> This is a law whose moral content Austin perceives as objective and universal, but whose content differs from the positive morality extant in contemporary discourse that the two should not be conflated.<sup>18</sup> It is therefore positive morality, as opposed to the Law of God, which we should distance ourselves from when attempting to locate Law's normative force.

This is not to say that the two cannot ever coincide. It is merely that, should such an overlap occur, it should not be seen as essential to the character of the positive law proposed. Austin gives the distinction made between crimes able to be described as '*mala in se*' and '*mala quia prohibita*' as indicative of this overlap:

For, through the frequent confusion...of positive law and positive morality, a portion of positive morality, as well as of positive law, is embraced by the *law natural* of modern writers on jurisprudence, and by the equivalent *jus gentium* of the classical Roman jurists.<sup>19</sup>

Any feelings we have to obey the law because it complies with our own moral standards are therefore completely coincidental and should be discarded from our enquiry. We are presented with a scenario to help elucidate this statement; we feel remorse should we kill an individual during the course of robbing them, but would not feel the same remorse should we kill a robber during the course of being robbed. Austin suggests that we should feel equal remorse for both killings if the act of killing itself were the source of our moral guilt; the fact that

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<sup>16</sup> *ibid* 119

<sup>17</sup> *ibid* 118

<sup>18</sup> *ibid* 11

<sup>19</sup> *ibid* 92

we do not is because the law of England makes a distinction between the two scenarios, thus exonerating us from our remorse as our nation's popular morality 'accords with the law.'<sup>20</sup>

It is unusual that Austin should make this statement without any serious attempt to ground it in ethical language; the suggestion that it is the law that determines whether or not we should feel morally guilty for our actions appears to question beg significantly. To take another example from English law and the doctrine of Parliamentary Sovereignty, Austin appears to suggest here that should Parliament pass a law which commanded that all blue eyed babies be executed at birth, the very fact that this law was passed by appropriate legislative procedure should be enough to exonerate us from our guilt should we be tasked with enforcing that statute. I would argue that many would not agree with this statement, thus demonstrating that Austin's claim lacks sufficient exploration of the issues which it purports to dismiss. It therefore follows that whenever we make a value judgement as to the validity of human law in enquiring whether 'the law agrees with or differs from a something to which we tacitly refer it as to a measure or test.'<sup>21</sup> we are asking ourselves whether we see the law in question as imposing a valid *moral* obligation upon ourselves. Austin's claim that '[Jurisprudence] is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness.'<sup>22</sup> can therefore be seen as an unhelpful simplification.

### 2.3 Where Law and Morals Meet

This claim that Austin is simplifying the analysis he wishes to make can be supported by a deeper exploration of his own characterisation of Law properly so called. He defines Law simply as:

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<sup>20</sup> *ibid* 84

<sup>21</sup> *ibid* 113

<sup>22</sup> *ibid* 112

...a command which obliges a person or persons...In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a course of conduct.<sup>23</sup>

He goes on to acknowledge that law and morality may overlap, but the fact that this is not always the case should be seen as indicative of the fact that the two ought not to be confused:

The body or aggregate of laws which may be styled the law of God, the body or aggregate of laws which may be styled positive law, and the body or aggregate of laws which may be styled positive morality, sometimes coincide, sometimes do not coincide, and sometimes conflict.<sup>24</sup>

Therefore, should an individual commit an act which violates one or more of these species of law thus identified by Austin, the wrongs committed should be delineated within each species rather than being collated into a whole:

The murderer commits a crime, or he violates a positive law: he commits a conventional immorality, or he violates a so called law which general opinion has established: he commits a sin, or he violates the law of God.<sup>25</sup>

Yet Austin goes on to make suggestions which muddy the clear waters he attempts to impose between his species, particularly those of positive law and positive morality. For example, as established in s.2.2 of this chapter, Austin holds that the societal fact of moral pluralism renders impossible any attempt at locating a universally objective moral standard against which the moral validity of law should be judged. It may therefore strike the reader as surprising that he goes on to claim that “The killing which is styled murder is forbidden by the positive law of every political society.”<sup>26</sup>

Note here that Austin does not claim *most* political societies, but *every*. If this is indeed the case, several questions follow. Why is it the case that murder is forbidden by the positive law of every political society? What feature is it of this crime in particular that has led to the situation whereby it is universally

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<sup>23</sup> *ibid* 29

<sup>24</sup> *ibid* 138

<sup>25</sup> *ibid* 138

<sup>26</sup> *ibid* 138

criminalised? And does it follow that, if murder is prohibited in every political society, that this is because the popular morality of every political society also prohibits murder in the way Austin suggests is true with the example he provides of killing a robber in self-defence? Does Austin here unintentionally endorse a universal moral standard in the prohibition of murder? He would, of course, deny such a conclusion – but the question remains unanswered in his work; if this is a universal moral standard which is universally recognised within law, might law itself possess an irreducible moral core?

This open question is one which will hopefully be addressed through the course of this work, but limitations of space prevent me from addressing it in more detail here. Instead, I will address yet another blurring between positive law and positive morality which Austin introduces in his work. It can be found in a margin note, and concerns the nature of what most legal scholars would initially identify as laws but whose status he disputes due to the definition he has adopted:

In strictness, declaratory laws, laws repealing laws, and laws of imperfect obligation (in the sense of the Roman jurists), ought to be classed respectively with laws metaphorical or figurative, and laws of positive morality.<sup>27</sup>

He concedes however that, as these concepts are closely connected to positive law:

[They] are an appropriate subject of jurisprudence. Consequently, I treat these as improper laws of anomalous or eccentric sorts, and exclude them from the classes of laws to which they in strictness belong.<sup>28</sup>

It is not initially obvious why Austin is prepared to discard his definitions in order to make allowances for these ‘anomalous or eccentric’ laws by excluding them from the classes where they ought to reside; by doing so, it could be argued that he partially delegitimises his attempt to create a watertight definition in declaring the subject of jurisprudence to be limited to positive law. Why is it that these should be appropriate subjects of jurisprudence, but questions aimed at

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<sup>27</sup> *ibid* 156

<sup>28</sup> *ibid* 157

exploring the overlap between positive law and positive morality should be excluded?

Austin gives no answer to this question beyond his earlier insistence on the impossibility of locating a universal and objective morality against which legal validity might be judged – and, as has been highlighted above, this denial is itself questionable given Austin’s identification of murder as a wrong universally prohibited by law. To not ask why this might be the case would be to limit our discussion arbitrarily. Indeed, it is suggested that Austin’s arbitrary exclusion of moral discourse within his concept of legality is founded on a frequent yet unacknowledged conflation of the concepts of collective and critical morality.<sup>29</sup> For if Austin holds the impossibility of locating a test for a universal principle of ethics as the prime reason for the failure of any theory of Natural Law,<sup>30</sup> he appears to be defining morality as being dependent on the practice of its principles – thus endorsing a collective standard. Yet in recognising that the existence of God given standards which can be codified to become positive law once ‘clothed with human sanctions’<sup>31</sup> necessitates the recognition of an order of *jus gentium*, he acknowledges an objective and universal standard of critical morality which is capable of generating higher order norms ‘obtaining at all times and obtaining at all places’.<sup>32</sup> In thus acknowledging that such higher order norms are applicable universally, Austin recognises that critical moral standards operate at the level of practical reason and could override positive law should they provide a superior reason for compliance. They therefore operate as reasons for action despite the fact that they are not issued by men to men as political superiors,<sup>33</sup> thus demonstrating that Austin’s claim that an order from a political superior is necessary for a rule to possess exclusionary force is false. By extension, such a claim can no longer stand as a definitional feature of law.

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<sup>29</sup> Collective Morality would be the empirically observable moral standards of a political community, whereas critical morality refers to a philosophically verifiable standard of moral truth independent of whether or not it is observed.

<sup>30</sup> Austin refers to the incommensurability of standards of Theistic morality, of utilitarian morality and of subjective preference as leading to difficulties in assessing the moral validity of a positive law. Austin (n 5) 112-113

<sup>31</sup> *ibid* 115

<sup>32</sup> *ibid*

<sup>33</sup> *ibid* 119

Should this be the case, then a necessary link between law and morality has been inadvertently acknowledged; that positive law which conflicts with standards required by *jus gentium* is incapable of guiding human action. Austin may here counter that religious pluralism serves as evidence that such a standard is incapable of being demonstrably proven as necessary, and thus such a necessary connection is conceptually impossible to demonstrate. This thesis will go on to argue that the writings of Alan Gewirth, to be introduced in Chapter Three, are capable of generating such an objective standard. For the time being however, having established that Austinian Positivism actively acknowledges the existence of an overriding moral reason against compliance with the positive law in standards of *jus gentium*, this thesis moves on to an exploration of the evolution of Natural Law thought with the hope of highlighting deficiencies in this school of thought which may also be addressed through Gewirth's writing.

### 3 Classical Natural Law

As was addressed in the introduction to this chapter, the term 'Natural Law' is often used to describe two distinct phenomena; it may be held to refer equally to a historical product of Western Civilisation from which it both originates and traces its development, or as a distinct philosophical doctrine which is both central to human knowledge and universal in its application.<sup>34</sup> For the purposes of this piece, I will adopt the definition of Natural Law proposed by d'Entrèves:

Perhaps the best description of natural law is that it provides a name for the point of intersection between law and morals. Whether such a point of intersection exists is therefore the ultimate test of the validity of all natural law thinking.<sup>35</sup>

The primary purpose of the following section will therefore be to trace the evolution of such thinking throughout history. I will begin by briefly expounding classical positions before moving into the work of St. Thomas Aquinas, arguably one of the most prominent proponents of Natural Law thinking. I will end by

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<sup>34</sup> d'Entrèves (n 3) 14

<sup>35</sup>ibid 111

discussing early modern Natural Law, and the move away from God in theories of Natural Law.

### 3.1 Classical Origins of Natural Law Theory.

D'Entrèves invites us to believe that 'It is best to begin by reducing [Natural Law] to its simplest expression. Natural Law goes back to God.'<sup>36</sup> Indeed, in including an extensive quote from Cicero in his work, he makes an extensive nod to this origin:

True Law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands and averts from wrongdoing by its prohibitions... We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and interchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is author of this law, its promulgator, and its enforcing judge.<sup>37</sup>

According to this definition, True Law should align with divine will for action. It is universal and unchangeable through time, in accordance with the law of God and His plans for our existence. Neither should it be viewed as exclusive to humanity; Ulpian argued that law should be viewed as that:

[W]hich nature has taught all animals... But we shall disregard so general an acceptation and consider the meaning of it essentially in relation to matters which are proper to the human race alone.<sup>38</sup>

What both of these definitions hold centrally is that the content of Natural Law has been handed down in order to shape humanity for the better. It is this aspirational morality that lent itself to the morality of scholars writing in the

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<sup>36</sup> *ibid* 38

<sup>37</sup> *ibid* 25

<sup>38</sup> *ibid* 38



Judaeo-Christian tradition, most notably St. Thomas Aquinas, whose contributions to the field of Natural Law deserve extensive comment in any introductory piece to the field.

### 3.2 St. Thomas Aquinas

Any exploration of Thomist Natural Law Theory should begin with three clarifying notes essential to a full comprehension of both the breadth and ultimate limitations of Aquinas' thought:

- i) Drawing on Aristotle, Aquinas argues that politics and political life more broadly are morally positive attributes in and of themselves, in accordance with God's intentions for man.
- ii) He is necessarily a product of his time, and combines the feudal hierarchical views (for example, at no point does he argue that popular consent is required for legitimate governance<sup>39</sup>) of his contemporary society with more community oriented and egalitarian views which we may recognise as being vital to a morally compliant Natural Law today.
- iii) From these starting points, he develops a logically coherent theory of Natural Law.<sup>40</sup>

It is the latter of these aspects of his writing that I will concern myself in this piece.

Sigmund has concisely summarised Aquinas' view of law as 'an ordination of reason for the common good promulgated by one who is in charge of the community.' – although it is worth noting here that 'reason' here means more than 'rationality'; it should be seen as a teleological and goal-oriented standard.<sup>41</sup> To a certain extent then, Austin and Aquinas agree in their assertion that law is necessarily promulgated by a political superior. They would also agree that law

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<sup>39</sup> Paul E. Sigmund, 'Chapter 8: Law and Politics' in Norman Kretzmann and Elonore Stump (eds.), *The Cambridge Companion to Aquinas* (Cambridge University Press 1993) 221

<sup>40</sup> *ibid* 217

<sup>41</sup> *ibid* 222

is designed to encourage or discourage certain behaviour; Aquinas thus characterises law:

Law is a kind of direction or measure for human activity through which a person is led to do something or held back. The word comes from ‘ligando’, because it is binding on how we should act.<sup>42</sup>

The two also share the belief in several species of law. Where they diverge is that Aquinas holds them to be hierarchical in nature. Foremost lies Eternal Law, ‘the rational governance of everything on the part of God as ruler of the universe’; next lies Natural Law, ‘the participation in the Eternal Law by rational creatures’; and lastly comes Human Law.<sup>43</sup> It is worth here remarking that, for Aquinas, Human Law necessarily requires some flexibility in its adherence to Natural Law; evils can and ought to be tolerated to a certain extent ‘so as not to prevent other goods from occurring or to avoid some worse evil.’<sup>44</sup>

From here on, the two diverge. Firstly, Aquinas is careful to limit the extent to which a political sovereign is able to exercise his legislative power:

... [L]aw is nothing but a dictate of practical reason issued by a sovereign who governs a complete community.<sup>45</sup>

Placing practical reason (in the teleological, aspirational sense outlined above) as a limitation on legislative sovereignty therefore presupposes that legislation which does not meet this standard is somehow deficient, and would fail to meet the definition of law:

A tyrannical law is not according to reason, and therefore is not straightforwardly a law, but rather a sort of crooked law.<sup>46</sup>

Aquinas holds this is because:

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<sup>42</sup> Thomas Aquinas, *Summa Theologiae Vol.28, IaeIIae 90-97*, (Thomas Gilby OP tr, Cambridge University Press 2006) Q.90 Art.1, 5

<sup>43</sup> Sigmund (n 34) 223

<sup>44</sup> *ibid* 225

<sup>45</sup> Aquinas (n 42)

<sup>46</sup> *ibid* Q92 Art 1, 45

Every law aims at this, to be obeyed by its subjects. It is plain, therefore, that leading its subjects into the virtue appropriate to their condition is a proper function of law.<sup>47</sup>

He then draws on St. Augustine to conclude that:

Augustine observes that *there never seems to have been a law that was not just*. Hence a command has the force of law to the extent that it is just. In human matters we call something ‘just’ from its being right according to the rule of reason. The first rule of reason is natural law, as appears from what is stated. Hence in so far as it derives from this, every law laid down by men has the force of law in that it flows from natural law. If on any head it is at variance with natural law, it will not be law, but spoilt law.<sup>48</sup>

Tyrannical law would necessarily fail to meet this standard, and should not be viewed as law because of this failure to gain popular obedience without coercion. In making this claim, Aquinas clearly locates the source of legal normativity within practical reason; rules which are incapable of providing absolute and exclusionary for compliance are incapable of guiding our actions, and therefore lack the necessary ability of law to do just this. This is clearly a conclusion which Austin would reject, and demonstrates a significant divergence in thought despite their similar starting points. Yet as was demonstrated at the end of s.2 of this chapter, Austin inadvertently makes a similar claim through his recognition of *jus gentium* – thus casting his presumed hostility into doubt.

Secondly comes Aquinas’ more community oriented approach to legislation<sup>49</sup>; he holds that law is fundamentally a community project, and that ‘making law belongs either to the whole people or to the public personage who has the responsibility for the whole people.’<sup>50</sup> To this extent, should it be possible for Human Law to coincide with the moral requirements of Natural Law, the two should coincide. For this to be possible, we should enquire as to the moral

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<sup>47</sup> *ibid* Q92 Art 1, 43

<sup>48</sup> *ibid* Q95 Art 2, 105

<sup>49</sup> *ibid* Q91 Art 1, 9

<sup>50</sup> Sigmund (n 39) 223

content behind Natural Law. For Aquinas, this content ultimately ‘derives from reflection on actions performed by human agents.’<sup>51</sup>

Human beings differ from irrational creatures in this, that they have dominion over their actions. That is why only those actions over which a human being has dominion are called human. But it is thanks to reason and will that Human Beings have dominion over their acts: free will is said to be the faculty of reason and will.<sup>52</sup>

This emphasis on the action-based nature for morality is important, and will form a central part of the main body of this thesis as the work progresses. It follows from this observation that, regardless of subjective concerns, all human beings are in theory equally rational, it may be possible to identify a ‘true’ version of Natural Law compliant with an objective and universal morality even if it is not automatically accepted by all who would be exposed to it:

So then in questions of theory, truth is the same for everybody, both as to principles and to conclusions, though admittedly all do not recognise truth in the conclusions, but only in those principles which are called ‘common conceptions.’<sup>53</sup>

In response to the question on how Natural Law can be the same for all even if all do not recognise it as such, Aquinas adds:

So then it is evident that with respect to general principles of theory and practice what is right is the same for all and is equally recognised. With respect to specific conclusions of theory the truth is the same for all, though all do not equally recognise it: for instance some are not aware that the angles of a triangle together equal two right angles.<sup>54</sup>

It is with this principle of universal truth in mind that he progresses to refer back to our ability as agents to judge whether or not our own positive laws are just or unjust; ‘If they are just, they have binding force in the court of conscience from

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<sup>51</sup> Ralph McInerny, ‘Chapter 7: Ethics’ in Norman Kretzmann and Elonore Stump (eds.), *The Cambridge Companion to Aquinas* (Cambridge University Press 1993) 196

<sup>52</sup> Thomas Aquinas, *Summa Theologiae Vol.16, IaIIae 1-5* (Thomas Gilby OP tr, Blackfriars 1969) 5

<sup>53</sup> Aquinas (n 42) Q94 Art 4, 89

<sup>54</sup> *ibid*

the Eternal Law from which they derive.<sup>55</sup> Aquinas is here referring to the Eternal Law of God, and rational creatures' participation within it. Yet here, a criticism familiar from Austin should be addressed – namely that the fact of religious pluralism casts into doubt the validity of the Eternal Law to which Aquinas refers. To address this concern, a clarification is necessary; the Eternal Law to which Aquinas refers here is one of practical rationality. Something can be said to belong to the natural and eternal law if man is inclined to it according to his nature.<sup>56</sup> Moral principles therefore exist in practical reason as 'intellect by its nature bids us to act according to reason.'<sup>57</sup> Aquinas therefore holds that the definition of legality must be located not in an abstract conception of theistic morality, but at the realm of practical reason and the moral principles which are of necessity also located there. This thesis then, to some extent, aims to develop this concept with reference to Gewirthian theory; Chapter three will explore the extent to which his writings refer to necessary constraints which are rationally identifiable from our noumenal agency, and which must therefore necessarily feature in any conception of practical reason. With the unavoidable fact of human agency at its core, Natural Law Theory is able to move on from its theist origins into a universal philosophical doctrine independent of the divine.

### 3.3 Early-Modern Natural Law Theory

Should a theory of Natural Law aim to prove the moral validity of a human positive law with reference to a universal standard, the task is rendered difficult by the reliance on a theological origin of that standard. Such a point was recognised by theorists who wrote in a post Thomist world, particularly during the upheavals occurring within Europe during the course of the reformation during which the hegemony of Catholic thought was brought into question. It is into this climate that a movement towards a more philosophically rigorous form

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<sup>55</sup> *ibid* Q96 Art 4, 131

<sup>56</sup> Dominic Farrell, *The Ends of the Moral Virtues and the First Principles of Practical Reason in Thomas Aquinas* (Gregorian and Biblical Press 2012) 128

<sup>57</sup> *ibid* 11

of Natural Law emerged, albeit one which builds on Aquinas' indisputable observation that:

Reason gets its motive force from the will, as we have shown. For it is because a person wills an end that his reason effectively governs arrangements to bring it about.<sup>58</sup>

A more subtle shift emerged around this period; a move away from the content of Natural Law being one concerned with Law and towards one which held all individuals as possessing inalienable rights.<sup>59</sup> The logic internal within such a shift holds that the recognition of universal and inalienable rights will lead automatically to the universal adoption of morally good law.<sup>60</sup>

This is the logic upon which Grotius based his writings; 'If natural law consists in a set of rules which are absolutely valid, its treatment must be based upon an internal coherence and necessity.'<sup>61</sup> Should a system of rules be recognised as internally coherent and necessary, they would remain absolutely valid even should God not exist.<sup>62</sup> Natural Law theory emerging post Aquinas can therefore be characterised thusly:

If law is not merely a command, if it does not proceed only from the will, law is the outcome of reason. Natural law is a plea for reasonableness in action. But it is also an assertion that only inasmuch as action can be measured in terms of reason does it properly come under the heading of law.<sup>63</sup>

It is upon this foundation of ethical rationalism that the acceptable theories of Natural Law progressed throughout the Enlightenment and to the present day. Space precludes me from spending more time discussing such key theories here, but more attention will be paid Kantian thought in particular as this thesis progresses.

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<sup>58</sup> Aquinas (n 42) Q90 Art 2, 9

<sup>59</sup> d'Entrèves (n 3) 61

<sup>60</sup> *ibid* 51

<sup>61</sup> *ibid* 55

<sup>62</sup> *ibid* 71

<sup>63</sup> *ibid* 77-78

## 4 The Contemporary Debate

It is upon the foundations laid by the Orthodox Positivism and Non-Positivism of Austin and Aquinas respectively that contemporary thinkers still establish their battle-lines. It will not come as a surprise however to learn that the nuances contained within the arguments laid down by both sides of the debate have become more sophisticated. Yet despite this, it is still possible to summarise both positions clearly and succinctly. For example, the positivist idea that Law and Morality, despite sharing common features, should be clearly demarcated because they are aimed at different recipients:

Ubi societas ibi ius.<sup>64</sup> Law presupposes society. Morals do not. Moral experience is essentially a matter for the individual. Legal experience is tied to the notion of a community.<sup>65</sup>

Natural Law can be equally summarised:

The theory of natural law is the outcome of a very old conviction, which goes back to the sources of our civilisation: the conviction that the purpose of law is not only to make men obedient, but to help them to be virtuous.<sup>66</sup>

It is upon these foundations that the continued search for an acceptable explanation of the normative force which law exerts upon as individuals is pursued.

### 4.1 The Normativity of Law

It may be asked why thinkers have devoted so much time and energy into their search for this elusive normative foundation, given that many have tried and seemingly as many have failed. The answer lies within law itself as a social phenomenon – many would argue that law is clearly more than merely an

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<sup>64</sup> *Where there is society, there is law.*

<sup>65</sup> d'Entrèves (n 3) 84

<sup>66</sup> *ibid* 82

expression of sovereign authority backed by threat, whereas as many would hold equally strongly that to claim that a necessary connection between law and morality exists is to equally misunderstand both concepts. Yet it is indisputable that, within the law, a specific logical exercise is taking place:

Given the nature of a legal system, the officials in that system are subject to distinctive constraints of rationality. There is, in this sense, an *inner rationality of law*.<sup>67</sup>

It therefore seems that the quest for the normative foundation of law is central to any theory which seeks to explain it as a distinct social mechanism. Such an observation led Hart to claim that any theory which suppresses law's normative claims 'fails to mark and explain the crucial distinction between mere regularities of human behaviour and rule-governed behaviour.'<sup>68</sup> This claim was named 'The Normativity Thesis' by Postema:

We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting. Thus an adequate general theory of law must give a satisfactory account of the normative (reason-giving) character of law.<sup>69</sup>

This characterisation of law as inherently concerned with providing a valid reason for choosing to act in a certain way returns us to examine the notion of agency as a potential source of the normative basis of law. This is a starting point which is acceptable to both positivists and non-positivists alike, as agency is an unavoidable fact. We, as participants in a society, make choices in order to pursue our ends, and it is these choices which the Law seeks to constrain. Our capacity to make choices is an unavoidable choice of our condition; as Korsgaard rightly identifies, 'Human beings are *condemned* to choice and action.'<sup>70</sup> – meaning we cannot escape our capacities as rationally autonomous agents. Put more

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<sup>67</sup> Michael E. Bratman, 'Reflections on Law, Normativity and Plans' in Stefano Bertea and George Pavlakos (eds) *New Essays on the Normativity of Law* (Hart Publishing 2011) 73

<sup>68</sup> H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 13

<sup>69</sup> Gerald J. Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 *Journal of Legal Studies* 165

<sup>70</sup> Christine Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford University Press 2009) 1



succinctly, ‘...[S]elf Constitution through action is our essential function as rational agents.’<sup>71</sup>

Central to our conception of ourselves as rational unified agents, for Korsgaard, is a requirement that we universalise our reasons for action with a Categorical Imperative;<sup>72</sup> a Categorical Imperative, should it be identifiable, is therefore the constitutive standard of rational unified agents.<sup>73</sup> This leads us to the realisation that, if our agency is inescapable and moral normativity is indeed constitutively linked to our agency, our ‘moral identity is therefore inescapable.’<sup>74</sup> By extension, if our conduct is morally constrained with reference to a Categorical Imperative, it would be contradictory to the very nature of a rule constraining action should a legal rule diverge from the moral requirements thus established. This strand of argument is typical of current Natural Law arguments which attempt to ground the normative force of law in a moral code derivable from agency, and is one which I will adopt in the main body of this thesis with my defence of Alan Gewirth’s *Principle of Generic Consistency*<sup>75</sup> as a supreme constitutional principle as a normative standard against which the validity of law can be judged. Yet positivism has not disappeared from contemporary debate. I will highlight one recent theory in the next section of this chapter in order to demonstrate the direction of contemporary positivism. Once this foundation has been laid, I will then spend much more time in later chapters discussing why I believe recent developments in positivism fail to dismiss the fundamental link between law and Gewirthian morality which emerged in *Law as a Moral Judgment*.<sup>76</sup>

## 4.2 Shapiro’s *Planning Thesis*: An Example of Contemporary Positivism.

In the middle of the Twentieth Century, some scholars began to dismiss positivism on its own terms. Rather than achieving its separation of law and

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<sup>71</sup> *ibid* 42

<sup>72</sup> *ibid* 32-33, 72-76, 81

<sup>73</sup> *ibid* 42

<sup>74</sup> *ibid* 129-130

<sup>75</sup> Gewirth (n 2)

<sup>76</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sheffield Academic Press 1994)

morality in an effective way, it was a victim of its own logic and a product of the social system from which it emerged:

As a reflection of a particular historical situation, the success of legal positivism is bound up with a contingent fact, the fact that the modern state has assumed a monopoly of law and the making of law.<sup>77</sup>

This has led much contemporary positivism down a very similar route to where Natural Law theory finds itself, in theories grounded in the unavoidable agency of those participants within a political society – one such theory can be found in Shapiro's *Planning Thesis*. This is grounded in what Shapiro holds to be the unavoidable fact of plan positivism, a concept he explains early in his thesis by paraphrasing John Austin in order to make his Positivism as apparent as possible:

[P]ositivism is trivially and uncontroversially true in the case of plans: the existence of a plan is one thing, its merits or demerits quite another.<sup>78</sup>

He adds that:

... [T]he existence of legal authority can only be determined sociologically: the question of whether a body has legal power is never one of moral legitimacy; it is a question of whether the relevant officials of that system accept a plan that authorises and requires deference to that body... [T]he creation and the persistence of the fundamental rules of law is grounded in the authority that all individuals possess to adopt plans.<sup>79</sup>

Shapiro thereby adopts a contractarian foundation to his positivism; individuals who are members of a society are bound by the laws which its officials produce through their ability to endorse and live by the plans established by those officials in their capacity as legal superiors. With regards to the ability of an individual to be a participant in this society, Shapiro limits his scope to those agents who are able to formulate the concept of a plan and then act upon it:

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<sup>77</sup> d'Entrèves (n 3) 187

<sup>78</sup> Scott Shapiro, 'Planning Agency and the Law' in Stefano Bertea and George Pavlakos (eds) *New Essays on the Normativity of Law* (Hart Publishing 2011) 18

<sup>79</sup> *ibid* 18

It is plausible to suppose that dogs, cats and mice act purposively insofar as they have desires and that they act on those desires in light of their beliefs. But they probably do not *plan* since they lack both the need and capacity to do so.<sup>80</sup>

So how can the normative force of law be derived from the existence of a plan in this way? Shapiro spends time defining the terminology which he uses throughout his paper in order to demonstrate how he crosses this normative bridge. Firstly, he defines plans as ‘... [A]bstract propositional entities that require, permit or authorise agents to act, or not to act, in certain ways under certain conditions.’<sup>81</sup> Norms, he defines as something which:

... [C]an be characterised as an abstract object that functions as a guide for conduct and a standard for evaluation. In keeping with this characterisation, plans too are norms. They are guides for conduct, insofar as their function is to pick out courses of action that are required, permitted or authorised under certain circumstances.<sup>82</sup>

He then explains where he believes the two concepts converge:

... [A] plan is a special kind of norm: first, it has a typical structure; namely, it is partial, composite and nested; secondly, it is created by a certain kind of process, namely, one that is incremental, purposive and disposes subjects to comply with the norms created.<sup>83</sup>

For Shapiro, the adoption of a shared planning mechanism is essential for any conception of the shared agency which is unavoidable in a social setting. Following Korsgaard, if individuals are condemned to choice and action, society is equally condemned to shared choices to pursue shared action. Planning is therefore essential, as are hierarchical structures which create institutional plans and enforces so as to ensure ‘that alienated [members of a society] end up acting in the same way as non-alienated ones.’<sup>84</sup> The fact that a plan has been adopted on their behalf is not of itself, however, the source of the obligation of the alienated to comply. From a moral point of view, it is not inconceivable that they

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<sup>80</sup> *ibid* 20

<sup>81</sup> *ibid* 25

<sup>82</sup> *ibid* 25

<sup>83</sup> *ibid* 26

<sup>84</sup> *ibid* 43

*ought not* to comply with a given course of action. Yet, for Shapiro, the fact that an individual accepts a shared plan which establishes a hierarchy binds them, from the point of view of instrumental rationality, to follow the plans which emerge from that hierarchy.<sup>85</sup> The consensual nature of the emergence of the hierarchy permits it to impose sanctions on those who do not comply with the aims of the shared plan:

If members of the community are less ‘cooperative’, legal authorities can dispose them to comply through various forms of intimidation. When these threats are strong and credible enough, even those who do not accept the law’s moral authority will nevertheless be motivated to follow the adopted plans.<sup>86</sup>

The plan to which coercion is being applied however does still not need to be in compliance with any identifiable moral code:

... [T]he existence of the shared plan does not depend on any moral facts obtaining. The shared plan can be morally obnoxious... Nevertheless, if the social facts obtain for plan sharing, then the shared plan will exist.<sup>87</sup>

Shapiro then brings his argument full circle, resting the separation of plans, and by extension law, and morality with reference to what he believes is the undeniable truth of ‘plan-positivism’:

Plan positivists believe that the existence and context of plans never depends on moral facts. Plan positivism is uncontroversially true... Terrorist plots, for example, exist even though they shall not be carried out from the moral point of view.<sup>88</sup>

This insistence on the consensual emergence of law through a series of planning decisions designed at streamlining a society and making it more efficient, for Shapiro, explains the normative force of law – agreement of those who submit to its authority. Yet this argument does have its flaws, which I will briefly address here in order to demonstrate why the continued case for a Natural Law based

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<sup>85</sup> *ibid* 37-38

<sup>86</sup> *ibid* 66

<sup>87</sup> *ibid* 65

<sup>88</sup> *ibid* 66

theory of law's normative force survives such contractarian positivism, and can indeed be seen to be superior in its exploration of the issues concerned.

Firstly, on the issue of those who are able to formulate plans or possess the ability to follow them; Shapiro that this category would be limited who possess the need and capacity to do so. By this definition, Shapiro excludes many from his theory who we would not necessarily wish to do so – children, the mentally ill or dementia sufferers, for example, arguably do not possess the capacity to formulate an effective plan. They would therefore be excluded from the legal altogether, yet this does not seem like an appropriate state of affairs. Similarly, it might be argued that crows or other intelligent animals who possess the capacity to create tools in order to pursue legitimate ends are indeed using their foresight to plan a course of action through which to better attain their end. They may then be included within this definition of a planner by Shapiro, and therefore be subject to law. The fact that they would be covered by this definition but a small child would not, in the absence of further justification, borders on the absurd. The summary of his position, that '[L]egal authority is a good because we are planning agents'<sup>89</sup>, is therefore shown to be deficient.

Secondly, Shapiro fails to address how a morally obnoxious plan could be adopted and maintained through the exercise of group agency should threats under the guise of legitimate sanctions be the only mechanism by which the plans are enforced. If a man in Shapiro's thought-experiment of the Cooks' Islands is instructed to buy butter but would prefer margarine, but buys butter anyway, his reason for action must be reliant on the special status of authority:

Legitimate authority is a good thing.

I ought to obey the authority's commands.

The planners have asked me to buy butter.

The planners are the authority.

I ought to obey the planners' commands.

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<sup>89</sup> Veronica Rodriguez-Blanco, 'The Moral Puzzle of Legal Authority; A Commentary on Shapiro's Planning Theory of Law' in Stefano Bertea and George Pavlakos (eds) *New Essays on the Normativity of Law* (Hart Publishing 2011) 88

Conclusion: I ought to buy butter.<sup>90</sup>

Yet agents rarely agree to be bound to follow principles which they themselves do not see a good reason for following; why should an individual submit themselves to such a demand? Shapiro's assertion that we should do so because it increases the ability of ourselves as individuals to survive<sup>91</sup> does not seem to grasp the normative argument at stake. To have practical force on the actions of individual agents, reasons emerging from a legal point of view necessarily should be more than theoretical; practical reasons are required.<sup>92</sup> Our own survival, for Shapiro, is a good in itself; yet if this is accepted we are faced with a paradox: 'How can [authority] coordinate the different goals and ends of the community in a good way without purporting to do good?'<sup>93</sup> And, since agents would not rationally consent to behaving according to a norm or rule which is external to them,<sup>94</sup> the motivation for following the legal norms presented must necessarily be grounded in an internalisation and acceptance of the plan to be pursued as a good in itself.

Thirdly, he gives us no convincing reason as to why individuals should feel normatively bound to follow plans which individual agents perceive to be immoral. He claims that an effective system of sanctions should exist to coerce individuals into compliance, but if we accept this then it is difficult to see how the legal system which emerges could in anyway be distinguished from a mere threat issued from a position of power. His system would be the proverbial gunman writ large. He also makes no real attempt to relate his grounding of normativity to this reason of avoiding punishment, instead locating in an assumed agreement. This observation exposes another problem with his theory, that he:

... [D]enies that the principle aim of law is to solve the problem of bad character. In his theory, law is basically a social planning mechanism.<sup>95</sup>

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<sup>90</sup> *ibid* 94

<sup>91</sup> *ibid* 97

<sup>92</sup> *ibid* 98

<sup>93</sup> *ibid*99

<sup>94</sup> *ibid* 105-106

<sup>95</sup> Katrine Schaubroeck, 'Legal Normativity and the Instrumental Principle' in Stefano Bertea and George Pavlakos (eds) *New Essays on the Normativity of Law* (Hart Publishing 2011) 109

By placing the normative basis of law on such an agreement towards social planning, Shapiro maintains a definition of law aimed at guiding conduct without making reference to moral concepts of the good. Yet, as has been shown, such an abstraction would be difficult to enforce against agents if they did not themselves internalise the end pursued as complying with a conception of the good which would be acceptable to themselves. A moral aspect is therefore unintentionally introduced here, which means that Shapiro's conclusion rests on whether or not the plans pursued are themselves moral.

### 4.3 A Natural Law Response to Shapiro

This observation raises issues which will be dealt with in much greater detail in the main body of this thesis, but which I will again touch upon here with regards to thinkers other than Gewirth. Foremost upon these is the observation that a moral standard can only pass normative authority to law if it itself already possesses a form of normative authority.<sup>96</sup> We are therefore tasked to identify a universal and objective moral principle against which the normative validity of law can be judged.

This thesis will progress in thought which may be broadly described as Kantian in origin. Central to the argument based around agency will be the idea of a Categorical Imperative, which provides in us reasons for valuing other beings which are analogous to the reasons for which we value ourselves. As expressed by Roversi, 'I value X *insofar* as I value myself and X is like me.'<sup>97</sup> - although this is a line of argument he himself believes can never provide a sound normative reason for action. I will spend this section of this chapter demonstrating why I believe this argument to be false.

Central to this argument of universalising values we see in ourselves is our own status as agents. Let us assume that there are certain conditions which are essential for us to properly undertake our agency.<sup>98</sup> These conditions can be held

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<sup>96</sup> *ibid* 111

<sup>97</sup> Corrado Roversi, 'On Constitutive Normativity' in Stefano Bertea and George Pavlakos (eds) *New Essays on the Normativity of Law* (Hart Publishing 2011) 297

<sup>98</sup> Gewirth would refer to these as 'Generic Conditions of Agency' - I will demonstrate how I believe he has identified these conditions in Chapter 3 of this thesis.

as essential with reference to what, in Kantian Terminology, is often referred to as the *Instrumental Principle*; ‘Whoever wills the ends also wills (insofar as reason has decisive influence on his actions) the indispensably necessary means to it that are within his power.’<sup>99</sup> Put more succinctly, ‘If you intend to E and judge that M-ing is a necessary means to E, you should intend to M.’<sup>100</sup>

This in itself does not create a normative obligation to follow whatever means may get us to the end we desire; for example, if a baby is crying and we desire that the crying should cease, we would not be normatively justified in sharpening a knife to more easily stab the baby to death.<sup>101</sup> Such a principle should therefore be modified in order to avoid the confusion of *is* and *ought* made apparent by this extreme example. For Korsgaard, this may take the lines of something like this:

If we allow reason a role in determining ends, then the instrumental principle will be formulated in this way: ‘if you have a *reason* to pursue an end then you have a reason to take the means to the end’. But if we do not allow reason a role in determining ends, then the instrumental principle has to go something like this: ‘if you are *going* to pursue an end, then you have a reason to take the means to that end.’<sup>102</sup>

Such a modified Instrumental Principle therefore lays the ground work for the reciprocity which is essential for the operation of Gewirth’s work.<sup>103</sup> Yet many readers may ask what difference these semantic shifts make to a successful attempt to locate a normative foundation of law. The Positivist theory of Shapiro and the Natural Law response highlighted above both take their starting point as the unescapable nature of human agency. To what extent then can the disagreement between Positivist and Non-Positivist theories be merely characterised as one revolving around terminology rather than being a genuine disagreement as to the fundamental nature of law?

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<sup>99</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, Mary Gregor tr, Cambridge University Press 1998) §417

<sup>100</sup> Schaubroeck (n 88) 117

<sup>101</sup> *ibid* 118

<sup>102</sup> Christine Korsgaard, ‘The Normativity of Instrumental Reason.’ In Garrett Cullity and Berys Gaut (eds) *Ethics and Practical Reason* (Oxford University Press 1997) 223

<sup>103</sup> This issue will be discussed in Chapter 3 of this thesis.



#### 4.4 More than a Word Game?

That the disagreement outlined above is merely a linguistic disagreement is the viewpoint of many in the legal world. Respected scholar Glanville Williams holds that the disagreement as to ‘what is law?’ is indeed purely semantic; and because it is not a real problem, we are faced with the reality that the problem will never be satisfactorily solved.<sup>104</sup>

This could be said to be because, in everyday parlance, the word law can mean several different things; so much is covered within the word – both thought and action – we cannot presume that a definition is easily discoverable:

Any attempt to define the word leads us into a maze of metaphysical literature, perhaps larger than has ever surrounded any other symbol in the history of the world.<sup>105</sup>

Such linguistic confusion can be said to arise from our tendency as human beings to attempt to objectify what are, in effect, mere abstractions:

As soon as we realise that *bird* or *law* are simply mental abstractions from the raw material of the universe, and that they do not exist by themselves separately anywhere, we realize that the idea of a true definition is a superstition.<sup>106</sup>

From this observation, it holds that no definition can ever be true or untrue, as there is no objective starting point from which the facts of the existence of a concept can be checked.<sup>107</sup> As such, for Williams, there is no such thing as ‘an intrinsically ‘proper’ or ‘improper’ meaning of a word’ as words are merely a ‘symbol for an idea [which] may vary with the person who uses the word.’<sup>108</sup> Therefore, the closest thing to a proper meaning for a word or concept which it is possible to identify is its usual meaning. By extension,

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<sup>104</sup> Glanville Williams, ‘Chapter IX; The Controversy Concerning the Word ‘Law.’’ in Pater Laslett (ed), *Philosophy, Politics and Society*, (Basil Blackwell 1970) 134

<sup>105</sup> Thurman Arnold, *The Symbols of Government*, (Yale University Press 1935) 216

<sup>106</sup> Williams (n 97) 151

<sup>107</sup> *ibid* 151

<sup>108</sup> *ibid* 136

...a person who uses a word in an unusual meaning must state clearly the meaning in which he is using it, on pain of being misunderstood if he does not.<sup>109</sup>

Yet it is clear from examining that the literature discussed to date, and will become clearer as more sources are discussed throughout the body of this thesis, that there is no such fundamental disagreement over what the subject of jurisprudence is. When theorists from both Natural Law and Positivist traditions use the word ‘law’, the same core concept is under scrutiny. What under debate is the normative content of the concept itself – does a necessary connection exist between law and morality, or is any connection merely contingent on the will of the sovereign? Austin’s following observation as to the misapplication of the word law therefore seems to be a deliberate attempt to obfuscate his terminology to further his own end:

We say that the movements of lifeless bodies are determined by certain laws: though, since the bodies are lifeless and have no desires or aversions, they cannot be touched by aught which in the least resembles a sanction, and cannot be subject to aught which in the least resembles an obligation.<sup>110</sup>

Similarly, Austin’s suggestion that International Law is not true law falls foul of this same observation. His thought did persevere well into the Twentieth Century before being further dismissed:

Le droit international est-il vraiment du droit? Cette question a préoccupé des juristes-philosophes et certains d’entre eux ont douté que le droit international fût du droit, puisqu’il ignore le législateur et le gendarme : les règles de droit n’y sont édictées par voie d’autorité (elles sont consenties, non imposées) et les sanctions n’y existent encore que d’une manière inorganique et rudimentaire.<sup>111</sup>

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<sup>109</sup> *ibid* 136

<sup>110</sup> Austin (n 5) 149

<sup>111</sup> Charles Rousseau, *Principles Généraux du Droit International Public* (Éditions A. Pedone 1944) 6  
My Translation: ‘Is International Law truly Law? This question has long preoccupied legal philosophers, and some amongst them have doubted that International Law is law as it lacks both legislator and policeman: International Legal Rules are neither declared from a position of authority (they are consented to, not imposed) and their enforcement mechanisms only exist in an artificial and rudimentary form.’

...

On peut observer en effet :

1o *Que l'existence du droit est indépendante de celle du législateur, car c'est le droit coutumier qui apparaît ordinairement en premier lieu.*

2o *Que l'existence d'une sanction directe matérielle et organisée n'est pas une condition de l'existence d'une règle de droit.*<sup>112</sup>

Such semantic disagreements can therefore be seen to be ancillary to the true question as to what constitutes 'law'; namely whether or not a normative reason for obedience can be located:

...[I]nternational lawyers saw that the word 'law' is not only a symbol for a reference; it also evokes a powerful emotional response. The word 'law' stimulates in us the attitude of obedience to authoritative rules that we have come through our upbringing to associate with the idea of municipal law. Change the word for some other and the magic evaporated.<sup>113</sup>

In defending a theory of Natural Law, this thesis commits itself to the strong claim that law is backed by a decisive reason for compliance<sup>114</sup> – conformity with the moral imperative contained within the PGC<sup>115</sup> – and holds that any rule which does not possess this necessary characteristic cannot be called 'law'. It thus places itself in opposition to Positivist theories, which would not commit themselves to this claim. In doing so, it opens itself to the frequent positivist assertion that it is concerned with what law ought to be, rather than the real object of jurisprudence – namely, what law actually is. Yet this allegation is misguided; it is not, Murphy claims, inconsistent to argue that a fake diamond is not a diamond. By extension, in suggesting that the same cannot be true of a 'fake law' which lacks the necessary decisive reason for compliance:

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<sup>112</sup> Charles Rousseau, *Principles Généraux du Droit International Public* (Éditions A. Pedone 1944) 7  
My Translation: 'We may see then: 1) The existence of law is independent from the existence of a legislator, as customary law usually precedes a legal system. 2) The existence of an organised, direct and material sanction is not a precondition for the existence of a legal rule.'

<sup>113</sup> Williams (n 97) 143

<sup>114</sup> Mark Murphy, *Natural Law in Jurisprudence and Politics* (2006 CUP) 10

<sup>115</sup> The nature of this connection will be established in Chapter 3 of this thesis.

The objection assumes that the natural law theorist is interested in asserting a connection between the law's existence and the desirability of its existence. The connections between a would-be rule's prescriptive force and the desirability of its existence are contingent. There is no way to transform the objection so that it applies to a recognizable version of the natural law view.<sup>116</sup>

## 5 Conclusion.

The purpose of this chapter has been broad, and as a piece it has undoubtedly raised more questions than I am, at this point, able to answer. Yet one thing should be clear; the search for the normative foundation of legal obligation is both long in its history and far from over. It is not enough to merely dismiss the search as a linguistic tussle, but instead we must view that a central difference between Positivism and Non-Positivism is the way in which they present the origins of the claim to authority made by law.<sup>117</sup> The nexus of disagreement between the two schools has been located in Natural Law's claim that the provision of a decisive reason for action is a necessary feature of law. It is therefore this claim that the remainder of this thesis will aim to support, with reference to the moral writings of Alan Gewirth.

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<sup>116</sup> Murphy (n 107) 20

<sup>117</sup> d'Entrèves (n 3) 187

# Chapter Two

## The Centrality of Normativity to the Concept of Law

### 1 Introduction.

In his 1998 Clarendon Lecture, Jules Coleman asked the central question of exactly what the purpose of Jurisprudence is – what questions is it seeking to answer? He claimed that these could be summarised in three main enquiries. Firstly, how law can make claims on our conduct purely by its status as law – in other words, can legal authority ever be explained without circular reference to a higher legal authority? Secondly, in what way can law purport to govern our conduct in a distinct manner? And thirdly, in what way do legal reasons become moral or otherwise legitimate authorities?<sup>1</sup>

The second of these questions identified by Coleman, once adequately expanded, highlights the centrality of normativity to the concept of Law. It is axiomatic that the purpose of Law is to control our behaviour as individuals – put another way, to create reasons for action. Coleman suggests that this terminology is often confused – we should recognise that X being a reason for A to act and X being a reason on which A acts are different concepts. He gives the example of a promise to meet; if A promises to meet B, forgets that he had done so but then meets B for a different reason, then the initial promise to meet remains a reason for acting despite not being the reason why I did act. Reasons on which I ultimately act are therefore motivational or otherwise causal in a way in which a general reason to act need not be, and can therefore be seen to warrant or justify action by providing a normative reason for basis for my ultimate action. In purporting to create a ground for action, Law therefore aims to be the reason

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<sup>1</sup> Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford University Press 2001) 70-72

for which I ultimately act – and therefore makes a normative claim on my actions.<sup>2</sup>

It is for this reason that this thesis will ultimately focus on normative theories of Law, aiming to show that Natural Law arguments that provide a normative grounding for action in morality are superior to normative positivist accounts. The purpose of this chapter is to explain in more detail exactly why I choose to dismiss non-normative positivism. Firstly, I will aim to explore further the meaning and status of normativity more broadly within legal discourse, establishing why philosophy of language imposes a single normative meaning on the concept of ‘law’ itself that precludes linguistic differentiation within jurisprudential discussion. It will then consider how theories that originate within the school of External Positivism which preclude moral content within legal reasoning cannot adequately account for the genesis of such a normative obligation. Lastly, Internal Positivism will be introduced. Such theories allow for the contingent existence of morality within a theory of law, but hold it to be neither a necessary nor sufficient criterion of validity. Some preliminary critiques of such positions will be established, and it will be suggested that the necessary moral core provided by a theory of Natural Law can provide solutions to the gaps that are located.

## **2 Meaning and Status of Normativity**

If we were to accept the traditional positivist definition of law as a series of commands as outlined in the previous chapter, it is worth pointing out that this contains several background assumptions. Firstly, if the aim of law is accepted as being to guide conduct through the medium of command, this does not entail that laws as a concept necessarily have a single dominant function; this can fluctuate according to the purposes of the law in question. This leads us to the assumption that law and any normative force it possesses does not exhaust the field of enquiry with regards to the binding force which law attempts to exert upon us. This is because strong assumptions are made as to the subjects against

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<sup>2</sup> *ibid*

whom law is addressed in any command based model of operation, namely that they are both free and intelligent, and therefore are able to understand the behavioural limitations the law in question seeks to impose.<sup>3</sup> In order to discuss the centrality of normativity to law therefore, these assumptions need to be justified.

Such a traditional positivist account of legal authority also appears to rely heavily on two competing definitions of what law actually means as a historical normative concept - many, for example, would argue that Natural Law theories of normativity currently operating in the English language emerge from a problem with the translation and subsequent conflation of the Latin terms 'lex' and 'ius' into the single English word 'Law'.<sup>4</sup> It is from this unavoidable conflation of terminology that Natural Law theory mistakenly emerges.<sup>5</sup>

The first section of this chapter will argue that this analysis is mistaken. It will examine theories which concern the normativity of language itself, drawing heavily on Wittgenstein's writings on the very possibility of private interpretations of words and meaning. Of central importance will be his observation that it is '...[N]ot possible to obey a rule "privately": otherwise thinking one was obeying a rule would be the same thing as obeying it.'<sup>6</sup> It will be suggested that the problem posed by linguistic indeterminacy can be solved with the use of an effective agreed referent to which all parties to a conceptual dispute are able to agree. The remaining analysis within the chapter will seek to determine whether such a referent possesses a normative meaning and, if so, what this normative meaning is.

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<sup>3</sup> Gerald J Postema, 'Law as Command: The Model of Command in Modern Jurisprudence' in Ernest Sosa and Enrique Villanueva (eds), *Social, Political and Legal Philosophy* (Blackwell 2001) 475

<sup>4</sup> *ibid* 478 - 479

<sup>5</sup> Such critics would claim that 'lex' – law – is the subject of modern jurisprudential enquiry. 'Ius'(or 'Jus') as a term contains a conception of justice or fairness which is the subject of inquiry for Natural Law theories and Legal Idealists. For such critics, the two are entirely separate concepts which have been mistakenly conflated in one word in English by an unavoidable linguistic constraint.

<sup>6</sup> Ludwig Wittgenstein, *Philosophical Investigations* (G.E.M. Anscombe tr, 3rd edn, Blackwell 1953) 69, §202

## 2.1 An Agreed Referent

The central tenet of this thesis, as previously addressed, is to analyse recent Inclusive Positivism against a theory of Natural Law underpinned by the moral philosophy of Alan Gewirth and expanded upon by Beyleveld and Brownsword. In order to do so, an agreed starting point as to the meaning of the word ‘law’ must be agreed upon in order to ensure that the ethical claims being made are addressing character of the same social phenomenon as that being discussed by Positivist theorists. For Allan Gibbard, such a settled normative meaning of a given word is essential, it axiomatically concerns the objective meaning of ethical statements.<sup>7</sup> Should we accept this as axiomatic, then it follows that any theory of Law which is built from ethical statements will also necessarily require an exploration of the normativity of meaning in order to be accepted by those who would be disinclined to agree that law and morality are necessarily connected.

Firstly, the linguistic confusion around the word ‘normative’ should be addressed – as it is often held that ‘the term “normative” has no single meaning in the academic fields that employ it.’<sup>8</sup> Gibbard suggests that ‘Shallowly...we might try saying that normative judgements are “ought” judgements.’<sup>9</sup> He continues:

‘Ought’ judgements, or many of them, have seemed in some way special or problematic. Normative judgements are judgements that are special in this way, whatever this way turns out to be. This gives us a characterization of normativity that is fairly light in its commitments: the only presupposition it builds into that term is that there be something important and characteristic and puzzling about the bulk of ‘ought’ judgements. If there isn’t, after all, it’s not much use having a special term ‘normative’ – except, perhaps, to explain away the impression that

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<sup>7</sup> Allan Gibbard, *Meaning and Normativity* (Oxford University Press 2012) 7

<sup>8</sup> *ibid*

<sup>9</sup> *ibid*



there is. If there is, the term invites us to identify what this special characteristic is.<sup>10</sup>

The question this section will seek to address, then, is whether or not there is a normative 'ought' meaning behind the term 'law', whereby we ought to accept one subject of discussion at the expense of others available to us.

Saul Kripke argues that such meaning with regards to any intention or future action is definitionally normative rather than descriptive;<sup>11</sup> in arguing this, he discusses and ultimately seeks to dismiss the paradox of meaning identified by Wittgenstein in his *Philosophical Investigations*:

[N]o course of action could be determined by a rule, because any course of action can be made out to accord with the rule. The answer was: if any action can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here.<sup>12</sup>

Put more simply, Wittgenstein is here suggesting that we can never be truly certain what we mean by a word used to express a given concept unless, when we use the word in question, we actively consider every possible meaning of the word and settle on one objective meaning. Since it is arguably impossible to do this, it is impossible to ever truly state that we know the objective meaning of any word when we engage in any form of communication. Were this true, our investigation as to the nature would be impossible to complete.

Kripke argues that the falsity of this claim can be demonstrated clearly in conceptual disciplines such as mathematics. He gives the example of addition, asking whether there is a correct answer to the question 'What is 68 plus 57?' Whilst we expect the answer to this question to be 125, this is dependent on both the questioner and respondent having a shared understanding as to the meaning of the word 'plus' as referring to the process of addition. He asks us to

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<sup>10</sup> *ibid* 10 - 11

<sup>11</sup> Saul A Kripke, *Wittgenstein on Rules and Private Language* (Harvard University Press 1982) 37

<sup>12</sup> Wittgenstein (n 6) 69, §201

contemplate an individual who, instead of understanding ‘plus’ as meaning ‘addition’, instead understands it as referring to the process of ‘quaddition’ designated by the symbol  $\oplus$  and summarised in the following formula:

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$$x \oplus y = \begin{cases} x + y & \text{if } x, y < 57 \\ 5 & \text{otherwise} \end{cases}$$

As, in our initial question ‘What is 68 plus 57’ both x and y are above 57, quaddition would require its adherents to give the answer ‘5’. Would they be incorrect in answering thus upon hearing the word ‘plus’? If we were to answer yes to this question, then we ought next to ask ourselves how we can conclude that such an answer is indeed incorrect. Again, we must look to the shared understanding – or in this case, the lack of shared understanding – as to the meaning of the word ‘plus’. The dispute Kripke identifies here is analogous to that between Natural Lawyers and Legal Positivists; does the word ‘law’ require one to account for a necessary connection with moral norms, or one that is at most contingent on sovereign will?

Two different origins of any such shared understanding are proposed; those resting on Brain Function ( $F_b$ ) and those resting on a Community Function ( $F_c$ ). These are demonstrable by a situation where we ask a speaker to present the statement ‘68 plus 57 =125’ to a community who accepts the operations of quaddition shown in the above formula. If any shared understanding of meaning rests on the interpretation of the concept by a given community,  $F_c$ , then our community of quaddition would tell him to reject the statement as the correct answer would be five. If, however, our speaker were to insist that their initial statement were correct, they would be relying on  $F_b$ . In doing this, he relies on ascribing a particular ‘correct’ understanding of the word ‘plus’ in the face of unanimous community opposition; he therefore claims that any ascription of

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<sup>13</sup> Kripke (n 11) 9

meaning contains an 'ought', and is therefore normative in character.<sup>14</sup> Applying this to dispute under consideration in this thesis, whether or not the concept of law is axiomatically connected to morality, we can then see clearly that differentiation between  $F_c$  and  $F_b$  as the source of meaning is of central importance. If there is indeed a correct, normative meaning contained within the word *law*, then we need to demonstrate that it can be found in  $F_b$  and not  $F_c$ .

Toddington correctly identifies that this may be easier said than done; it might be simple to define natural phenomena such as mathematics, but social phenomena such as law, founded on abstract theoretical suppositions, are fundamentally more difficult to pin down.<sup>15</sup> It is not immediately obvious why this should be the case, however. Meaning facts which concern states of affairs are as inherently natural as other facts; the controversy still revolves around determining what the state of affairs is, and therefore remains a normative question.<sup>16</sup> Any attempt must necessarily focus on the function of the phenomenon as a principle determinant of the object under consideration.<sup>17</sup> In doing so, it must allow for a plurality of conflicting conceptions of the focal case of the phenomenon, whilst simultaneously ruling out all which cannot be countenanced as a possible candidate.<sup>18</sup> In placing emphasis on a focal rather than conceptual definition of the subject of jurisprudential enquiry, Natural Lawyers ought to be content in that a Positivist cannot accuse them of being concerned with what law ought to be rather than what it is, whilst Positivists can rest assured that they cannot be accused of relying on a similar straw man. From this, a conceptual analysis can be constructed which allows a settled discussion of the social practice of law.<sup>19</sup>

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<sup>14</sup> Gibbard (n 7) 45-46

<sup>15</sup> Stuart Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh University Press 1993) 28-29

<sup>16</sup> Gibbard (n 7) 49

<sup>17</sup> Toddington (n 15) 58; Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009) 23, 43

<sup>18</sup> Toddington (n 15) 65

<sup>19</sup> Capps (n 17) 41

In order to effectively answer questions around the nature of law, it is therefore essential that the subject of the enquiry can be agreed upon. It is therefore essential that a definition of law can be located which is acceptable to both Positivists and Natural Lawyers,<sup>20</sup> and which does not presuppose central tenets of either viewpoint. Without this, it would be impossible for a meaningful enquiry to take place given that the starting point of the enquiry would be what was ultimately under dispute. Beyleveld and Brownsword make this point clearly, when they claim that it is necessary that any jurisprudential enquiry ‘...specify the concept which is necessary for knowledge...of a connotation agreed between disputants to be possible.’<sup>21</sup> Our intellectual enquiry can only be successful if we can demonstrate that the phenomenon under dispute actually conforms to a ‘nomological scheme’.<sup>22</sup> Put differently, the semantic label given to focus of an enquiry must be agreed upon by those who disagree as to its precise meaning in order for any conclusion to be acceptable. This is a concept which has become known as an *agreed referent*.

Contenders for such a focal referent have been proposed by Capps, who suggests that ‘[I]t is widely accepted and probably logically necessary that law is a social institution which in some way affects the practical reasoning of agents.’<sup>23</sup>, and by Fuller, who holds that ‘[L]aw is a purposive enterprise which provides an institutional framework for unifying our community’s judgments and stabilising and structuring our social relations.’<sup>24</sup> This thesis agrees with Beyleveld and Brownsword that an appropriate agreed referent for an enquiry into the concept of law is as follows:

Law...refers to ‘*the enterprise of subjecting human conduct to the governance of rules*’,... the choice of this referent is a stipulation and we can only have a genuine debate with those who are prepared to accept this starting

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<sup>20</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet and Maxwell 1986)119

<sup>21</sup> *ibid* 118

<sup>22</sup> Toddington (n 15) 28

<sup>23</sup> Capps (n 17) 51

<sup>24</sup> *ibid* 127

point. Disagreement over the concept of law is to be viewed in terms of different ways of conceptualizing this referent.<sup>25</sup>

The contention that law is ‘the enterprise of subjecting human conduct to the governance of rules’ is an appropriate referent in that it makes no reference to normative source of the rules specified by law, merely that law is an attempt to resolve disputes with reference to norms.<sup>26</sup> One point of note in adopting this referent however should be its location of law as being within the realm of practical reason. Should law seek to subject human conduct to rules, an attempt is being made to guide our action. Law therefore necessarily claims to provide a reason for compliance with its demand which overrides all other reasons for non-compliance with the law in question. Any normative claims which arise from law cannot be separated from the deliberative rationality within which decisions on how to act are formed. Such a statement is axiomatic in the nature of normativity, and ought not throw into doubt the independence of law as a normative framework. The statement is made succinctly by Capps:

[L]aw is autonomous in the sense of it being a set of distinctive general norms which are established to stabilise social relationships within a community, but it is not autonomous in the sense that it must be isolated from broader concerns of practical reasonableness if it is to fulfil this function.<sup>27</sup>

In proposing this agreed referent, Beyleveld and Brownsword have proposed an acceptable starting point for jurisprudential enquiry for all parties, regardless of their preferences. In doing this, they have therefore arrived at a definition of ‘law’ which is grounded in  $F_b$  and not  $F_c$ . They have done this by prioritising the focal aspect of the referent, thus emphasising the non-semantic properties of the concept of law to explain its overall development as an idea.<sup>28</sup>

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<sup>25</sup> Beyleveld and Brownsword (n 20) 120; emphasis added to denote referent.

<sup>26</sup> *ibid* 120

<sup>27</sup> Capps (n 17) 129

<sup>28</sup> Paul Horwich, *Truth* (Oxford University Press 1990) 28

A difficulty arises when, having completed this logical reasoning as to the possibility of meaning, we return to Wittgenstein's initial problem of linguistic certainty. For again, he would likely argue that it is impossible for us to consider every possible meaning of a term which is available to us every time we speak, and it is thus impossible for us to conceptualise a truth-conditional account of the normative meaning of our words. Any debate between Positivists and Natural Lawyers is therefore impossible, as there is no way of knowing that both parties are referring to the same concept during the course of their debate. To counter this, we must look further into the problem thus presented; should any disagreement over the meaning of the words in question occur, then what exactly are we basing the disagreement upon? It would be incorrect to claim this would be on the present meaning of the words as being used when the disagreement occurs. Rather, any disagreement would centre around whether or not our current usage accords with past usage of the same terms.<sup>29</sup>

Such meaning-scepticism can be refuted only by considering how an agent would actually use any categorical assertion that an individual is following a given rule – for example, that by 'law' he means the agreed referent given above. Following this, we introduce the conditional assertion that 'if an individual were to follow such-and-such a rule, he must do so-and-so on a given occasion.'<sup>30</sup> Yet this problem is neatly sidestepped by Beyleveld and Brownsword in proposing the agreed referent above; by giving parties to the dispute as to the meaning of the term a focal referent on which they can agree, they allow for a plurality of conceptions whilst excluding all non-plausible candidates from consideration.  $F_b$  is therefore attained by consensus as to the core function of the term which is under dispute.

The aim of this section has been to demonstrate that disputes as to the necessary features of concepts such as law are ones which are impossible to resolve without an agreement as to the meaning of the terminology used within the dispute. Here, it is of central importance that the word 'law' should be defined

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<sup>29</sup> Kripke, (n 11) 12

<sup>30</sup> *ibid* 108

in a way which is objective and acceptable to all parties to the dispute. It has been noted that law is fundamentally a means by which our action is guided, and therefore possesses a normative element. The remainder of this chapter will attempt to further narrow our search for the normative element of law.

## 2.2 Normativity, Agency and Law.

As has been suggested above, central to the concept of normativity is a further conception of agency; without an agent against whom a normative claim could potentially be made, no normative claim is possible. Such a claim will be expanded here, particularly with reference to a Kantian conception of action upon which the normative claim of Law might be founded. This section will aim to show that Law is inescapably part of the framework of practical reason against which normativity necessarily makes claims. Such a necessary link can be demonstrated by the shared terminology between conceptions of Law and those of Practical Reason; both concern themselves with ideas of obligation, of permission, endowments and rights. Rationality and coherence are as equally central to legal principles as they are to those of practical reason generally; even legal practice itself is oriented entirely towards finding a rational way in which to deal with a practical problem.<sup>31</sup>

Central to such a notion is a conception of the will as the only possible non-contingent provider of moral worth. If we take this as true, then it must also be recognised that not every exercise of the will is unconditionally good; it is possible that an agent might choose to undertake a particular action which is not in accordance with a guiding moral principle which is ultimately discernible from the will. It is from this observation that the legal idea of a duty arises, one which – again – appears normatively indistinguishable from the concept of a moral duty to act in a certain way. In this sense, duty becomes fundamentally intertwined with the broader concept of the will.<sup>32</sup> Such a conclusion can be seen in Kant’s moral theories; as summarised by Berteau, in Kant’s framework practical reason is a unified concept which ‘ultimately depends on the same

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<sup>31</sup> Stefano Berteau, *The Normative Claim of Law* (Hart 2009) 175

<sup>32</sup> *ibid* 178

grounds for its normativity, meaning that practical reason carries normative force by virtue of its linkage with humanity understood as the rational power to decide for oneself the ends worthy of pursuit.’<sup>33</sup> It is therefore impossible, from a Kantian perspective, to have a legal obligation without reference to a corresponding moral obligation, as both ultimately rest on the same normative requirements imposed on any way in which an agent employs their practical reason. Such requirements are imposed on any action which can be said to be undertaken voluntarily as opposed to involuntarily; it can therefore impose requirements to act in a certain way for action, but not reaction; on internal inclination but not external circumstances; on stimulus, but not response. For ‘[W]hat makes someone a human agent is a capacity not only for reaction (which is wanton and can go any which way) but also for conduct framed in view of one or more principles into which are embedded principles providing guidance.’<sup>34</sup>

Based on this agential understanding of the subject, the first principle of action which is required for a normative requirement to be imposable on that action is an ability to reflect and then act upon a given stimulus or set of stimuli. This autonomy leads to an ability within the actor to self-determine their actions both negatively, in that they are able to act independently of externally imposed standards, but also positively, in that they possess the capacity to select or devise standards of conduct of their own making or consensual acceptance.<sup>35</sup> Put more succinctly:

[H]uman agency is the capacity to act on models established by reflective, rational and autonomous choice; and human agents are subjects capable of acting on self-imposed reasons, reasons they have worked out for themselves exercising their capacity for reflection.<sup>36</sup>

From this observation, we are able to clearly pinpoint the correlative connection between the reasons an agent uses when making a decision on how to act in a given circumstance and the respective normative force these reasons exert upon the agent during the decision making process. For it is the normative force that a particular reason exerts on an agent that provides them with a purpose for

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<sup>33</sup> *ibid* 186

<sup>34</sup> *ibid* 194 - 196

<sup>35</sup> *ibid* 197 - 201

<sup>36</sup> *ibid* 202



choosing that particular course of action over any alternative. Without the metaphorical crossroads which an agent must traverse when choosing one course of action over the alternatives, no normative force can persuade the agent to prefer a particular act over another. Normativity therefore requires agency in order to be meaningful as it is inescapably linked with the very idea of reasons for action. As Berteau again summarises, ‘Normativity could not emerge but for a constituting act on the part of human agents, and in this sense the normativity of objects is said to depend on fundamental features of human agents.’<sup>37</sup>

In light of this conclusion, we must next ask what practical agency itself entails. It can be separated into two interconnected facets:

On the one hand, the minimally necessary self-conception exists *before* and *beyond* the agent as a *deep conception* enjoying a good measure of independence from this or that agent, which is to say that the conception is only marginally dependent on one’s inclinations, and it cannot be disposed of without loss of one’s practical identity, for its constituent features cannot be given up without thereby giving up one’s distinctive existence as a human agent. At the same time, however, the minimally necessary self-conception is the outcome of the capacity for self-reflection that enables human agents to move about in the practical sphere in specific ways and makes each individual capable of recognising herself as such.<sup>38</sup>

Given both the deep and minimal definitions of a self-conception of agency identified by Berteau necessarily entail reference back to the decision maker themselves, they necessarily can be seen as constitutive of the very fact of agency itself.<sup>39</sup> Following from this, if the act of making decisions based on reasons is definitionally necessary for agency, then it becomes instantly apparent that the opportunity for normativity to provide reasons to guide an agents’ conduct is also definitionally built into the idea of practical reason itself.

This may appear to be a fairly asinine observation, yet its implications for the legal sphere cannot be understated; a connective chain has been identified which

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<sup>37</sup> *ibid* 205

<sup>38</sup> *ibid* 208, *emphasis original*.

<sup>39</sup> *ibid* 220

ties together the disparate concepts of agency, of practical identity and of practical reason. If normativity is necessarily present whenever an agent chooses a particular course of action over another, it can be said to be present in the very idea of agency itself. This normative necessity is carried through to the idea of practical reason by being the model which guides agents within the practical sphere of action. In light of this transfer, it follows that normativity therefore is able to exert its force on every agential action which is itself found within the domain of practical reason – including, for our purposes, legal obligations.<sup>40</sup> This jump is not a controversial one; in that it is a means of regulating agential behaviour and providing reasons for adhering to a particular framework of social interaction more broadly, law is necessarily concerned with agency.<sup>41</sup>

A common counter to this necessary connection between agency and law is that any attempt to characterise agency in this way is meaningless. It is simply too abstract; individuals in the real world do not see themselves as complying with such a definition. We do not exist as machines acting according to the demands placed upon us by practical reason. Instead, individuals necessarily see themselves as embedded within certain social and cultural practices, and it is these practices which more often guide our actions than an appeal to the machine-like practical reason employed by such theories of agency. Therefore, in order to have any meaningful existence, definitions of agency must make reference to these social and cultural practices which, more often than not, are the true guides of our behaviour.<sup>42</sup>

Such an observation may have its appeal, yet it appears to operate on a misunderstanding of what is *necessary* for agency and what may be considered as *contingent* influences on how an agent makes their decisions. Bare agency itself requires the three essentials of reflectivity, rationality and autonomy as discussed above. I will consider this necessary definition in more detail with the introduction of Gewirth's theories in Chapter Three, yet for the moment this observation will suffice to rebut the argument of culturally grounded agency. For the bare agency identified through these three necessary components is itself

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<sup>40</sup> *ibid* 224

<sup>41</sup> *ibid* 227 - 228

<sup>42</sup> Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1990) 13

enough to guide an individual's actions; it may be characterised as partial or deficient, but it cannot be said to provide an incomplete explanation of agential action. Should other considerations play a role in the decision making process, these considerations should therefore be characterised as additional and contingent; whilst they can play a role in the decision making process, they need not necessarily do so.<sup>43</sup> More importantly, if these culturally or socially grounded reasons for action serve so as to actively counter the autonomy, rationality and reflectivity of those against whom they are directed, they then actively undermine the bare agency of those same subjects.<sup>44</sup> It is therefore impossible for them to exert any meaningful normative demand on an agent, given the necessary link between agency and normativity identified in the preceding paragraphs.

Given then that a bare conception of agency is required for normativity and a connecting chain between the concepts of agency and practical reason is identifiable, a normative element is apparent in any action governed by practical reason – including within the realm of law. Our attention must now turn to the extent to which this normative requirement is necessary with the very concept of law itself. The first observation to make in this line of enquiry is one which would be equally acceptable to both legal positivists and natural lawyers; it is impossible to see a law as existing in isolation. Law is necessarily systemic in nature, and individual laws need to be seen in light of the system of which they form a part. From this observation, it should be taken as equally axiomatic that the normative force possessed by a single law can also not be seen in isolation. The normativity of individual laws can therefore not be separated from the normative force exerted by the system they comprise; they should instead be viewed as necessarily linked.<sup>45</sup>

This claim appears to run contrary to the popular positivist viewpoint that legal claims are predominantly subjectivist. Such a claim would hold that legal claims are claims made by particular subjects or procedures against a particular individual, as opposed to being inherent in 'statements, acts, institutions, practices and procedures of law'.<sup>46</sup> Such a subjectivist claim however can be seen

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<sup>43</sup> Berteau (n 31) 230

<sup>44</sup> *ibid* 232

<sup>45</sup> *ibid* 30

<sup>46</sup> *ibid* 31 - 32

to be idealistic; it can be dismissed in that it doesn't account for the persistence of certain legal standards throughout various independently created legal systems. Such a persistence can, however, be explained by the existence of a necessary moral core inherent within the concept of law itself.

A positivist may seek to counter this dismissal by introducing reductivity to the normative definition so observed; any normative arrangement which may be identifiable within the concept of law itself can be reduced to a simple series of facts. Such a reduction strips such normative connections of their guiding force, in that if a normative claim can be stated in terms of facts then the norm itself belongs not to the category of 'ought' but of 'is'.<sup>47</sup> Nothing then separates these 'normative' claims from those claims which may be exerted legislator and subject.<sup>48</sup>

Several means of countering this claim are available to those who would hold that a normative 'ought' is axiomatic to the concept of 'law', building on the normative content of the word itself established in earlier in this chapter.<sup>49</sup> Firstly, a foundationalist response is available. Such a claim would take the form of the observation that the normative claims made by law go beyond, and indeed transcend individual experiences and instead should be seen as resting on a universal and objective truth which is identifiable through logocentric reasoning based on an external point of reference. Such a claim may reignite an earlier level of scepticism however, in that it may be viewed as too abstract to therefore possess meaning – how can it be possible to transcend personal experience whilst retaining any viable content? Such an objection is fairly strong in that we have already drawn a necessary connection between the normative foundation of legal claims and the realm of practical reason, and therefore to agential decision making – if this claim has been accepted as correct, then it seems difficult to then attempt to locate this normative force in a source external to the agent. For expediency, it shall have to suffice at this point in the chapter to note that a response to this sceptical challenge can be found in Alan Gewirth's Principle of Generic Consistency (hereafter PGC); the PGC creates a universally acceptable instrumental reason for compliance with its moral requirements that,

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<sup>47</sup> *ibid* 140

<sup>48</sup> *ibid* 142

<sup>49</sup> s.2.1

rather than being located externally from the agent, are instead constructed through a dialectically necessary argument proceeding from the very fact of agency itself, and can therefore withstand the challenge posed. The point will, however, be expressed in further detail towards the end of this chapter.

A second response to the reductionist claim can be its acceptance; we may wish to concede that normativity, law and obligations can be directly equated with the concepts of factuality, power and sanction respectively. It could be said however that this would be to mischaracterise the concept of normativity itself, and strip the term of any meaningful properties. On a realistic level these terms are simply not used interchangeably, particularly within the legal sphere – if they were, then no dispute between positivists and natural lawyers would exist. The very fact that this debate is ongoing could therefore be seen as evidence that to concede the point is to oversimplify the question being posed.

Lastly, we may seek to look further into the concept of authority itself in order to demonstrate that the reductionist argument is flawed. The essence of the reductionist claim is that authority itself rests on, and therefore is synonymous with, the idea of force. This claim appears to miss the point of the normative question however, as the term ‘authority’ entails an element of legitimacy within it. If this were not the case, we would use the words ‘threat’ or ‘force’ interchangeably with ‘authority’, which we do not. Authority can therefore be better synonymised with the idea of ‘legitimate force’; this then begs the question of where and how the force gains its legitimacy, which takes us back to the original normative question the reductionist sought to answer.

The failure of the reductionist argument therefore leaves us with the realisation that legal normativity is both a fact which cannot be excluded entirely from the very concept of law, and that it possesses a meta-ethical component. For in addition to possessing an action-guiding aspect, this aspect must be legitimate. Its categorical, compulsory or unqualified status therefore requires expansion in a purely legal context. Berteau again makes this argument extremely succinctly when he notes that ‘[W]e need to explain not just the capacity of the law to guide action but the categorical and unqualified demands corresponding to the practical guidance provided by the law.’<sup>50</sup> For Natural Lawyers, the normative

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<sup>50</sup> Berteau (n 31) 160 - 161

foundation which provides the legitimacy of these demands is necessary within the very idea of law itself. For positivists however, normativity poses several problems for identifying the concept of law. The next section of this chapter will provide us with a brief introduction to some of the ways in which positivism seeks to address the issue.

### 3 Normativity in Positivist Theory

As has been claimed in the previous definitional chapter, Legal Positivism has traditionally been defined negatively with reference to Natural Law. Whereas the latter holds the link between law and morality to be conceptually necessary, the former argues that it is not. It is therefore a fairly broad theoretical heading in that it covers any ideas which do not conceptually link law with morality. Such theories generally hold, then, that the authoritative claim made by law is one which rests entirely on social facts and that these social facts should simply be accepted; where these facts gain their authority is not a question with which legal philosophers should engage themselves.<sup>51</sup>

If we were to instead seek a definition of Positivism which does not make reference to merely an absence of morality, then Ronald Dworkin provides us with four main tenets which we may look for in a system in order to identify whether it may qualify as law according to the positivist tradition. Firstly, a Rule of Recognition must be present whose purpose is to identify which criteria are both necessary and sufficient for the existence of Law. Secondly, the system proposed by the theory must operate so that every norm within it takes the form of a rule; Dworkin refers to this simply as the Model of Rules. Thirdly, it must subscribe what is commonly referred to as the 'Seperability Thesis', which holds that substantive merit or moral value cannot, of itself, be sufficient for legal validity. This is grounded on the similar idea of the 'Practical Difference Thesis', which holds that legal validity requires additional criteria to moral validity, otherwise there is no meaningful distinction between the terms as motivations

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<sup>51</sup> Jules Coleman, 'The Conventionality Thesis' in Ernest Sosa and Enrique Villanueva (eds), *Social, Political and Legal Philosophy* (Blackwell 2001) 355

for action. Put by Coleman, '[L]aw must be able to make a practical difference as law: that is, a difference in the reasons for action that apply to those to whom the law is directed.'<sup>52</sup> Law must therefore be seen creating norms distinct from moral norms, otherwise our motivation for acting according to the law would not be meaningfully different to our reasons for acting morally; the two must therefore be seen as different phenomena. Lastly, Dworkin holds that Positivist Theories must subscribe to what he calls the Discretion Thesis, in that judges must be granted limited legislative powers in so called 'hard' cases in which the law is unclear. Dworkin would argue that, should we see moral principles as binding legal sources, then each of these four criteria are undermined.<sup>53</sup>

Regardless of whether we seek to define Positivism in positive or negative terms, it is uncontroversial to categorise it as being ultimately concerned with the criteria for legal validity, and not why these criteria for legal validity are ultimately valid themselves. For positivists, this is a separate enquiry.<sup>54</sup> Broadly speaking, positivist theories can be split into two encompassing types, which will here be discussed in turn. Firstly, Exclusive Legal Positivism will be addressed. This branch of positivism holds that can be no link whatsoever between moral reasoning and legal validity. Secondly, Inclusive – or Incorporationist – Legal Positivism will be introduced; this branch holds that moral reasoning can form a part of legal validity, but that it does not have to. Any link between the two is therefore contingent as opposed to necessary. The purpose of this section is to introduce the central normative positions taken by each of these two branches of positivism, but without introducing or critiquing specific examples of this stage. This will, instead, take place later in this thesis. The myriad writings of Joseph Raz, widely categorised as the most influential contemporary exponent of Exclusive Positivism, will be examined in Chapter 5. This will be followed by three examples of contemporary inclusive positivist theories, those of Lyons, Coleman and Kramer respectively, which will be critiqued in Chapter 6.

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<sup>52</sup> Coleman (n 1) 68-69

<sup>53</sup> *ibid* 104

<sup>54</sup> Berteau (n 31) 69

### 3.1 Exclusive Legal Positivism

‘[E]xclusive legal positivists...have maintained that the legality of a norm must depend on its social source, and any appearances to the contrary must be explained in some other way.’<sup>55</sup> In this line, Jules Coleman succinctly establishes the central tenet of exclusive positivism – the complete exclusion of moral reasoning from any attempt to locate the source of valid legal norms. If we are to define law by reference to conventional sources, then normativity – insofar as it is a moral concept as opposed to a legal one – should be completely excluded from the discussion.<sup>56</sup>

Exclusive positivists justify this on what can be broadly characterised as an appeal to legal realism. Such theories hold that the inclusion of moral principles in a discussion of legal normativity, even on a contingent basis and therefore in a way which is compatible with inclusive positivism, is to conflate two separate ideas; what the law *is*, and what the law *should be*. Since jurisprudence is the study of what law is, we should not consider moral norms in our search; to do this is to ask what the law *should be*, which is a different enquiry. Jurisprudence therefore ought not to concern itself with moral reasoning of any kind, as to do so would be to go beyond its purview.<sup>57</sup> To include moral norms in legal reasoning is to provide a further reason as to why the population may seek to follow a given law, but is not connected with a search for what the law actually is.

In Kelsenian language, to conflate these two enquiries is to confuse the validity of a given law with its efficacy. Berteau makes an attempt to distinguish these two different properties of a given law using language more fitting for the present enquiry, claiming that ‘Validity differs from efficacy by its being primarily meaning-related, as opposed to primarily nature-related or society related...’<sup>58</sup> Yet to separate these two acceptability-features of a given piece of legislation raises definitional problems which it is difficult for an Exclusive Positivist to overcome. Firstly, we should remember that a central claim of exclusive

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<sup>55</sup> Coleman (n 1) 67 - 68

<sup>56</sup> Berteau (n 31) 99

<sup>57</sup> Coleman (n 1) 105

<sup>58</sup> Berteau (n 31) 154 - 156



positivism is that legal validity itself also ultimately rests purely on social facts. They would therefore find Berteau's definition difficult to accept in that it claims that both validity and efficacy should be judged in this way; to attribute some additional inherent meaning to validity above this is to introduce an arbitrary and ultimately fallacious distinction.

The second problem Berteau's definition raises for Exclusive Positivists arises from a reliance on empirical assessment; if efficacy is ultimately a social fact, empirical assessment becomes the only way in which to accurately assess the efficacy of a given law. This should be a stand-alone assessment which is different from the validity of a law. Yet to rely on an empirical assessment in this way tells us nothing of why a particular legal norm is viewed as possessing efficacy; it merely informs us whether or not people do see it as something which they feel bound to follow. If the purpose of jurisprudence is to explain how a legal system comes into being as a normative concept in itself, it is important to distinguish how an individual's motivation to follow a given norm as law is different from how a person might follow a norm under a threat of violence should non-compliance occur. Law should provide a motivation for action beyond that of a mere threat, but to end our enquiry at an empirical assessment of whether a law possesses efficacy does not allow us to assess this distinction. Such a distinction might be ascertained by asking what motivates an individual to view a given law as possessing efficacy, but this would be an enquiry which is prohibited by exclusive positivism. It is this second observation which provides the reason for which this thesis will focus primarily on inclusive, or incorporationist, positivism; such exclusive positivism cannot provide a reason for why efficacy exists with reference to either an individual law or a legal system, as it arbitrarily limits the jurisprudential enquiry so as to exclude questions of validity. Efficacy can therefore be said to contribute to the existence of a norm, but the level of efficacy possessed by a given law cannot be the ultimate arbiter of whether or not that particular law should be seen as producing a valid norm. We are required to consider validity in order to justify efficacy.

Such a concession is made by Kelsen in his original theory outlining the difference between legal validity and efficacy when he claims that 'minimum effectiveness [in that those to whom a legal rule is addressed choose to be bound

by it] is a condition of validity.’<sup>59</sup> An exclusive positivist may here claim that such a concession is compatible with his theory, in so far that it does not make reference to a moral reason for why a law possesses validity which grants it efficacy. Yet Dworkin provides a reasonably clear example of how it is impossible to completely exclude morality from legal deliberation. He suggests that if, in the course of their deliberation, a judge’s application of the Common Law could be interpreted as legislation, then it is impossible to suggest that they would not incorporate moral concepts such as justice and fairness within the deliberative process for which they have exercised this discretion.<sup>60</sup> This observation categorically undermines the central claim of exclusive positivism, but remains compatible with an inclusive positivism which holds that morality, although a potential contributing factor to arbitration, is neither necessary nor sufficient in order to produce a legal outcome. For example, were a judge to borrow law from another jurisdiction in his deliberation, this would not result in a claim that the whole of the donor country’s law has become part of that of the adopting jurisdiction; in the same way, morality can contribute to the development of law but cannot be its sole point of reference with regards to validity and efficacy.<sup>61</sup>

Many exclusive positivists would dispute the extension of efficacy in this way as a conflation of two different questions. Efficacy, for the purposes of jurisprudence, is a social fact describing the extent to which a particular law is followed by those against whom it is directed; in other words, whether a legal system possesses authority. To ask whether a system is valid is to ask whether this authority is legitimate – something which is irrelevant for the purposes of efficacy. For even if a legal system does *not* possess legitimate authority, it will still claim that it does so – and it is the claim of legitimate authority which is therefore a norm-creating reason for action under law regardless of efficacy.<sup>62</sup>

To understand the ramifications of this claim for our present enquiry, we are required to explore in slightly more detail the nature of a norm itself. If we accept that norms are fundamentally grounded in practical reason as outlined in Section

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<sup>59</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2<sup>nd</sup> edn, University of California Press 1970)11

<sup>60</sup> Coleman (n 1) 105

<sup>61</sup> *ibid* 106

<sup>62</sup> Berteau (n 31) 100

2.2 of this chapter – an uncontroversial claim given that rules, by necessity, are reasons as to why we should undertake action of a given type - then we are able to differentiate two different species of norms which possess subtly different scopes of application. The first would be first order norms – those which provide us a basic reason for action. Such exclusions are necessarily exclusive in that they are a directive to both behave in a certain way and to disregard alternative reasons for acting. An exclusion such as this requires that such reasons should be viewed as reasons in their own right, independent of any deliberation as to their validity or justification.<sup>63</sup> Second order norms differ; they employ rationality and reason in order to justify why a particular first-order norm should be accepted and be viewed as valid, and can either impose positive or negative restrictions on our action.<sup>64</sup> In order for exclusive positivism to provide a reason for the existence of law, it must therefore be viewed as a first-order norm thus described; if it provides only second-order norms, then exclusive positivism is definitionally insufficient. With this observation in mind, the following description can assist us:

Legal systems, understood as structures for the exercise of authority, claim to issue provisions of a certain kind, that is, provisions capable of excluding and pre-empting all those reasons that do not emanate from them. Laws are accordingly regarded as directives purporting to provide content-independent protected reasons for action, namely, as directives that, independently of their content, carry both a prescription to act in a certain way and an instruction excluding courses of conduct based on depended reasons.<sup>65</sup>

If we were to be presented with a directive which claimed to be law but clearly was not, it would not possess a stand-alone reason which required us to adhere to it. A minimum level of content is therefore required in order to provide a justification for why a law can be viewed as such, and therefore followed as such. It is clear then that the concept of law belongs to the family of second-order norms, and, subsequently, cannot be identified purely by reference to exclusive positivism alone. Even many prominent exclusive positivists fail to address how

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<sup>63</sup> *ibid* 103

<sup>64</sup> *ibid* 102

<sup>65</sup> *ibid* 105

this characterisation be avoided; Joseph Raz, for example, characterises the normative nature of law as follows:

- I. Normativity is essential to the broader concept of law and therefore to its definition.
- II. The normative force of law takes the form of a claim to legitimate authority.
- III. It generates a content-independent reason to act, which:
- IV. Incorporates exclusionary content; and
- V. Has a moral nature in that it is generally addressed to all.<sup>66</sup>

The claim to content independence proposed in category III does not sit comfortably with the claim of legitimate authority contained in category II, to the point where these can be reasonably viewed as irreconcilable. It can therefore be demonstrated that exclusionary positivist theories which build on a dichotomy between what law *is* and *ought to be*; between *lex* and *ius*; can be viewed as mischaracterising or as misunderstanding of the normative claim made by law. Whilst significant scholarship has been undertaken on the topic, scholarship which I am unable to address in full throughout the thesis, this section has attempted to highlight some key flaws with the standpoint in order to justify the focus of this thesis on Inclusive Positivism. If we view law as possessing authority which is legitimised in some sense of the word, then we recognise that the relationship between form and substance in the legal context is fundamentally inclusionary, and that justifications are therefore to be recognised as an essential component of any legal directive which is grounded upon them.

### **3.2 Inclusive Legal Positivism**

Central to Inclusive Positivism is the claim that any authority cannot be entirely exclusionary; if the contents of a directive stray too far from the purpose for its introduction, the authority which issued it will be unable to enforce it. When individuals assess whether or not a law exerts a valid force, they undertake an assessment of whether these two positions are still sufficiently in alignment for

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<sup>66</sup> *ibid* 107

the norm to be considered valid. Such a position is frequently criticised; opponents such as Raz suggest that such a balancing exercise is fictitious in the extreme. Not only is it not the case that individuals weigh up the substantive merits of every single directive-giving law which is designed to guide their actions as and when they are presented with such a direction, but to organise a legal system on the subjective judgement of the substantive merits of each individual interaction with the law is neither a reasonable nor a desirable way in which to organise a legal system. Raz therefore concludes that the authority of a given law or a legal system cannot be limited by substantive reasons which might be required to justify its existence.<sup>67</sup>

Whilst such a criticism is valid, it mischaracterises the claim frequently made by inclusive positivists. Individuals often do make value judgements based on the substantive merits of individual legal choices; if this were not the case, then the Kelsenian distinction between efficacy and validity explored above becomes meaningless. Secondly, if individuals do make substantive judgements against a pre-existing standard, it does not follow that such a criterion of validity be subjective in nature. It is conceivable that a functioning legal system might exist whose criterion of validity are an objectively observable benchmark which is uniformly applicable to all substantive judgements which need to be made; if these criteria can be identified, the criticisms identified above fail.

Should we wish to identify features of inclusive positivism essential for the purposes of this thesis, the following definition would be useful; 'Inclusive Legal Positivists maintain that there is no inconsistency between the core commitments of positivism and the existence of moral criteria of legality.'<sup>68</sup> Phrased differently, the central tenet of legal positivism is that law is valid if it is followed conventionally by officials because it meets the criteria for validity as required by something Hart would label a 'secondary rule of recognition.' What this criterion of validity is remains entirely content independent; it may contain moral reasoning, but such reasoning only becomes legal reasoning if it is followed by the officials charged with identifying the law.<sup>69</sup>

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<sup>67</sup> *ibid* 115

<sup>68</sup> Coleman (n 1) 67

<sup>69</sup> *ibid* 120

This thesis is directed towards a Natural Law rebuttal of the second aspect of this claim. It will argue that a moral component is not merely permissible for officials to identify the law, but that conformity with an objectively identifiable moral standard is necessary for legal validity. Such a claim goes beyond the requirement of inclusive positivism, but is founded within a logical fallacy arising from a Hartian conception of the secondary rule of recognition. This will be expounded upon in significantly more detail in Chapter Four of this thesis; for the present time, it will be simply stated that Hart's Rule of Recognition is presented as both content independent and peremptory. As such, it forecloses meritory deliberation of itself, and becomes a first-order norm as described above; it is simply required that its validity be accepted on its own sake.<sup>70</sup> This argument is unconvincing in itself for the same reason as exclusive positivism was previously dismissed; there is no reason as to why such a rule should be accepted unless a reason for its acceptance can itself be justified. Chapter Three of this thesis will suggest that the moral writings of Alan Gewirth, as developed by Deryck Beyleveld and Roger Brownsword, can provide this reason in a rationally acceptable natural law theory.

Nevertheless, for the purposes of this section it holds that inclusive positivist theories of law distinguish content of and grounds for legal sources in a way in which the natural law theory to be developed would reject. Inclusive positivism holds that the grounds need necessarily be a social fact, and that – although this fact may be moral in content – this is only required if allowed by the Rule of Recognition.<sup>71</sup> External positivists may counter that to permit moral reasoning in this way defeats the purpose of a Rule of Recognition – to provide or force a consensus and agreement on a particular dispute of the basis of law. The fact of social pluralism has rendered morality too contentious a foundation upon which to ground a universally applicable criterion of recognition, so to incorporate a moral component in a Rule of Recognition would result in the perpetuation of the very disagreement which the Rule is designed to avoid.<sup>72</sup> This criticism again, however, fails to consider the possibility of a universally acceptable moral standard which may be thus incorporated into a Rule of Recognition; were such

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<sup>70</sup> *ibid* 120 - 121

<sup>71</sup> *ibid* 107 - 108

<sup>72</sup> *ibid* 112

a principle to be identified, the criticism would fail. Inclusive Positivism is therefore able to resist such an external criticism.

A final criticism which may be levelled against Inclusive Positivism from an External perspective is that, should Inclusive Positivism hold that morality may form the basis of legal reasoning, any resultant test would fail the Practical Difference Theory. This viewpoint requires that a legal norm must necessarily provide guidance founded on a different basis than that which already exists within moral reasoning; unless it can do this, there is no practical difference between legal and moral reasoning which can identify a specific reason for action as legal in origin.<sup>73</sup> Such a claim is founded in the very idea of a reason for action itself. If a claim is made that a rational individual views themselves as constrained by the demands of the moral restraints of right reason as when they act, as permitted by inclusive positivism, the following dilemma arises:

- a) If law were to require an outcome different to that which may be permitted by right reason, then to follow the law is to be irrational.
- b) Yet if law were to require the demands of the moral restraints imposed by right reason, then it would require identical forms of action. As such a requirement adds no additional reason, it cannot be viewed as different; it therefore cannot be viewed as a separate legal norm separate to one derived from morality. It thus fails the requirements of the Practical Difference theory.<sup>74</sup>

Yet such an assessment ignores the fact that many legal requirements do expressly rest upon moral principles, and can therefore again be dismissed as fictitious. An attempt to circumvent this inclusion can be found in an appeal by Raz to the related, yet separate notion of practical authority as follows. If such to submit to an authority's assessment of what the 'demands of right reason' might require would produce a better outcome than would making an assessment for ourselves, then it becomes rational to submit the authority rather than follow our own judgements. This 'Normal Justification Thesis' therefore permits a moral reason for action which remains normatively grounded in a separate species of legal authority; any moral force which is transferred into the

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<sup>73</sup> *ibid* 113

<sup>74</sup> *ibid* 121 - 122

legal sphere by this service conception is gained whilst retaining the required content-independence of the Rule of Recognition within the legal system.<sup>75</sup>

This explanation as to the permissibility of the inclusion of moral reasoning within a given legal system is problematic however, and does not convincingly explain the moral content found, and accepted, within legal systems. Firstly, the concession is dismissed by many Exclusive Positivists themselves as it can be characterised as resting on a presumption that all laws are prescriptive in nature. The criticism claims that this is not a true characterisation of how the law imposes obligations in that not all law allows for such appeals to practical reason; many provide us with a stark imperative, requiring standards of behaviour more akin to a 'must' than a mere 'ought'.<sup>76</sup> Such imperatives do not lend themselves well to the balancing of outcomes which Raz lays out in his Normal Justification Thesis. Secondly, a critic of Raz's theory may equally claim that, in relying on a balancing of outcomes in order to find a more preferable result, the existence of a criterion of how a given outcome may be assessed as preferable is presumed. Yet despite relying on this presumption, Raz makes no attempt to identify what such a criterion might be. We therefore return to the criticism levelled at Exclusive Positivism above; it cannot give adequate justificatory reasoning as to why we should submit our actions to the restrictions placed upon them by law.

In attempting to justify the incorporation of morality into the law in this way however, Raz does take a step in the right direction; namely, through the adoption of an internal viewpoint. The capacity of individuals to choose one of multiple possible courses of action based on the desirability of the outcome is a fundamental aspect of our behaviour, as is the adoption of a particular practice as a norm. This process of choice and adoption of a particular limitation on our actions is an undeniable feature of the naissance of a legal system. Embracing the internal point of view in such a way is the equivalent of endorsing both a particular pattern of behaviour and the practices which result in them.<sup>77</sup> The question posed to jurisprudence then can be phrased as follows: Is it possible to identify the motivational factor which causes individuals to adopt and endorse a

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<sup>75</sup> *ibid* 122 - 123

<sup>76</sup> Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (Oxford University Press 1999) 83 - 89

<sup>77</sup> Berteau (n 31) 73



particular pattern of behaviour as the basis of a legal system? Such a factor must emerge from the internal point of view and must be one which is capable of generating categorically binding norms of conduct upon those against whom it is addressed.

#### **4 Conclusion.**

This chapter has, again, been purposefully broad in its scope, and has had as its objective to explain to the reader why the remainder of the thesis has chosen to focus on the debate of inclusive normative positivism as opposed to non-normative positivism. It has firstly attempted to demonstrate, with reference to the philosophy of language, that legal philosophers necessarily consider the same subject when making their enquiries. Arguments that the meaning of language employed within jurisprudence is open to debate has been explored with reference to Wittgenstein and Kripke, and this claim has been shown to be fallacious. Words can be seen to possess a clear normative meaning, and to misconstrue that meaning is to engage in semantics at the expense of rational legal argument.

Having demonstrated the existence of a linguistic normativity which is contained within the meaning of the word 'law', this chapter introduced the idea that Exclusive Legal Positivism is incapable of convincingly explaining the origin of the normative force which motivates the subjects of law to conform to the requirements of a rule which claims to be legal in nature. It has then moved to introduce a how Inclusive Positivism attempts to circumvent this problem. As has previously been mentioned, specific examples of these theories will be assessed in detail for the extent to which they fulfil their objectives later in this thesis. Yet based on these preliminary observations it seems evident that a more persuasive means of explaining legal normativity is required. This normative basis must provide an explanation of why individuals feel obliged to follow a legal rule, why they should feel bound to accept the deliberative functioning of their Rule of Recognition and why officials within the system would also accept this secondary rule. In this sense, the normative basis should be capable of explaining the linked concepts of validity and efficacy to all against whom it is

addressed. It is the position of this thesis that such a normative basis can be found in the PGC provided by Alan Gewirth, and therefore in Natural Law. The following chapter will establish why the PGC should be seen as such a principle, grounding it firmly in a Kantian ideal of the person.

# Chapter Three

## The Gewirthian Solution.

### 1 Introduction.

Should a given individual be transplanted from the early twentieth century to the present day, they would in all likelihood be amazed at just how much society had progressed. Technological advancements in areas such as transport, communications and entertainment which we take for granted appear almost unimaginable when viewed from the perspective of a mind formed by the nineteenth century. Yet, should our individual be actively engaged in jurisprudence they may find the landscape of the early twenty-first century remarkably familiar, still dominated as it is between the two schools of Natural Law and Legal Positivism and their competing justifications for the normative force of law. Although terminologies may have changed and new modified theories might have emerged on each side, the same concern – a satisfactory explanation of the relationship between law and morality – is still under rigorous debate.

This is problematic, for, as our technological capacities have increased, so have the means by which we are able to detrimentally interfere with one another's existence. Yet the theoretical reasoning underlying the operation of our legal systems – the very means by which human interaction is regulated by the state and other bodies – has remained static. This theory is grounded on the assumption that, for a large part, this is the result of a failure to identify a truly universal moral code as opposed to one grounded in the subjective terms of a particular era or geographical location, one which could be rationally accepted by all people regardless of their subjective viewpoints. The issue was put succinctly by American philosopher Alan Gewirth in the preface of his 1978 book 'Reason and Morality':

In a century where the evils that man can do to man have reached unparalleled extremes of barbarism and tragedy, the philosophic concern with rational justification in ethics is more than a quest for certainty. It is also an attempt to make coherent sense of persons' deepest concerns about the principles that should govern the ways they treat one another.<sup>1</sup>

The extent to which a moral theory such as that proposed by Gewirth is genuinely of use to a theory relating to the normative foundation of law is debatable; as Torben Spaak identifies, in the real world it is the case that law 'necessarily claims to *trump* moral and other reasons for action'.<sup>2</sup> In addition, it is rarely the case that, in courtroom situations where a conflict arises between law and morals, judges – in their capacity as legal officials – will recognise the latter as legally relevant.<sup>3</sup> We have come across the problem identified in the abstract of this thesis, that it is impossible that  $(R_L x, \Phi \ \& \ R_M x, - \Phi)$ , and it appears the positivist assumption that that the law claims exclusionary authority over moral concerns is the most commonly accepted solution.

This thesis will argue against this position, suggesting that Gewirth's moral theory is directly relevant to identifying a rational normative grounding for any successful legal system. It will therefore aim to demonstrate the dialectical necessity of the statement  $(R_M x, - \Phi) > (R_L x, \Phi)$  if the PGC can be demonstrated to be necessarily linked to the concept of law. Such a link has been sketched in the previous chapter, which attempted to establish the linguistic necessity of a unified theory of norms; the problem we are thus faced with is the common problem faced by all theories of natural law. In order for such theories to be successful, two requirements must be met:

- 1) We must accept the doctrine of moral realism; and
- 2) Moral truths must be identifiable by human reason.

This chapter will attempt to demonstrate that these two requirements can be provided by the PGC. It will begin by arguing Gewirth's Principle of Generic

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<sup>1</sup> Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978) ix

<sup>2</sup> Torben Spaak, 'Kelsen and Hart on the Normativity of Law' in Peter Wahlgren (ed), *Perspectives on Jurisprudence; Essays in Honour of Jes Bjarup* (Stockholm Institute for Scandinavian Law 2005) 399-400

<sup>3</sup> *ibid*

Consistency, developed in his 1978 *Reason and Morality*<sup>4</sup> and significantly expanded upon in subsequent works, is capable of meeting the first in that it establishes a dialectically necessary argument by which all agents are committed to recognising a principle of moral permissibility. It will then move on to address the second requirement, demonstrating that these arguments are grounded in a sound conception of reason which rests on Kant's conception of the Categorical Imperative.

## 2 The Dialectical Necessity of Morality

A large part of the positivist denial that law and morality are concepts which are necessarily linked is in part based upon theorists' belief that it is impossible to identify a truly objective and universal set of moral values which would be acceptable to all individuals regardless of their subjective considerations. Alan Gewirth, in formulating his PGC, attempts to overcome this problem by grounding a supreme moral principle on a purely rational basis. In doing so he is directly confronting intuitionist morality with its claims of moral self-evidency, and conventionalist morality's claims that certain principles underlying the morality of a given culture can be used to elucidate upon specific moral rules and judgements.<sup>5</sup> He instead views and defines morality as unique in guiding action in that it imposes requirements which take precedence over all other modes of guiding action, including legal obligations and even self-interest:

...[A] morality is a set of categorically obligatory requirements for action that are addressed at least in part to every actual or prospective agent, and that are concerned with furthering the interests, especially the most important interests, of persons other than or in addition to the agent or the speaker. The requirements are categorically obligatory in that compliance with them is mandatory for the conduct of every person to whom they are addressed regardless of whether he wants to accept them or their results, and regardless also of the requirements of any other

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<sup>4</sup> Gewirth n.1

<sup>5</sup> Gewirth n.1, ix - x

institutions such as law or etiquette, whose obligatoriness may itself be doubtful or variable.<sup>6</sup>

It is this other-regarding concern applying to all agents which forms the basis of the PGC, the workings of which are explored in more detail below. This section will attempt to demonstrate that, far from being contingent to the operation of law, only a categorically binding and dialectically necessary moral principle such as the PGC can provide the normative grounding necessary for a legal system to successfully claim authority over those to whom it is addressed.

## **2.1 The workings of the Principle of Generic Consistency**

Gewirth believes that, unlike the scientific method favoured by Kelsen, moral judgements cannot rely on empirical facts or observations to check their truth and objectivity without question-begging moral rightness or the correctness of the moral judgement in question. He calls this problem that of ‘the correspondence correlate’ or of ‘the independent variable’; are there any independent variables against which the correctness of moral judgements can be correctly determined?<sup>7</sup> Gewirth argues that any attempt to locate such an independent variable should be grounded in something which is universally possessed by any individual against whom such a moral principle is addressed. He argues that the very idea of action (and the noumenal agency required for its pursuit) should therefore be seen as a potential source of moral principle, as the concept of action possesses two generic features relevant for moral discourse:

- a) Voluntariness: Conduct must be externally sourced (i.e.: not caused by reflex or disease) and not caused by either direct or indirect compulsion; and
- b) Purposiveness: Actors have goals which constitute their reason for acting.<sup>8</sup>

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<sup>6</sup> *ibid* 1

<sup>7</sup> *ibid* 5

<sup>8</sup> *ibid* 27-37

Such a grounding in the fact of agency<sup>9</sup> forms the beginning of a sequence of logically progressive statements which create a dialectically necessary morality applicable to all agents – the PGC. Such a dialectically necessary method starts with the descriptive statement ‘I do X for purpose E.’<sup>10</sup> as demonstrated by the features of agency discussed above, and expanded upon by Beyleveld in order to more clearly demonstrate the progression of the argument:

Stage 1 (RM 22-63): A PPA<sup>11</sup> claims by definition:

i) I do (or intend to do) X voluntarily for some purpose E

By virtue of making this claim, the PPA rationally must consider that (claim) in the logical sequence.

ii) E is good;

iii) My freedom and wellbeing are generically necessary conditions of my agency

iv) My freedom and wellbeing are necessary goods.

Stage 2 (RM 63 – 103): By virtue of having to accept (iv), a PPA must accept:

v) I (even if no one else) have a claim right (but not necessarily a moral one) to my freedom and wellbeing.

Stage 3 (RM 104-98, esp. 104-28): By having to accept v) on the basis of i), the PPA must accept:

ix) Other PPAs (PPAOs) have a (moral) claim right to their freedom and wellbeing.

If this is the case, then every PPA must claim, by virtue of being a PPA,

xiii) Every PPA has a (moral) claim right to its freedom and wellbeing,

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<sup>9</sup> The centrality of the capacity, or agency, of the individual to the operation of law is recognised by both Kelsen and Hart, as discussed above in ss. 2.3 and 3.2 respectively.

<sup>10</sup> Gewirth n.1, 43

<sup>11</sup> Prospective Purposive Agent

Which is a statement of the PGC.<sup>12</sup>

This argument requires some unpacking in order to ensure that any ambiguities are removed. Firstly, that statement i) entails statement ii); statement ii) is to be read as ‘because I think E is good’, which is not the same as claiming that E is objectively good. This differential, made from the internal viewpoint of the agent,<sup>13</sup> lends the argument dialectic rather than asseroric character. Secondly, the voluntariness of statement i) entails statements iii) and iv), holding that agents necessarily make an evaluative judgement about the goodness of freedom and wellbeing required for them to pursue E. As these conditions are necessary for E to be successfully pursued, a deontic judgement is made which claims rights to freedom and wellbeing; as all agents necessarily must make this claim by the very fact of their agency, rights to freedom and wellbeing must be universal amongst all agents.<sup>14</sup> The bare minimum this form must take is that agents must expect that others should refrain from interference in their rights;<sup>15</sup> if an agent therefore makes claim rights to freedom and wellbeing, as they are logically committed to doing, they are also logically committed to recognising a supreme principle of morality – namely against action which harms the freedom and wellbeing of an agent.<sup>16</sup> To do otherwise would be to condone non-consensual interference in an agent’s own rights, which they are logically precluded from doing.

It should be noted however that at this stage in Gewirth’s argument, the ‘right’ and ‘ought’ are not in and of themselves moral claims. They may have other normative foundations, such as pragmatism or aesthetics; for until consideration of others’ interests outside the agent, without the principle of reciprocity and interaction, no moral principle is brought into play.<sup>17</sup> It may be asked then, why such claims to freedom and wellbeing should be classified as rights at all; why

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<sup>12</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality; An Analysis and Defense of Alan Gewirth’s Argument to the Principle of Generic Consistency* (University of Chicago Press 1991) 14

<sup>13</sup> A viewpoint which is central to, for example, the theories of Hart and Kelsen.

<sup>14</sup> Gewirth n.1, 48-52

<sup>15</sup> This claim mirrors Kelsen’s claims that legal systems often share a minimum common factor in that one act which is generally prohibited is interference in another’s pursuit of an end which is not expressly prohibited by law.

<sup>16</sup> Gewirth n.1, 63-64

<sup>17</sup> *ibid* 69



not rather see them as egoistic demands? Gewirth suggests that is because rights, unlike demands, require certain criteria be fulfilled which are supplied by the PGC as laid out by Beyleveld above:

- a) Rights claims must be grounded in a valid, legitimate and justifiable claim based on entitlement.
- b) Such entitlement must be grounded in valid rules or other identifiable reasons.
- c) Rights claims require a community to be addressed towards which understands the legitimacy of the rules or reasons upon which the rights claim is based;
- d) Such a community must be both legal and political in nature.<sup>18</sup>

The initial rights-claim therefore exists because the goods of freedom and wellbeing are not necessary for a specific act (E), but are required for action itself. It is therefore impossible to waive these specific rights and remain an agent; since non-interference is therefore necessary for action itself, such goods must be claimed as rights.<sup>19</sup>

It is therefore suggested that the PGC established by Gewirth, with its two meta rights of freedom and wellbeing for all agents, can provide the normative foundation of law. It does so based on the dialectically necessary argument thus presented, in that the PGC has demonstrated itself to be categorically binding on all agents by the necessary fact of their bare agency. Any attempt by agents to deny that they are bound to accept the PGC as imposing an absolute and exclusionary limitation on their action fails for two interlinked reasons:

- 1) Should an agent seek to deny that they are bound to respect the rights of other agents as per the PGC, the result of their doing so is that they deny the importance of their own agential rights.
- 2) This claim is a logical contradiction in that they are making a claim to their agential rights in the very act of denying their importance.

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<sup>18</sup> *ibid* 71-72

<sup>19</sup> *ibid* 77

- 3) All agents are bound to respect the conditions of the PGC in order to avoid contradicting themselves by their actions.

It follows that only law that produces outcomes which would not contradict the rights enjoyed by agents should be seen as morally valid, and therefore capable of being accepted by the population as deserving to be respected and followed. For example, in any interaction between agent X and recipient Y, X participates voluntarily and it is therefore up to him to decide whether to pursue coerced or uncoerced interaction with Y.<sup>20</sup> However, in recognising his own ability to choose whether to participate in a transaction, X must also recognise that all recipients – including Y – also have a choice in whether or not they wish to participate. Should X take it upon themselves to remove the choice from Y, this does not remove the acknowledgement that the choice exists; it therefore contradicts their rights to freedom and wellbeing, and goes against the requirements of the PGC<sup>21</sup> and should not form the basis of any law which seeks to maximise its efficacy amongst those against whom it is directed.

The PGC may therefore be formulated simply as follows; ‘Act in accord with the generic rights of your recipients as well as those of yourself.’ To deny this principle is a logical contradiction, as you claim rights which you possess by virtue of your agency, whilst simultaneously claiming that those rights are not enjoyed by those who also possess that same agency. This makes Gewirth’s argument categorical, as it is impossible for an agent to shift the conditions of their own agency:

If A has  $\pi \rightarrow A$  has  $\epsilon$  BECAUSE of S, B has  $\pi \rightarrow B$  has  $\epsilon$  IS ALSO VALID in S.

A = Me,  $\pi$  = being a PPA<sup>22</sup>,  $\epsilon$  = claim right to F&W, B = PPAO<sup>23</sup>

PPAO  $\rightarrow \pi \Rightarrow \equiv$  PPAO  $\rightarrow \epsilon$  from internal viewpoint of PPA  $\therefore$  PPAO dialectically possesses  $\epsilon$ <sup>24</sup>

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<sup>20</sup> ibid 131

<sup>21</sup> ibid 134

<sup>22</sup> Prospective Purposive Agent

<sup>23</sup> Other Prospective Purposive Agent

<sup>24</sup> Beyleveld n.12, 44-45

## 2.2 Universal Morality in a Pluralistic World

A common mistake made by those who seek to dismiss the PGC is to assume that Gewirth attempts to prove a categorical imperative. This is not his task; he rather seeks to show that a PPA contradicts themselves if they choose not to act in accordance with the PGC.<sup>25</sup> It is admittedly similar to other supreme moral principles such as the categorical imperative expounded by Kant, but differs from this in two main ways. Firstly, it focuses on generic but specific rights rather than the Kant's open-ended indeterminism.<sup>26</sup> Secondly, it avoids the difficulty of relativism and associated critiques by proceeding from the cognitive standpoint of the agent.<sup>27</sup> The PGC is therefore universalisable based on the logic that if a Predicate (P) belongs to a Subject (S) because of a Quality (Q), all S who have Q possess P.<sup>28</sup> Therefore, all S who are PPAs possess generic rights to freedom and wellbeing. Such a statement is dialectically necessary in that it is relative to what all agents must logically accept for themselves,<sup>29</sup> and universal in that all human beings are capable of rational autonomy and are therefore PPAs.<sup>30</sup>

It may be argued that the argument that being a PPA is enough to claim generic rights – something Gewirth refers to as the Argument for the Sufficiency of Agency<sup>31</sup> - when coupled with the observation that all human beings are capable of rational autonomy and are therefore PPAs, blurs the universalisation claimed by Gewirth into an objective claim rather than a universally applicable instrumental reason. This will make many sceptical of such claims, as it is often difficult to persuade individuals of objective morality in a morally pluralist world.

In order to address this critique, Gewirth argues that it is important to distinguish positive from normative morality. Positive morality concerns itself with rules or

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<sup>25</sup> *ibid* 15

<sup>26</sup> Gewirth n.1, 169

<sup>27</sup> *ibid* 161

<sup>28</sup> *ibid* 105

<sup>29</sup> Alan Gewirth, *The Community of Rights* (University of Chicago Press 1996) 16

<sup>30</sup> Gewirth n.1, 138

<sup>31</sup> *ibid* 110 - 114

directives held as categorically obligatory, and is often found in customary ways of acting which are empirically identifiable. By contrast, normative morality concerns moral precepts, rules or principles that are valid and ought to be upheld *as* categorically obligatory. Unlike customary positive moralities, normative precepts exist independently of personal belief and are rationally identifiable through reason. Certain standards of moral rightness, such as the PGC, are simply universally valid; no alternative or mutually valid principles of what is genuinely morally right can coexist with its dialectical necessity.<sup>32</sup> To insist on cultural pluralism in light of normative morality entails one of two arguments. Firstly, one may argue that normative morality cannot exist; the only standards are a series of positive moralities – a line taken by both Kelsen and Hart. This is countered by Gewirth with the observation that such a view is simplistic and ignores pluralism within cultures,<sup>33</sup> along with a reiteration of the dialectical nature of the universalisation which takes place within the PGC:

The argument depends on the recognition that *action* is the universal and necessary context of all moralities and indeed of all practice. For all positive moralities and other practical precepts, amid their vast differences of specific contents, are concerned, directly or indirectly, with telling persons how they ought to act, especially toward one another. In addition, all persons are actual, prospective or potential agents, and no person can reject for herself the whole context of agency, except, perhaps, by committing suicide; and even then the steps she takes to achieve this purpose would themselves be actions. The general context of action thus transcends the differences of the various positive cultures and moralities.<sup>34</sup>

Secondly, it may be countered that this appeal to the ‘rational’ is itself culturally grounded in Western morality. Any universalisation therefore is culturally grounded, rather than truly universal. To this, Gewirth would respond that any ‘objective’ morality may only be identified through deduction and induction, and would be empirically ineluctable. Appeals to other forms of reasoning, such as

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<sup>32</sup> Alan Gewirth, ‘Is Cultural Pluralism Relevant to Moral Knowledge?’ (1994) 11 (1) *Social Philosophy & Policy* 22, 22-24

<sup>33</sup> *ibid* 25-26

<sup>34</sup> *ibid* 27

religious faith, are themselves only justifiable by reference to deduction and induction. These principles of induction and deduction may themselves be justified by myth or faith, but such justification must itself operate on a level of induction or deduction. Gewirth therefore feels able to conclude that ‘rational moral knowledge is epistemically relevant to cultural pluralism, but not conversely.’<sup>35</sup>

Lastly, the PGC may be criticised as being grounded in Western values of Individualism. The terminology of ‘rights’ emerged in fourteenth century Europe, and the adoption of such terminology ignores the existence of societies and philosophies whose focus is more communitarian in nature. Gewirth may return with the observation that this presumes the non-existence of any normative morality, which again suggests a misunderstanding of the operation of the PGC on the behalf of those who argue it.<sup>36</sup> Secondly, the concepts of rights and agency clearly predate the fourteenth century even if the specific terminology does not.<sup>37</sup> Lastly, societies are made from the choices and acts of individuals acting together; the whole point of rights is to protect them from undue persecution from the community as a whole – to criticise rights as individualistic therefore misses the point.<sup>38</sup>

There are many more such critiques which may be raised regarding the extent to which it is ever possible to rationally identify a supreme moral principle, but limitations of space mean I am unable to discuss them here – they will, however, be introduced in some detail in the next chapter. The issues I included in this discussion have been chosen as they are directly pertinent to the direct workings of the PGC itself.

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<sup>35</sup> *ibid* 30-32

<sup>36</sup> *ibid* 33-35

<sup>37</sup> Gewirth n.1, 77

<sup>38</sup> Gewirth n.32, 33-35

## 2.3 From Moral Principle to the Foundation of a Legal System

The previous sub-section has attempted to demonstrate that the PGC operates as a universally applicable principle of instrumental reasoning, acting similarly to a categorical imperative to bind all agents to act in accordance with its requirements at pain of contradicting their own agency. We must now turn to address the implications of such a principle for the notion of legality. This will be addressed in three stages. Firstly, the necessary link between legality and the PGC will be demonstrated with reference to the agreed referent identified in Chapter Two of this thesis. Secondly, the connection between the PGC and legality will be identified within the scope of a Rule of Recognition. Lastly, the extent to which PGC compliant law can be seen to be compatible with legal pluralism, the Rule of Law and adjudicatory principles will be addressed in order to demonstrate the practical applicability of the theoretical connection.

In order to firstly ascertain the relevance of the PGC to the concept of law, let us first return to a discussion at the beginning of Chapter Two and remind ourselves of the agreed referent for the concept of law which forms the basis of this enquiry. As has been addressed, such a referent must allow for a plurality of realistic conceptions whilst excluding any non-plausible interpretations of the term in order to be acceptable to all parties within jurisprudential dispute.<sup>39</sup> The referent that this thesis believes meets this criterion is identified by Beyleveld and Brownsword, who hold that Law is ‘the enterprise of subjecting human conduct to the governance of rules’.<sup>40</sup> This referent notes that law has a normative element in that it aims to guide human conduct yet remains silent as to the source of the normative claim made by legal rules, thus being acceptable as a starting point for an enquiry attempting to locate this source of normativity.

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<sup>39</sup> Stuart Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh University Press 1993) 65; Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet and Maxwell 1986) 119

<sup>40</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet and Maxwell 1986)120; emphasis added to denote referent.

The starting point for such an enquiry should be to unpack a necessary feature of the referent; if the purpose of law is to subject human conduct to the governance of rules, then the rule in question must be capable of succeeding in the enterprise of guiding action in order to meet the criterion. Any rule attempting to guide human action must therefore give the agent to whom it is addressed adequate reason for compliance with its requirements in order to be successful and, by extension, meet the criteria contained within the referent. In thus requiring a reason for compliance, we can see clearly that law operates at the level of practical rationality and instrumental reason. This statement locates the success of a rule in becoming law at the level of practical rationality, thus necessitating that the referent operates on the same normative plane as the PGC. Since the PGC operates as a categorical imperative which all agents are required to follow, it is therefore an absolute and exclusionary reason not to behave in a non-compliant manner. Since a rule must be capable of providing a reason to be followed in order to possess the criterion necessary to be described as law, it follows that a rule which is not PGC compliant is incapable of meeting this success criterion and therefore cannot be described as law in a meaningful sense of the term. All law must therefore be PGC compliant if it is to succeed in subjecting human conduct to the governance of rules. This is necessary given that the PGC is presupposed by all practical reason; if law belongs to the deliberative stage of practical reasoning, as is necessitated by the referent above, it follows that the PGC is the supreme principle of all practical, moral and legal reason.<sup>41</sup>

Reference to the PGC is therefore necessary to ascertain the legal status of a rule.<sup>42</sup> It follows that the PGC must be incorporated within any test for the legal validity of a given norm, what Hart might refer to as the 'Rule of Recognition'. This thesis endorses the Rule of Recognition proposed by Beyleveld and Brownsword:

For us, a rule is legally valid only if there is an act moral right to posit the rule for attempted enforcement. There is only an act moral right where:

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<sup>41</sup> *ibid* 189

<sup>42</sup> *ibid* 190

- i) There is authority under the [Principle of Generic Consistency] to posit the rule for attempted enforcement; and
- ii) The norm prescribed by the rule involves no substantive violation of the PGC's act morality.<sup>43</sup>

This Rule of Recognition contains two distinct components, both of which are necessary for the legal validity of a given norm. The first criterion is aimed at legal officials, and the second at the agent to whom a rule which claims legal validity is addressed. The implications of each of these criteria for legal validity will be considered in turn.

Firstly, in addressing the legitimacy of the role of legal officials in a legal system, our first criterion governs when an official is capable of possessing the authority to issue a binding legal norm. Beyleveld and Brownsword consider three categories of how this claimed authority can be exercised: where the act of the authorised agent is PGC compliant, where the act of the authorised agent is based on a sincere attempt to successfully apply the PGC, and where the act of the authorised agent is not based on a serious attempt to apply the PGC. These are referred to as theoretical authority, practical authority and an abuse of authority respectively.<sup>44</sup> In order to possess legitimate authority to create a legal norm, the official in question must therefore possess either theoretical or practical authority<sup>45</sup> – any action which does not ought to be considered ultra vires, and incapable of generating binding legal norms.<sup>46</sup>

In this sense, the PGC acts as a limitation on the ability of officials to create legal norms. This is a feature which exists in many legal systems, and ought not to be dismissed as undue moral limitation on the ability of a legislator to create positive norms. Many legal systems possess constitutional provisions or Bills of Rights which limit the authority possessed by officials to create law – the PGC is

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<sup>43</sup> *ibid* 328

<sup>44</sup> *ibid* 292-293

<sup>45</sup> *ibid* 297-298

<sup>46</sup> *ibid* 293



therefore acting in a similar capacity in requiring this first criterion of legality,<sup>47</sup> in that it

[S]ubjects legal officials to the regime of a particular role-morality – the morality of subjective agent moral rights. And, secondly, the specific force of practical authority hinges on the distinction between subjective and objective agent moral rights and the idea of rational defensibility in particular.<sup>48</sup>

In doing this, the first criterion identified here allows a community to legitimately propose rules necessary for social cohesion with an omnilateral voice capable of possessing authority to guide action.<sup>49</sup> Law is therefore able to legitimately guide society in a way which allows cohesion through the enforcement of morally permissible standards, and allows a legitimate means by which disputes as to these standards can be resolved.<sup>50</sup>

Next we will consider our second criterion, which requires that the norm in question itself involves no substantive breach of the PGC. It thus limits the substantive content of legal rules to those which are compliant with the requirements of the PGC. Yet a critic may here object that to substantively limit the content of legal norms is to ignore the fact of legal pluralism; that the content of legal systems does vary between systems, thus precluding a settled substantive content for legal norms. Such an argument is misplaced for two reasons. Firstly, it presupposes a positivist notion of legal validity in that it appears to hold that a law becomes law by dint of its being passed by a relevant body. Such a starting point is at odds with the agreed referent this thesis endorses, which makes no reference to the source of the normative force possessed by a given rule. Secondly, the PGC compliant Rule of Recognition suggested above does not serve to set a required content for a legal system, but to provide a test by which some rules are necessarily excluded from the realm of legal normativity should their substantive requirements be non-compliant with the PGC. It is instead a

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<sup>47</sup> *ibid* 303

<sup>48</sup> *ibid* 302-303

<sup>49</sup> Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart 2009) 161-162

<sup>50</sup> *ibid* 166-167

test for permissibility, and the scope of norms which may be permitted through compliance with the PGC remains broad. Beyleveld and Brownsword address this point when they identify three types of rule which can allow for rational and not unreasonable disagreement, whilst retaining the force of law:

1. A choice of rule where the PGC allows multiple outcomes, but one must be chosen – such as a decision as to which side of the road to drive on;
2. A rule where the PGC gives different weight to different generic conditions of action and, by extension, the generic rights they generate, but where the extent to which these rights are affected is uncertain and disputed; or
3. A rule which requires a complex application of the PGC which may give rise to reasonable doubt about the veracity of the PGC-compliance of the rule.<sup>51</sup>

Another reason as to why legal pluralism is not just possible but unavoidable within a legal system governed by a PGC compliant Rule of Recognition can be found in the fact that the application of the PGC is necessarily context specific; it is a general principle rather than a context bound rule, meaning that the permissibility of an action is dependent on the circumstances in which it takes place. The example is given of a Society A, in which food is scarce, and Society B, where food is plentiful. A rule which allows citizens to retain crop production which is surplus to their requirements would be permissible in Society B, but not in Society A – where a result of the rule would be the starvation of citizens who are unable to feed themselves.<sup>52</sup> These examples serve to demonstrate that the PGC serves to answer the question of whether a rule is legally permissible; since permissibility is not the same as prohibition, it is a fallacy to suggest that the PGC does not accurately describe the nature of law due to its proscriptive nature. This can be seen through the fact that the PGC does allow for reasonable pluralism with regards to the substantive content of a legal system, provided that the rules in question do not breach the substantive content of the PGC.<sup>53</sup>

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<sup>51</sup> Deryck Beyleveld and Roger Brownsword, 'Principle, Proceduralism and Precaution in a Community of Rights' (2006) 19 (2) *Ratio Juris* 141, 147-148

<sup>52</sup> Beyleveld and Brownsword (n 40) 190

<sup>53</sup> *ibid* 190-191

This connection may seem to be too neat for some to be acceptable as a meaningful connection between law and morality. In order to circumvent this objection, this section will continue to address the connection with reference to the concept of the Rule of Law. The Rule of Recognition identified above serves to protect the Rule of Law in both its procedural and substantive conceptions in the first and second criteria contained within it respectively. The former, according to Beyleveld and Brownsword, would allow for the procedural concerns addressed by Lon Fuller's eight desiderata of law to be addressed.<sup>54</sup>

[T]he PGC encourages the development of a supportive context for action. It is essential, therefore, that official action be congruent with the public framework of rules if citizens are to be able to plan on a rational basis. Reliance upon the rules must be protected, and expectations engendered by the rules must not be frustrated by perverse official administration.<sup>55</sup>

The second criterion addresses substantive Rule of Law concerns in providing that the Generic Conditions of Agency of all agents within a political community are protected by the substantive limitations on the content of a rule proscribed by the PGC. Thus, congruity is reached between the governors and the governed with regards to subjects' expectations as to the nature of officials' conduct.<sup>56</sup>

These PGC compliant elements of the Rule of Law would, of course, need to be upheld by a functioning system of adjudication. Such a system is necessary in a society where complex applications of the PGC may not always give a concrete answer,<sup>57</sup> or where rapidly developing technology requires regular regulatory updates to ensure the PGC compatibility of the relevant legislation.<sup>58</sup> It is first worth noting that, as is required of all officials by the first criterion of legality above, a judge must act in compliance with the PGC in order to give his judgments the legal authority they necessarily claim. Judges are therefore under

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<sup>54</sup> *ibid* 316-324

<sup>55</sup> *ibid* 322-323

<sup>56</sup> Henrik Palmer Olsen, 'Fidelity to International Law' in Patrick Capps and Shaun D Pattinson (eds) *Ethical Rationalism and the Law* (Hart 2017) 199

<sup>57</sup> Beyleveld and Brownsword (n 51), 148

<sup>58</sup> *ibid* 154

an obligation to make serious attempts to apply the law correctly in order for their judgments to possess normative force.<sup>59</sup> They must make a sincere and serious attempt to locate the facts and apply the PGC correctly, expend a reasonable amount of time doing so,<sup>60</sup> and observe other relevant procedural conditions for judging such as publishing a clear and intelligible decision based on ‘a sincere and serious attempt at reasonable justification’.<sup>61</sup> This adjudicatory framework would be ensured through the adoption of such widely accepted legal maxims as *audi alteram partem* and *nem iudex in causa sua*.<sup>62</sup> A key feature of this mode of judicial adjudication should at this stage be stated explicitly. The necessity of incorporating the PGC into any definition of legality demonstrated above requires us to abandon the orthodox position that judges should be precluded from moral interpretation of the law. The opposite is instead obligatory; in order for judgments to possess normative force within the realm of deliberative rationality, judges must assess the extent to which the rule claiming legal status is itself PGC compliant. Moral judgment is therefore an essential part of any legal deliberation should it be the case that morality necessarily defines the scope of the ‘legal’.<sup>63</sup>

The purpose of this section has been to demonstrate that the agreed referent introduced as the subject of our enquiry in Chapter Two of this thesis necessitates that the law operates on the level of practical reason. As the PGC also operates at this level, its operation as a categorical imperative requires legal rules to be compliant with its requirements in order to possess the authority they require to guide our action. The PGC therefore necessarily forms part of a Rule of Recognition which exists to test the legal status of a proposed rule. Legal obligations are therefore moral obligations, and legal rights are moral rights.<sup>64</sup> A necessary link between law and morality has therefore been demonstrated. The remainder of this section will address some possible criticisms of the connection which has been established.

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<sup>59</sup> Beylveld and Brownsword (n 40) 386

<sup>60</sup> *ibid* 386

<sup>61</sup> *ibid* 386 n 6; 402-403

<sup>62</sup> *ibid* 393

<sup>63</sup> *ibid* 401

<sup>64</sup> *ibid* 211-213

An initial objection which should be addressed here is the observation that, should the PGC be necessary to a Rule of Recognition, a system may arise which appears close to utilitarianism in its nature. If all mankind are PPAs, a single PPA must consider all mankind in ascertaining the moral perceptibility of an action – and if all mankind is to be considered, what is the difference between the PGC and Utilitarianism?<sup>65</sup> Gewirth would identify the following differences:

- a) The PGC prescribes an objective and identifiable end through a dialectically necessary method; there is no room for subjective value judgements on utility.
- b) The PGC is more limited; an objective limit exists to the duties which correlate with positive rights.
- c) The PGC imposes duties to help those who cannot help themselves, rather than legitimising action merely to maximise benefit to the community.
- d) Conflicts of rights legitimised by the PGC are not solved by appeal to utility maximisation, but by a cost-benefit analysis on which right best promotes the equal agency of all PPAs; those which are more essential to agency take priority.
- e) The purpose of the PGC is to ensure necessary conditions of agency are available to all PPAs rather than the majority; it is distributive, not aggregative.<sup>66</sup>

We can therefore see then that, unlike utilitarian theories of morality or material deontologies, the PGC is self-justifying due to inconsistencies created by an infringement of distributive mutuality in violating the generic rights of others whilst relying on one's own to do so. The PGC therefore does not ask an agent to apply generic rights to recipients, but render them in proportion with his own.<sup>67</sup> As such, we can see that the equality of generic rights requires 'at least mutual abstention from coercion and harm.'<sup>68</sup> a principle which, as our discussion of Kelsen in Chapter Four establishes, we find in many legal systems.

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<sup>65</sup> David Cumminsky, 'Gewirth's Kantian Consequentialism' in Michael Boylan (ed), *Gewirth: Critical Essays on Action, Rationality and Community* (Rowman & Littlefield 1998) 128

<sup>66</sup> *ibid* 128 - 129

<sup>67</sup> Gewirth (n 1) 203-204

<sup>68</sup> *ibid* 207

Should the PGC be adopted within a viable Rule of Recognition, its effects may be more easily identifiable in some spheres of law than in others. For example, criminal law can be seen as clearly necessary to uphold the rights of all members of society. It also provides punishments through retributive justice whose primary purpose is to redress inequalities which emerge from criminal activity (equality being non-interference in others' basic rights).<sup>69</sup> Similarly, legal defences against criminal charges may also be legitimised by reference to the PGC – for example violence may be used in self-defence if no other means of protecting rights exists, as this is not an infliction of harm but an attempt to restore the equilibrium of non-harm.<sup>70</sup> The PGC can also be used to justify civil unrest and disobedience should a law be rationally proven to be morally wrong by reference back to itself.<sup>71</sup>

But as the PGC can provide both positive and negative rights, it may also produce positive and negative legal obligations in its role within a Rule of Recognition. The purposiveness in the statement 'I do X for purpose E' requires three types of good, thus requiring law to impose both positive and negative duties on those to whom the PGC would be directed in its role as a Basic Norm:

- a. Basic Goods, which provide basic wellbeing required for action. These include life, physical integrity (including requisite food, shelter and the like), mental equilibrium and personal confidence that one's ends may be achieved.
- b. Nonsubstantive Goods, which require that an agent's purpose fulfilment is not lowered by ensuring agents retain and do not lose what they already possess and see as a good.
- c. Additive Goods, whose aim is the amelioration of purpose fulfilment by allowing action whose aim is to increase the goods attained.<sup>72</sup>

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<sup>69</sup> *ibid* 294, 298

<sup>70</sup> *ibid* 213-215

<sup>71</sup> *ibid* 322-333

<sup>72</sup> *ibid* 53-56

Since PPAs logically must hold that PPAOs have a duty not to interfere in their freedom and wellbeing, a substantive principle of practical rationality ( $\alpha$ ) emerges which must form the underpinning of any law permitted with reference to the PGC:

My subjective viewpoint on practical reasonableness (SPR) for my purposes (or, more strictly, my SPR for PPAO's purposes, in consistency with my SPR for my purposes) must impose at least a prima-facie other-referring duty (a duty on PPAO) to at least refrain from interference with my freedom and wellbeing.<sup>73</sup>

Such a formulation, according to Beyleveld, can be universalised through a series of logical stages  $\alpha_2 - \alpha_4$ <sup>74</sup> to lead to the final substantive principle of practical rationality,  $\alpha_5$ : 'The SPR for its purposes of every PPA must specify that all PPAs have prima facie rights to their freedom and wellbeing.'<sup>75</sup>

Such a principle underpinning the PGC's operation as an indicator of the normative foundation of law can be used to justify both positive rights and, to continue this analogy, legal entitlements. This is not the same as to claim that everybody possesses absolute needs need or possess absolute obligations to fulfil the correlative duty; it merely holds that all should be treated appropriately when in true need, and a duty to act when they are in a position to do so at no substantial loss to themselves. The PGC may also serve to shift this burden predominantly upon the state itself, which would be in a better position to undertake such legal obligations than a collection of individuals.<sup>76</sup> Should a proposed legal rule therefore fail to pass the test of moral permissibility provided by the PGC, it should be rejected as lacking the authority necessary to direct the actions of those to whom it is addressed. Since the ability to direct the actions of its subjects is axiomatic to the concept of law, a non-PGC compliant rule is therefore incapable of meeting the necessary function of a legal rule, and cannot be called law in any meaningful sense of the word. It is only with PGC compliance that a legal norm can justifiably coerce individuals into compliance.<sup>77</sup>

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<sup>73</sup> Beyleveld (n 12) 51-52

<sup>74</sup> *ibid* 51-54

<sup>75</sup> *ibid* 55

<sup>76</sup> Gewirth, (n 29) Ch. 2

<sup>77</sup> Alan Gewirth, 'The Basis and Content of Human Rights' in J. Roland Pennock and John W Chapman (eds), *Human Rights – Nomos XXIII* (New York University Press 1981) 139

### 3 Identifiability in Kantian Personhood

In abstracting personhood to a conception of bare agency, Gewirth attempts to engage in a project of universalisation to provide a moral concept which will be acceptable to all. He acknowledges that this is necessary for any conception of rights which can function as universal norms:

For human rights to exist there must be valid moral criteria or principles that justify all humans, qua humans, have the rights and hence also the correlative duties.<sup>78</sup>

He believes that such a principle can only be located in the idea of action given that moral claims necessarily ‘consist directly or indirectly in precepts about how persons ought to act toward one another’, yet must be mind-independent in order to be true rights.<sup>79</sup> These two features are present in the dialectically necessary argument which he presents, which must logically be accepted by all agents on pain of contradiction. The Generic Conditions of Agency he identifies are described thus:

[F]reedom consists in controlling one’s own behaviour by one’s unforced choice while having knowledge of relevant circumstances, and well-being consists in having the other general abilities and conditions required for agency.<sup>80</sup>

This leads us to Gewirth’s formulation of his principle, ‘*Act in accord with the generic rights of your recipients as well as yourself.*’<sup>81</sup> This acceptance of this statement is Dialectically Necessary for all agents as:

Simply by virtue of being actual or prospective agents who have certain needs of agency, persons have moral rights to freedom and well-being. Since all humans are such agents having such needs, the generic moral rights to freedom and well-being are human rights.<sup>82</sup>

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<sup>78</sup> *ibid* 120

<sup>79</sup> *ibid* 124

<sup>80</sup> *ibid* 125

<sup>81</sup> *ibid* 131

<sup>82</sup> *ibid* 132



Thus phrased, Gewirth's principle should be viewed as acting as a categorical imperative on action. It is a synthetic a priori principle, a characteristic which renders it similar in both scope and foundation to the conception of the Categorical Imperative provided by Kant in his ethical writings. Beyleveld suggests that it is not a true Categorical Imperative in the sense that it only applies to agents who value their own agency, yet the dialectically necessary argument requires that all agents are required to accept it.<sup>83</sup> The logical implications of these descriptions are, however, almost congruent for the purposes of the law. In order to further establish how the PGC is able to function as a Categorical Imperative and be a necessary feature of legal validity, we should examine the Kantian conception of the person upon which such an imperative ultimately exists. This section will therefore begin by detailing how, for Kant, a Categorical Imperative attains its own normative force. It will then address the implications of such normative force on legal systems, before concluding with a rebuttal of some preliminary objections. Throughout the section, references will be made to the implications of the PGC on the discussion at hand as the issues arise.

### 3.1 The Centrality of Practical Reason

Kant, like Gewirth, believed that the authority of morality must depend on features that are inherent within rational agents.<sup>84</sup> Most famously, his Categorical Imperative from the Formula of Universal Law provides a test against which the permissibility of actions is to be assessed:

Act only according to that maxim through which you can at the same time will that it become a universal law.<sup>85</sup>

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<sup>83</sup> Deryck Beyleveld, "Gewirth versus Kant on Kant's Maxim of Reason: Towards a Gewirthian Philosophical Anthropology" in Per Bauhn (ed) *Gewirthian Perspectives on Human Rights* (Routledge 2016) Ch1

<sup>84</sup> Immanuel Kant, *Groundwork of the Metaphysics of Morals* (Mary Gregor and Jens Timmermann tr, rev ed, CUP 1998) 4:389-90, 4:400, 4:427, 4:442-3

<sup>85</sup> *ibid* 4:421

Both men therefore commit themselves to the claim that practical reasoning is itself capable of providing the foundation of moral norms. For Kant, the connection he identifies is – to some extent – axiomatic. He states that ‘One must *be able to will* that a maxim of our action become a universal law: this is as such the canon of judging it *morally*.’<sup>86</sup> Yet such a statement is far from controversial. Hegel criticised moral formulae in the abstract as nothing but empty formalism, as such principles removed any recognition of the features which are essential to full personhood.<sup>87</sup> Mill similarly felt that any deduction reached from an abstract maxim ‘fails, almost grotesquely’ if the only consequence of non-compliance were the fact of contradiction of the will.<sup>88</sup> Kant would rebut such considerations, claiming that the Categorical Imperative does the heavy work for him in providing substantive moral verdicts from formal deliberative procedure.<sup>89</sup> Kant is therefore committed to claiming that deliberative procedures and practical rationality are capable of producing moral norms which possess three features:

- 1) Inescapability, in that their application does not depend on their being convergent with the agent’s own interests;
- 2) Authority, in that their being requirements of reason renders non-compliance *prima facie* irrational; and
- 3) Supremacy, in that they operate to exclude all non-compliant conduct on the ground of irrational contradiction.<sup>90</sup>

We can see that Gewirth, in casting the PGC in practical rationality, must also commit himself to the same claims. So how can practical rationality be capable of creating such norms which can counter the criticisms put forward by, amongst others, Mill and Hegel? This is the question to which we will now turn.

Korsgaard identifies three principles as being essential to any understanding of practical reason. The first of these is Kant’s instrumental reason, which holds

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<sup>86</sup> *ibid* 4:424

<sup>87</sup> Georg Hegel, *Elements of the Philosophy of Right* (H.B.Nisbet tr, Allen Wood ed, CUP 1991) §135

<sup>88</sup> John Stuart Mill, *Utilitarianism* (Roger Crisp ed, OUP 1998) 51-52

<sup>89</sup> Mark Timmons, *Significance and System: Essays on Kant’s Ethics* (OUP 2017) 84

<sup>90</sup> David Brink, “Kantian Rationalism: Inescapability, Authority, and Supremacy” in Garrett Cullity and Berys Gaut (eds) *Ethics and Practical Reason* (Clarendon Press 1997) 255

that an agent has a reason to perform an action which will allow him to attain his ends. Such reasoning is usually given the label of a hypothetical imperative, in that it follows that if I want E, I have a reason to X. Secondly is the Principle of Prudence, which is connected to self interest in that I have a reason to do what is in my best interest. Such reasoning can also be construed as a hypothetical imperative, in that if E is in my best interests then I have a reason to X. Lastly are moral principles, which operate as categorical imperatives which declare that whatever my E, I must X.<sup>91</sup> The PGC operates on a similar logic to the latter in that, whatever my E, I must comply with its requirements though my very ability to do X. Moral principles are therefore located at the deliberative stage in that they place restrictions on other reasons which I might possess; practical reason is therefore an appropriate place to look for normativity.

A rationalist such as Gewirth would here conclude that the normativity of any instrumental principle comes from its logical necessity, in that it is a necessary or logical truth that an agent should agree to its precepts.<sup>92</sup> The PGC, being logically necessary, can also produce normative claims. Korsgaard suggests that this statement itself contains a concrete conception of practical rationality: '[T]o be rational is to deliberately conform one's will to certain rational truths, or truths about reasons, which exist independently of the will.' Yet this claim, for Korsgaard, is circular and does not provide us with any real justification as to why we should follow the guide of our will.<sup>93</sup> Yet this criticism is aimed at the idea of instrumental rationality generally; the PGC can survive the attack in that compliance with its requirements is dialectically necessary for all agents, thus providing the justification Korsgaard requires for adherence to the rationalist principles. The dialectical necessity of the PGC thus provides the normative foundation Korsgaard believes is required for an instrumentally rational reason to exert authority over our decisions.<sup>94</sup> This is a justification Korsgaard ought to accept. The PGC operates as a synthetic a priori principle which provides an instrumental reason for compliance, in that to act contrary is to deny ones agency

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<sup>91</sup> *ibid* 215-218

<sup>92</sup> *ibid* 218

<sup>93</sup> *ibid* 218-219

<sup>94</sup> *ibid* 220

and thus commit oneself to a paradox. If an imperative requires a synthetic proposition to provide means upon which it can operate,<sup>95</sup> the PGC has met this requirement. It might be objected that this account can only hold if the reasoning has a decisive influence on action,<sup>96</sup> yet the dialectical necessity of the PGC also allows it to rebut this sceptical claim.

Korsgaard may once more object that this justification of moral reasoning does not support a coherent account of rationality. Rationalism is presented as holding that facts exist external to an agent about what there is a reason to do, and that to be rational is to ensure our conduct is in conformity with these reasons. Yet rationalism, for Korsgaard, is incapable of giving us a reason to comply with these reasons.<sup>97</sup> The claim that to do what is right according to these external facts itself needs supporting, thus – Korsgaard believes – creating an infinite regress which fails to address why external claims should be internalised by an agent.<sup>98</sup> Such a characterisation of the PGC can again be dismissed, as the dialectical necessity of the argument requires all agents to internalise the principle on pain of contradiction of their own agential status. Since to even attempt to reject our agential status requires us to use our same status as agents, the PGC not only provides a reason why it should be internalised, but exceeds Korsgaard’s criticism and provides an inescapable obligation to do so.

The above categorisation of the PGC an inescapable instrumental reason is with Korsgaard’s claim that the reflective nature of human consciousness is the source of, and thus is necessarily central to the solution to, normative problems:<sup>99</sup>

If the problem is that morality might not survive reflection, then the solution is that it might. If we find upon reflecting on the true moral

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<sup>95</sup> *ibid* 235-236

<sup>96</sup> *ibid* 236

<sup>97</sup> *ibid* 240

<sup>98</sup> *Ibid* 241-242

<sup>99</sup> Thomas Nagel, “Universality and the Reflective Self” in Onora O’Neill (ed) *The Sources of Normativity* (CUP 1996) 200

theory that we still are inclined to endorse the claims that morality makes on us, then morality will be normative.’<sup>100</sup>

The necessity of the internalisation of the PGC therefore allows the moral principles which stem from it to be normative in the same way as Korsgaard believes her interpretation of Kantian ethics also possesses normativity. For she holds that normative questions must be answered in a way which addresses the agent who asks the question,<sup>101</sup> which the PGC obliges agents to do every time they act. Thus, the PGC complies with Korsgaard’s assertion that ‘[T]he reflective endorsement test is not merely a way of justifying morality. *It is morality itself.*’ and can therefore be viewed as imposing legitimate moral constraints on action.<sup>102</sup>

### 3.2 Kant and Law

Having explored the ability of the PGC to generate norms in line with Kantian conceptions of practical rationality, we may now proceed to ask what implications this might have on our understanding of law. A useful place to begin the discussion would therefore be to discuss Kant’s own ideas of legal obligations. In distinguishing between natural and juridical law<sup>103</sup> Kant has been characterised as some authors as belonging in the positivist tradition;<sup>104</sup> this is a conclusion which will be rejected as misunderstanding the implications of a rationally justifiable Categorical Imperative on all forms of action.

Our discussion will nonetheless begin with the claim, grounded as it is in a literal reading of the *Metaphysics of Morals*, that Kant firmly distinguishes between natural and juridical law. This thesis rejects the categorisation as misplaced; Kant actually states something more subtle, that juridical law itself contains both

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<sup>100</sup> Christine Korsgaard, “Reflective Endorsement” in Onora O’Neill (ed) *The Sources of Normativity* (CUP 1996) 49-50

<sup>101</sup> *ibid* 85-86

<sup>102</sup> *ibid* 89; italics original

<sup>103</sup> Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor tr, CUP 1996) 6:224

<sup>104</sup> Marcus Willaschek, ‘Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Laws in Kant’s *Metaphysics of Morals*’ in Mark Timmons (ed) *Kant’s Metaphysics of Morals: Interpretive Essays* (OUP 2002) 65-87

positive and natural in origin.<sup>105</sup> Kant holds that knowledge of natural law is necessary for judicial science and, when combined with empirical knowledge of the requirements of positive law, subsequent inquiries can be appropriately classed as jurisprudence.<sup>106</sup> Far from being a proto-positivist, Kant instead claims that a true knowledge of positive law is itself impossible without a firm grounding in the requirements of morality.

Kant holds that this necessary connection derives from the fact that action itself contains a law, in that unconditional practical principles are necessary regardless of the individual ends possessed by an agent.<sup>107</sup> Actions falling under this principle are therefore good intrinsically in that all agents must see them as so; for our purposes, it is worth noting that Kant appears to be describing here what Gewirth would call the ‘Generic Conditions of Agency’, namely freedom and wellbeing. Moral laws designed to protect these goods are also characterisable as unconditional practical principles in this sense, as action itself is intrinsically necessary for all ends and so should itself be seen as a good.<sup>108</sup> If moral laws definitionally take the form of a categorical imperative,<sup>109</sup> then we must conclude that judicial laws are necessarily normatively inferior to the moral law.<sup>110</sup> We have here sketched out an argument which is remarkably similar in form to the PGC; we should therefore see that Kantian conceptions of law as incorporating the Universal Principle of Right mirror those of the dialectical necessity of PGC compliant law:

Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.<sup>111</sup>

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<sup>105</sup> Kant (n 77) 6:224

<sup>106</sup> *ibid* 6:239

<sup>107</sup> Kant (n 58) 4:402

<sup>108</sup> Kant (n 77) 6:221

<sup>109</sup> *ibid* 6:223

<sup>110</sup> Ben Laurence, “Juridical laws as moral laws in Kant’s *The Doctrine of Right*” in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Reasons and Intentions in Law and Practical Agency* (CUP 2015) 208

<sup>111</sup> Kant (n 77) 6:230

This, for Kant, leads into the following claim:

[I]t cannot be required that this principle of all maxims be itself in turn my maxim, that is, it cannot be required that *I make it the maxim* of my action; for anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it. That I make it my maxim to act rightly is a demand that ethics makes on me.<sup>112</sup>

Kant thus claims that juridical laws cannot possess any obligation independently in that they concern purely external relations between the choices of separate agents. It is only when they are internalised through rational deliberation, as discussed in the previous section, that they are capable of possessing normative force. Since the process of internalisation requires the juridical rule in question to be in conformity with the PGC in order to be accepted by the agent as possessing normative character, the rule cannot possess normative force unless it is PGC compliant.

It is this concept of right, in conformity with the moral law, that Kant grounds legal normativity.<sup>113</sup> Once seen alongside the dialectically necessary requirements of the PGC, the law must necessarily possess moral permissibility in order to possess normative character. The necessary link between law and morality has therefore been demonstrated. Purely positivist law without reference to moral normativity would be empty, leading us to the conclusion that formal considerations such as a demonstrable categorical imperative necessarily generate substantive normative conclusions.<sup>114</sup> This conclusion itself again relies on the centrality of practical reason previously discussed; the ‘function of [which] is to order concepts so as to give them the greatest possible unity combined with the widest possible application.’<sup>115</sup> For without reason, concepts would be unable to be applied to the world; they would exist ‘[I]solated and

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<sup>112</sup> Kant (n 77) 6:231

<sup>113</sup> Ernest J. Weinrib, “Law as a Kantian Idea of Reason.” (1987) 87 *Columbia Law Review* 472, 472

<sup>114</sup> *ibid* 473-474

<sup>115</sup> Immanuel Kant, *Critique of Pure Reason* (Paul Guyer and Allen Wood tr, CUP 1998) A644/B672

separated from one another (by an empty intervening space)<sup>116</sup> Since law itself is not a physical object but is itself a concept, it is not unreasonable to claim that ‘The idea of reason runs through the whole length of law as a single fiber that connects each part with every other part, not as an overlapping of fiber twisted on fiber.’<sup>117</sup> The concept of reason here is necessarily a practical one, as the purpose of the law is its application; and Kant’s conception here appears to be once more grounded in the idea of agency. The PGC is therefore again applicable within the scope of practical reasoning Kant identifies:

A faculty of choice, that is, merely **animal** (*arbitrium brutum*) which cannot be determined other than through sensible impulses, i.e.: **pathologically**. However, one which can be determined independently of sensory impulses, thus through motives that can only be represented by reason, is called **free choice** (*arbitrium liberum*), and everything that is connected with this, whether as ground or consequence, is called **practical**.<sup>118</sup>

Agency, and the necessary grounds and limitations upon which it operates, is therefore centrally important to the causality of concepts.<sup>119</sup> Any obligations which arise from the necessary grounds of agency, such as those imposed by the PGC, must therefore be intrinsically obligatory by the very nature of practical reason; furthermore, such normative obligations are necessarily internal to the activity in order to provide a binding obligation.<sup>120</sup> It is therefore essential to see law as operating within a unified conception of normativity centred on practical reasoning, and thus necessary to see claims to bindingness as being true only to the extent that such claims are PGC compliant.

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<sup>116</sup> *ibid* A659/B687

<sup>117</sup> Weinrib (n 87) 481

<sup>118</sup> Kant (n 89) A802/B830 – Emphasis original.

<sup>119</sup> Kant (n 58) 4:462

<sup>120</sup> Weinrib (n 87) 486



### 3.3 Preliminary Objections

Chapter four of this thesis is tasked with an in-depth rebuttal of some criticisms that might be made of this conclusion, criticisms which might be directed at either the validity of the PGC itself or its necessary application to law. Yet it would be worthwhile to also address some preliminary concerns here, as they have been alluded to throughout this section. The first of these will be the ascription of the label ‘moral’ to the restrictions imposed by the PGC on both our actions and, subsequently, the substantive content of law. Sidgwick famously described reliance on a categorical imperative as being nothing but empty formalism, and held that any reliance on its principles were more logical than moral:

[I]f a kind of conduct that is right (or wrong) for me is not right (or wrong) for someone else, it must be on the ground of some difference between the two cases, other than the fact that I and he are different persons.<sup>121</sup>

This claim can be rebutted with reference to the scope of Kant’s, and by extension Gewirth’s claims. For these categorically imperative claims are not just based on the characterisation of their content as logical, but as necessary:

Everyone must admit that a law, if it is to hold morally, i.e. as the ground of an obligation, must carry with it absolute necessity; that the command: thou shalt not lie, does not just hold for human beings only. As if other rational beings did not have to heed it; and so with all remaining actual moral laws; hence that the ground of the obligation here must not be sought in the nature of the human being, or in the circumstances of the world in which he is placed, but a priori solely in concepts of pure reason, and that any other prescription that is founded on principles of mere experience...can indeed be called a practical rule, but never a moral law.<sup>122</sup>

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<sup>121</sup> Henry Sidgwick, *Methods of Ethics* (7<sup>th</sup> ed, Macmillan 1907) 379

<sup>122</sup> Kant (n 58) 4:389

It is therefore incorrect to ascribe this as simply a logical constraint on action, as this ignores the fact that the necessity of the obligation thus created imbues it with normative force. In reducing this normative force to one of logic, Sidgwick mischaracterises the rational internalisation of the obligations which is necessary for normativity to arise. We can therefore reject the reduction.

A second objection would be at the centrality of formalism to Kant's project. As has been alluded to previously, Hegel and Mill are highly sceptical of the extent to which an abstracted conception of agency thus described is capable of generating normative claims. Again, this scepticism can be dismissed. We could firstly claim that such claims would apply only to die-hard individualists who would reject the ability of any and all authority to impose limits on their actions.<sup>123</sup> As we have shown that such a rejection of the PGC would involve agential contradiction, it would therefore be an irrational standpoint to take and cannot rebut the dialectical necessity of the argument thus presented. Yet even were we to grant the objection of abstraction, it can be seen to miss the point. For, as Weinrib claims: 'Reason neither detaches the will from acting nor precludes the act's having a particular content; its role is rather to imbue that act with the significance of freedom.' Since action is the focus of obligations, and action is itself an abstract concept which does not need a specific location in a specific conception of the self, it is not objectionable to reach the conclusion that the concept of agency is capable of generating abstract norms.<sup>124</sup>

A final and connected objection might be raised by Korsgaard, based on the ascription of universal scope to the moral principles thus identified. Universalisability can only demonstrate that what is rational for me is to be self-interested, and that subsequently I must agree that you must also view the pursuit of self-interest as rational. Such a connection is incapable of generating the normativity that has been claimed here.<sup>125</sup> Such a claim, however, appears to be grounded on the assumption that the claims being made regarding the respect of other agents are not necessary, but somehow optional. This is not the case.

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<sup>123</sup> Timmons (n 63) 144-145

<sup>124</sup> Weinrib (n 87) 503

<sup>125</sup> Christine Korsgaard, "Reply" in Onora O'Neill (ed) *The Sources of Normativity* (CUP 1996) 220

The PGC demonstrates that it is necessary for all agents to respect the Generic Conditions of Agency possessed by other agents, at risk of contradiction. Such a claim is coherent with the instrumental rationality principle defended in section 3.1 of this chapter, which Korsgaard concedes is capable of generating norms in the way she seeks to deny in this objection. We should therefore dismiss the objection as being grounded in a misunderstanding of the argument of the PGC; Korsgaard is happy to ground the moral permissibility of acts through a test of universalisation on the same source as the general requirement of following instrumental hypothetical imperatives.<sup>126</sup> Since this is the foundation of the PGC, she should accept it as a source of norms. The Kantian notion of agency upon which the PGC is built holds that agents are able to ‘transform contingent values into necessary ones by valuing the humanity that is their source.’<sup>127</sup> Since the PGC provides a dialectically necessary reason to do just this, our conclusions as to its universal applicability as a moral standard – and our subsequent conclusions as to the impact of this acceptance on juridical rules – are sound.

#### **4 Conclusion.**

This chapter has sought to establish the ability of the Principle Generic Consistency to meet the two necessary requirements for any Natural Law theory; that moral truths exist, and that they are rationally identifiable. It has been shown that an inescapable Kantian conception of the person is the foundation on which the instrumental reasons to act which are the starting point of the PGC are universalisable to the point where they impose normative obligations to comply with its requirement to respect the Generic Conditions of Agency necessarily claimed by all agents as rights. The next chapter will seek to defend this principle against common attacks made against its validity; a necessary step if its validity and the claimed necessary connection to law is to be upheld.

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<sup>126</sup> *ibid* 231

<sup>127</sup> *ibid* 240

# Chapter Four

## Defending the Necessary Connection.

### 1 Introduction.

Gewirth's Principle of Generic Consistency has been shown to be categorically binding on all agents, in that it operates via a dialectically necessary argument to provide an instrumental reason that all agents are required to accept at the risk of contradicting their own agency. It has been demonstrated to be founded on an equally irrefutable foundation of practical reasoning in the Kantian tradition. As law and morality are both part of the same unified concept of practical reasoning, the PGC must necessarily override contradictory legal reasons for action due to its functioning as a categorical imperative to action. It must therefore be the case that where contradictory legal and moral obligations exist, it is a logical necessity that  $(R_M x, - \Phi) > (R_L x, \Phi)$ . An essential normative link between law and morality has therefore been established.

This is a bold claim, and not one that is universally accepted. This chapter will therefore be dedicated to rebutting common objections to this conclusion, expanding on the numerous attempts to defend the PGC which have already been made,<sup>1</sup> and will be comprised of two parts. It will firstly address some philosophical concerns regarding the validity of the PGC itself. Thinkers that will be engaged with directly can broadly be categorised as being from the sceptical tradition; Williams, Leiter, Foot and Nietzsche will be introduced, and their rebuttals will be assessed for their success in defeating the PGC. The writing of David Enoch will also be considered; Enoch simply argues that the

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<sup>1</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Principle of Generic Consistency* (University of Chicago Press 1991)

penalty of contradiction is not one that ought to trouble an agent who decides that they should not be bound by the PGC. This is a troubling line of argument for Ethical Rationalism, but it is hoped that the analysis to follow will demonstrate that Enoch's attack does not hit its target.

The chapter will then move on to rebut some classical positivist arguments against the claim that Gewirth's moral theory is directly relevant to identifying a rational normative grounding for any successful legal system. Firstly, Hans Kelsen's *Pure Theory of Law*<sup>2</sup> will be considered, a theory first developed in 1934 but significantly expanded upon in the 1960 second edition. Of particular interest to the argument is Kelsen's concept of the 'Basic Norm,' which will be critiqued in detail. Secondly, H.L.A. Hart's 1961 work *The Concept of Law*<sup>3</sup> will be introduced, with his central notion of the 'Rule of Recognition' being compared to Kelsen's 'Basic Norm'. It is hoped that it will be demonstrated that both theories fail on two accounts. Firstly, they do not provide an adequate explanation of the source of their own normative claims; secondly, they are unable to satisfactorily rebut the connection between law and morality required by the dialectically necessary argument for the PGC.<sup>4</sup> Such an argument was introduced in the previous chapter, and will be shown to be equally resistant to the philosophical challenges to its validity to be presented here.

## 2 Philosophical Criticisms of the PGC

Moral claims grounded in conventional morality are, by their nature, controversial. Yet this thesis is concerned with critical morality; those moral principles which can be demonstrated to be philosophically sound regardless of their acceptance by a population. The two may overlap, but it is only the latter which is capable of generating the normativity required for moral and, it is contended, legal authority. Yet within critical morality too, claims to have

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<sup>2</sup> Hans Kelsen, *Pure Theory of Law* (Max Knight tr, 2<sup>nd</sup> edn, University of California Press 1970)

<sup>3</sup> H.L.A. Hart, *The Concept of Law* (3<sup>rd</sup> edn, Oxford University Press 2012)

<sup>4</sup> Alan Gewirth, *Reason and Morality* (University of Chicago Press 1978)

identified a moral principle which is universal in its scope are many. We must therefore justify why we seek to identify the PGC as our preferred point of moral reference rather than any number of competing theories. A good place to begin would be with the claim that the PGC operates on an argument which is dialectically necessary for all agents based on the fact of bare agency. Given the character of the argument and the incontrovertible fact of noumenal agency, it is contended that the principle should be seen to be valid unless it can be proved to be false. The first section of this chapter will therefore be an exploration of various theories which could be used to attack the validity of the claim to dialectical necessity made by the PGC. It is hoped that analysis will show that none are capable of rebutting the claim, and that the PGC should therefore be accepted as the supreme moral principle and a valid source of normative claims.

## 2.1 Bernard Williams

The first thinker upon whom our spotlight will turn will be Bernard Williams. Williams is well known for reviving Aristotelian conceptions of the good life in modern analytic philosophy, and his belief that the only ethical belief that might survive the challenge of reflective endorsement put forward in our previous chapter would be the relatively empty claim that ‘that a certain kind of life was the best for human beings.’<sup>5</sup> Such a claim is empty by his own concession, in that it is devoid of any substantive direction as to what content of the life in question would, in fact, make it the best for human beings. He would therefore undoubtedly be sceptical of the claim to universality present within the PGC. This is not to say that Williams is dismissive of claims of moral truth; to the contrary, he believes that the very fact of moral disagreement presupposes that a correct answer to moral problems does exist. Were there no correct answer, he suggests a moral disagreement would be exactly the same as two men on a boat – one of whom is seasick and one who isn’t – disagreeing as to the merits of ocean travel. The fact that moral statements necessarily contain a truth claim and do not merely reflect the speaker’s own attitude sets them apart from

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<sup>5</sup> Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana 1993) 154

subjective perceptions such as this.<sup>6</sup> Williams' position should therefore be seen as one which recognises that morality exists, but that it would be practically impossible to discern its requirements to a degree where they were seen as uncontroversial. It is for this reason that he would be inclined to subject the PGC to scrutiny.

Williams' first objection might be to criticise the Kantian foundations of the PGC. He might argue that the level of abstraction taking place in the application of a categorical imperative robs the agent to whom it should apply of their subjective features which are necessary for a meaningful standard of moral deliberation. A formal, impartial principle is too impersonal, and is therefore unrealistic given the personal interaction necessary for moral deliberation to raise its head:<sup>7</sup>

Of course, in general a man does not have one separable project which plays this ground role: rather, there is a nexus of projects, related to his condition of life, and it would be the loss of all or most of them that would remove meaning.<sup>8</sup>

In removing these multiple projects from deliberation and replacing them with the abstract idea of 'action', we are preventing recognisable moral deliberation from taking place. The project must be grounded so as to give meaning to life, and must therefore necessarily reflect the lived experience;<sup>9</sup> abstracting morality to Kantian notions of practical rationality precludes this, and therefore undermines the project. To give an example, Williams suggests that it is an incontrovertible fact that individuals gain attachments to other agents over the course of their lives, and that it is therefore absurd to suggest that moral deliberation would take place on an impartial footing given the unavoidability of interpersonal relations. It seems natural that one would be inclined to behave more sympathetically to a close friend or family member than to somebody seen in a neutral or negative light. To deny this, Williams argues, denies any value in

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<sup>6</sup> Bernard Williams, *Morality: An Introduction to Ethics* (CUP 1972) 29-30

<sup>7</sup> Bernard Williams, *Moral Luck* (CUP 1981) 4

<sup>8</sup> *ibid* 13

<sup>9</sup> *ibid*

human existence and should therefore be rejected.<sup>10</sup> Williams' argument is one which doubtless will resonate amongst those who come across it, but it does not engage on a substantive level with the normative argument present within the PGC. It should be seen as predominantly descriptive of what was earlier characterised as collective morality; how agents interact with one another based on their subjective preferences, and therefore a standard which cannot be assessed for its normative validity. Williams might contend that this is exactly the point – that morality is not something which lends itself well to critical analysis such as that which forms the basis of the Kantian project.

Yet it is difficult to see how this rejection can be reconciled with Williams' own observation that moral disagreement is suggestive of moral truth;<sup>11</sup> if moral truth is something which exists, then a tool must exist for its identification. Such a tool must necessarily be impartial in order to be universally acceptable to all, necessitating the level of agential abstraction employed by Kant and, by extension, the bare agency which forms the foundation from which the PGC is discerned. Reasons provided by such an identifier need to be internalised by the agent in order to provide a reason for them to act,<sup>12</sup> requiring its application against a particular motivation to act.<sup>13</sup> Since the PGC is grounded in the fact of bare agency, definitionally internalised for all agents, then its dialectically necessary conclusions must also be internalised through the undertaking of any and all action. The internalisation required in order for a principle to exert reason-giving force on an individual that Williams requires is therefore achieved through deliberative reasoning on how to act, therefore meeting his own requirements for the internalisation of any reason.<sup>14</sup> Williams' concerns about the falsehood of the reason to follow the PGC can also be rebutted; he believes an internal statement is falsified by 'the absence of an appropriate element from [the agent's motivation]',<sup>15</sup> but as the dialectically necessary reason to comply with the PGC is contained in the bare fact of action, it is impossible to such an

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<sup>10</sup> *ibid* 18

<sup>11</sup> *ibid* 75

<sup>12</sup> *ibid* 101

<sup>13</sup> *ibid* 102

<sup>14</sup> *ibid* 104

<sup>15</sup> *ibid* 102



ascription of falseness to apply without action failing to take place. This, too, is compliant with Williams' own conception of action – reasons for which must be internal or no action would take place.<sup>16</sup> In thus locating action on the internal plane, Williams is bound to accept the rules of deliberative rationality that this internalisation requires. He is thus bound to acknowledge the operation of the PGC, or else he misunderstands the nature of action itself.

Williams might assert that this is a neat sidestep of the argument he originally raised; that any principles which derive from the abstract level are too imprecise to be applied to moral dilemmas in the real world, and therefore of no real use to the resolution of moral conflict. In locating morality at the level of practical reason, Gewirth's formula is limited to the production of 'general and formal principles to regulate the shape of relations between rational agents'<sup>17</sup>, and such unmediated categorical imperatives impose demands which are unrealistic in their rigidity.<sup>18</sup> Such a claim has already been dismissed as being too closely associated with conventional as opposed to critical morality, but we should treat Williams' criticism even more sceptically; such a claim would actually contradict his own characterisation of action and the location of value within it. This contradiction begins in Williams' concession that all agents necessarily possess a general desire not to have their freedom frustrated in that they place desire on the outcome of their actions; without this desire, they would possess no reason to act. As Williams puts it, , '*[O]mne appetitum appetitur sub specie boni*'; everything pursued is pursued as something by dint of the agent's perception of it as desirable.<sup>19</sup> Desire is therefore the locus of all action, necessitating a legitimate claim to non-interference.<sup>20</sup> This is the statement made by the dialectically necessary step between the first two stages of the PGC outlined by Beyleveld in section 2.1 of the third chapter of this thesis, putting Williams' understanding of action on a level with that of Gewirth. Since Williams makes a general claim that applies to all agents, he must necessarily believe in the universalisation of the rights claim and must therefore have a reason to perceive this universalisation as

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<sup>16</sup> *ibid* 107-111

<sup>17</sup> Williams (n 5) 54

<sup>18</sup> *ibid* 55

<sup>19</sup> *ibid* 58

<sup>20</sup> *ibid* 56

both necessary and true.<sup>21</sup> Williams suggests that the problem which must be addressed therefore is the agent's claim to a right to non-interference in his ends; if this prescription is reasonable, it must be reasonable for all agents thus necessitating a universal principle of non-interference in others' freedom to act.<sup>22</sup> Williams' problem is that Agent A's self-interest gives him no reason to respect Agent B's self-interest, and without this there is no claim to prescription of interference.<sup>23</sup> Such maxims can therefore be seen as empty in that their formalism means they lack the ability to provide a reason to respect others' claims to non-interference.

Yet Williams does not give an adequate reason for rejecting the PGC. He would accept that all three steps are valid, including the principle of universalisation. He simply disagrees that the fact all agents necessarily claim a right to freedom gives a reason for agents to respect one another's rights. Such a claim is puzzling, as the logical implication of this is that Williams sees that other agents would also not possess a reason to not interfere with his own rights – thus necessitating the conclusion that he would not mind if his will were constantly frustrated. He holds that this is not his position, arguing that his lack of proscription should not be seen as permission to interfere, but merely as silence on the matter.<sup>24</sup> This argument is, however, far from satisfactory, and can be rejected on two interlinked grounds. Firstly, in claiming that lack of proscription is not analogous to permission, it shifts the burden of legitimising the decision of whether or not to interfere back to the interfering agent; it thus presumes that agent whose actions may be interfered with does not care about their outcome. This contradicts Williams' earlier maxim of *omnia appetitum appetitur sub specie boni*; action stems from desire, and desire from a perception that the end will be beneficial for the agent acting to achieve it. The agent will therefore naturally be aggrieved if their ends are frustrated against their will, which is why Williams suggest agents claim a right to non-interference in the first instance. In claiming an agent shouldn't care if their ends are frustrated, Williams must abandon his

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<sup>21</sup> *ibid* 60

<sup>22</sup> *ibid* 60

<sup>23</sup> *ibid* 61

<sup>24</sup> *ibid* 62

theory of motivation for action – and, in doing so, shows that his objection to universalisation based on impartiality of agents is founded on a mischaracterisation of action.

Secondly, we can reject Williams argument in its relocation of the ultimate decision of whether or not to interfere. Let us grant that an agent can be disinterested in their ends and that a lack of proscription is not analogous to permission; this merely shifts the burden of the decision back to the potential interfering agent. A decision still has to be made as to whether or not interference should be carried out, requiring rational deliberation on the part of the potential interfering agent. Two outcomes of this deliberation are possible. If they do decide to interfere, they abandon their own claim to non-interference. If they decide not to interfere, they recognise that the other agent is claiming a right to non-interference which must be respected. The PGC is therefore again at play, and rationally must be respected in order for action to take place. Williams' objection can therefore be seen as not addressing the substantive content of Gewirth's argument as, if it did, Williams would be forced to agree with the conclusion that the PGC imposes legitimate restrictions on the course of our action.

Such a conclusion would still be likely to be rejected by Williams. His recognition that moral conflict is indicative of moral truth is one that has already been mentioned,<sup>25</sup> but it is tempered by his continued scepticism as to the possibility of resolving the debate. For he also is committed to the following characterisation of moral deliberation, a conclusion he sees as to be necessarily entailed by the possibility of moral conflict:

- a) There cannot be one acceptable currency for value-conflict resolution;
- b) It is not true that external values can always be applied as resolution;
- c) It is not true that value can be rationally appealed to as resolution;
- d) Therefore no conflict can be rationally resolved.<sup>26</sup>

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<sup>25</sup> Williams (n 7) 75

<sup>26</sup> *ibid* 77

Such a conclusion flows naturally from Williams' scepticism that rationalism can provide an answer to ethical dilemmas. Perceived moral obligations frequently do conflict;<sup>27</sup> the perceived conflict must be grounded in equally valid options or it would not exist,<sup>28</sup> therefore necessitating a degree of moral relativism.<sup>29</sup> If true, then the categorical imperative on all action provided by the PGC necessarily fails; we must therefore dig deeper into Williams' rationale in order to see whether the foundations of this conclusion can adequately disprove the legitimacy of the PGC.

Williams' scepticism appears to be rooted in his belief that practical reasoning cannot provide a normative foundation for moral principles. This scepticism is in turn founded in Williams' denial that acts can ever be concretely linked to a given end due to the inherent uncertainty which exists in the world. It therefore appears to be a scepticism grounded in a denial of causation. Williams believes that luck inevitably plays a role in the execution of the will and must therefore be accounted for in any account of practical rationality. Yet as individuals have no control over intrinsic luck, it cannot be adequately planned for in the execution of our actions.<sup>30</sup> This introduces a level of arbitrariness and indeterminacy in all action, which in turn makes deliberation ultimately arbitrary and indeterminate itself. Such principles are incapable of being the foundation of normativity. Williams would here find an ally in Hannah Arendt, who similarly argues that the unknowability of whether or not our ends will ultimately be attained renders our desires imprecise and uncertain, and therefore incapable of possessing the authority required to generate normative claims.<sup>31</sup> These statements are both seemingly sound, but misunderstand the foundation of the PGC. The argument does not begin at the execution stage, as these objections may suggest, but instead begins with deliberative rationality itself. The moral requirements are therefore dialectically necessary not on the execution of the will, but from its conception. It applies to agents based on their capacity to formulate a desire to act, not the carrying out of the action in turn. Since Arendt

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<sup>27</sup> *ibid* 125

<sup>28</sup> *ibid* 139

<sup>29</sup> *ibid* 142

<sup>30</sup> *ibid* 26

<sup>31</sup> Hannah Arendt, *The Human Condition* (2<sup>nd</sup> Ed, University of Chicago Press 1998) 230-232

and Williams both accept that deliberative rationality must exist in order for them to conceptualise the execution of the will, they therefore agree that the PGC's starting point is valid. They must therefore accept the argument, as their rebuttals do not damage its integrity.

The above section has aimed to demonstrate that Williams' criticisms that rationality is incapable of providing an applicable moral principle are founded on a mischaracterisation of the arguments that they do, or a reliance on a differing understanding of what morality is. None, therefore, go any way to undermining the reasons we have to accept the PGC as binding. He ought therefore to accept the requirements it imposes, for he accepts that his scepticism is concerned with matters of doubt.<sup>32</sup> Having addressed these doubts, a rational agent should see the PGC as valid; it meets the criteria for the generation of normativity in that it is about ultimate justification, is rationally inescapable, is practically relevant and is justified.<sup>33</sup> It should be therefore viewed as inescapably valid by Williams' own definition of the property: '[A] demand will be inescapable in the required sense if it is one that a rational agent must accept if he is to be a rational agent.'<sup>34</sup>

## 2.2 Nietzsche

Having addressed the twentieth century scepticism of Bernard Williams, this chapter now moves to the more complicated task of addressing objections to the PGC which might arise from the writings of Nietzsche. His writings are renowned for having turned the field of ethics somewhat on its head, leading many to regard him as the ultimate moral sceptic. It is for this reason that we will address his concerns here.

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<sup>32</sup> Bernard Williams, 'Ethics and the Fabric of the World' in Ted Honderich (ed), *Morality and Objectivity: A Tribute to J.L.Mackie* (New York University Press 1981) 204

<sup>33</sup> Bernard Williams, "History, morality, and the test of reflection" in Onora O'Neill (ed) *The Sources of Normativity* (CUP 1996) 213

<sup>34</sup> Williams (n 32) 206

Nietzsche appears to begin from an essentially subjective conception of the good, arguing that values themselves are only good insofar as they allow us to preserve a certain type of life.<sup>35</sup> As such, morality – in that it directly reflects this subjective idea of value – must also be a concept whose essence is subjective, in that values are inescapably shaped by external factors which serve to shape an individual's personhood: '[A person's] morality which provides decidedly and decisively *who he is* – that is, in what hierarchy the innermost drives of his nature are arranged.'<sup>36</sup> Morality therefore reflects a person's subjective priorities which arise from his lived experience. Such subjectivism, if true, would be fatal to the universal claim made to the PGC as subjective ethics is clearly in

with a principle which claims to be both moral and universal in its application. A knock on effect of the subjectivism espoused by Nietzsche is that he also rejects that obedience to moral requirements is not something which is, of itself, of *prima facie* value. The idea of a categorical imperative as espoused by Kant is therefore to be rejected, in that obedience should only be required if to do so would further the subjective interests of the agent in question.<sup>37</sup> Again, this conclusion is directly contradictory to the claim to universal application made by the PGC. It is, however, contended that the PGC is – surprisingly – fully compatible with Nietzsche's ethical writings.

In order to see this compatibility, we should realise that Nietzsche is best regarded as an ethical naturalist; he holds that moral principles can be identified *iff* they are correlated to pre-ethical facts of those who espouse them.<sup>38</sup> The PGC does this in grounding its own moral principle in noumenal agency, a pre-ethical and amoral fact necessary for any action to be undertaken. If something can be proved to be essential for any form of human flourishing then it can therefore be seen to possess universal value and, for Nietzsche, can legitimately be used to justify the suppression of other interests.<sup>39</sup> It follows that the PGC, grounded in the necessity of human agency and protecting the conditions essential for the

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<sup>35</sup> Friedrich Nietzsche, *Beyond Good and Evil* (Marion Faber tr, OUP 1998) ¶3

<sup>36</sup> *ibid* ¶6

<sup>37</sup> *ibid* ¶188

<sup>38</sup> Simon May, *Nietzsche's Ethics and his War on 'Morality'* (Clarendon Press 1999) 10

<sup>39</sup> Nietzsche (n 35) ¶220

will to be exercised, possesses universal value. It can therefore legitimately preclude action contrary to its own requirements. Such a conclusion is essential if Nietzsche's own unified conception of will and action is to be accepted.<sup>40</sup> If a person's values are limited by what kind of person he is,<sup>41</sup> yet some characteristics are essential for all persons, then these universal characteristics can impose universal requirements in a way which, whilst maintaining the value pluralism at the heart of Nietzsche's project, precludes activity which would contradict their essential nature. Nietzsche's conception of value pluralism in and of itself does not, therefore, damage the validity of the PGC.

Nietzsche may object to this conflation in that it places excessive importance on an essentially formalistic and impersonal application of practical reasoning. For whilst essential, Nietzsche dismisses reasoning as being fundamentally unsound in that it is reducible to an interpretation 'according to a scheme that we cannot throw off'.<sup>42</sup> Yet this riposte does not characterise our insistence on the necessity of the PGC. Firstly, we can object on Nietzsche's own contradictions. If rationality is only an interpretation and, as such, cannot be used to justify the claim that the results of deliberative rationality should be seen as possessing truth-claims, then Nietzsche's own project necessarily fails. Since we can presume that in writing his theses that Nietzsche was concerned with discerning and communicating concepts which he believed to be true, otherwise he would not be undertaking the action, Nietzsche is undertaking an exercise which relies on the rational justification of his claims.<sup>43</sup> If rationality is merely an interpretation possessing no independent value or truth claim in its conclusions, then Nietzsche's project can itself be dismissed as a paradox. Secondly, even the product of rational deliberation could only be seen as an interpretation lacking truth-claims, the criticism would still not damage the PGC. The principle is not to be seen as constructed on a particular rational outcome, but on an inescapable fact of noumenal agency. Nietzsche accepts that agents necessarily undertake deliberative reasoning with regards to practical rationality; since the dialectically

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<sup>40</sup> *ibid* ¶12

<sup>41</sup> *ibid* ¶6

<sup>42</sup> Friedrich Nietzsche, *The Will to Power* (Walter Kaufman and R. J. Hollingdale tr, Vintage 1968) ¶522

<sup>43</sup> May (n 38) 139-149

necessary argument stems from this inescapable fact, the conclusions of the PGC must be sound.

### 2.3 Other arguments from Scepticism

Having discussed and rejected criticisms against the validity of the PGC which might be raised by Williams and Nietzsche, this chapter moves on to consider further arguments against Gewirth's position. We will first discuss a general criticism of the structure of the dialectical argument of the PGC as presented by Richard Friedman, before moving to address substantive criticisms that might be raised by Philippa Foot and Brian Leiter.

First though, the structural critique. Friedman raises several problems with the PGC, but the most jarring for him is the claim that the argument mistakenly conflates an argument based on dialectical necessity with one of rational choice.<sup>44</sup> He argues that the mere dialectical necessity of an argument does not lead to the conclusion that it is one which a rational agent would accept. Why should an agent claim his rights are grounded in the logical necessity of an argument rather than other grounds?<sup>45</sup> This is an argument which fails on its own terms. Firstly, it seems axiomatic that an agent *should* stake his claim to rights in an argument which is logically necessary; if the argument were otherwise then it could be disregarded with no implications. Since he necessarily values his rights this conclusion would be one he should be motivated to avoid at all costs, as to do so undermines the rights-claim he seeks to impose. Any successful rights claim must therefore be a logical necessity or it will fail. Secondly, the argument fails for a misunderstanding of the scope of the PGC. An agent could conclude that the dialectically necessary argument is not one he wishes to accept, and therefore concede that he does not desire a sound foundation to his rights. Yet agential will is not itself enough to deny the truism that these rights remain necessary for

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<sup>44</sup> Richard B. Friedman, 'The Basis of Human Rights: A Criticism of Gewirth's Theory' in J. Roland Pennock and John W Chapman (eds), *Human Rights – Nomos XXIII* (New York University Press 1981) 150

<sup>45</sup> *ibid* 152-153



his status as an agent. This is the starting point of the PGC which Friedman does not address; in thus rejecting the dialectically necessary argument the agent is using the agency whose importance he seeks to deny. The claim is therefore inherently contradictory, and should be recognised as failing accordingly.

Having addressed a methodological concern, we may now move on to address the first of our two remaining sceptics by examining a potential objection from Philippa Foot regarding the existence of a categorical imperative on action. Before we address Foot's objection, we should begin with her characterisation of the location of moral principles:

[T]he moral character of an action is on occasion affected by the position of the agent on the causal nexus; by the fact that he is on the one hand the initiating agent of a sequence or happening, or by contrast merely one who does not intervene.<sup>46</sup>

Foot hereby states that the moral character of an action is determined in its entirety in the circumstances of action itself. In this claim she allows discussions relating to moral permissibility to concern not just action itself, also the deliberative process leading to the execution of a given act:

[T]here is a morally relevant distinction between what we do and what we allow to happen, [and secondly] that there is a similarly relevant distinction between what we aim at and what we foresee as the result of what we do.<sup>47</sup>

The distinction here raised is one that does not engage directly in a challenge to the PGC's unified conception of reason and action. The point we should take from these excerpts is a simple one; that Foot believes that moral normativity is one which is located firmly in deliberative rationality and its resultant actions. Her objection would be in categorising the imperative found in the PGC as one which is categorical in nature rather than merely hypothetical. For to jump from a hypothetical to a categorical imperative requires proof of overriding constraint.

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<sup>46</sup> Philippa Foot, 'Morality, Action and Outcome' in Ted Honderich (ed), *Morality and Objectivity: A Tribute to J.L.Mackie* (New York University Press 1981) 25

<sup>47</sup> *ibid* 23

In order to demonstrate the difficulty in establishing such a normative claim, Foot uses the example of rules of etiquette;<sup>48</sup> we use similar normative language when discussing such demands, yet the bindingness remains hypothetical in that it is contingent on us wishing to be seen as being in compliance.<sup>49</sup> Moral claims, she argues, behave in a similar way – their claims only possess normative character insofar as we care about being moral agents:

The fact is that the man who rejects morality because he sees no reason to obey its rules can be convicted of villainy but not of inconsistency. Nor will his action necessarily be irrational.<sup>50</sup>

This is a claim which is similar to that raised by David Enoch in s.2.4 below, so the full range of objections which can be made against Foot will not be explored here. Instead, it will merely be pointed out that the PGC is characterisable as an example of dialectically necessary instrumental reasoning. We necessarily care about our agency, otherwise we would not be attempting to act – to claim otherwise contradicts this point, leading to an irrational outcome. To say that this is something an agent might not care about does not undermine the validity of the conclusion that they necessarily do. The objection is therefore grounded on a mischaracterisation of the argumentative structure of the PGC, and should be rejected as invalid.

Lastly, we turn our attention to the scepticism of Brian Leiter. The claim assessed for its validity here will be his scepticism not of the moral, but the jurisprudential project of determining the necessary features of a concept of law. His focus is on the validity of what he refers to as the demarcation problem – how and if the normative systems of both law and morality can be seen to be separable.<sup>51</sup> It is therefore the enterprise, rather than the substantive conclusion, which Leiter believes to be unsound. Fatal to the exercise is positive law's nature as a human artefact, in that it cannot exist without being the product of human action.<sup>52</sup>

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<sup>48</sup> Philippa Foot, "Morality as a System of Hypothetical Imperatives" (1972) 81(3) *The Philosophical Review* 305, 308

<sup>49</sup> *ibid* 309

<sup>50</sup> *ibid* 310

<sup>51</sup> Brian Leiter, "The Demarcation Problem in Jurisprudence: A New Case for Skepticism" (2011) 31(4) *Oxford Journal of Legal Studies* 663, 633

<sup>52</sup> *ibid* 666

The necessary variance in the purpose and application of human constructs over time means their essential attributes are notoriously difficult to identify, if they exist at all.<sup>53</sup> It therefore follows:

If, in the history of philosophy, there is not a single successful analysis of the ‘necessary’ or ‘essential’ properties of a human artefact, why should we think law will be different?<sup>54</sup>

Leiter’s scepticism is misplaced for several reasons. Firstly, we shall return to his claim that artefacts’ purpose and application necessarily vary over time. He claims this is true of all artefacts, suggesting that ‘Because human ends and purposes shift, the concept of ‘chair’ has no essential attributes.’<sup>55</sup> This claim is unfounded; it is simply untrue to claim that the concept of a chair has no essential attributes. Although its form may vary over time – some may have three legs, some four and some even more – their fundamental purpose remains the same. A chair which is incapable of fulfilling the purpose of providing a supported surface on which a person can sit fails to be a chair, thus constituting a constant purpose regardless of form. This discussion may seem tangential, but the point being made is that artefacts should be judged by their form only to the extent that that form is capable of meeting the requirements of their purpose. The fact that an artefact’s form can vary over time is a factor independent to its purpose, and therefore the scepticism Leiter proposes is grounded on a mistaken conflation of form and purpose. There is therefore no reason to presume that the purposive requirements necessary for a system of law should not be equally constant throughout time.

Secondly, we can reject Leiter’s implicit claim that the difficulty of the enterprise is one which should preclude us from undertaking it. Such a claim, taken to its conclusion, would preclude vast swathes of human knowledge. Let us not forget that many scientists would claim that their enquiry is not one that could be proven beyond all doubt, and that scientific enquiry is merely a logical statement based on a rational assessment of the evidence that we have. Leiter would surely

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<sup>53</sup> *ibid* 666-667

<sup>54</sup> *ibid* 669-670

<sup>55</sup> *ibid* 666-667

be disinclined to state that research into the nature of the universe or the prevention of disease is doomed to failure as scientific enquiry is a human artefact; it is therefore unclear why the objection should be raised against inquiries into the nature of law. Leiter's scepticism of jurisprudence, whilst healthy, should therefore not be seen to preclude the possibility of the enterprise.

## 2.4 Enoch

The final PGC sceptic to be addressed in this part of the chapter will be David Enoch. His main criticism of the PGC, as has been alluded to in the previous section, is that it presumes that an agent should care about his agential status. Its requirements can therefore be dismissed if an agent simply does not care that the result of this non-compliance will be his denial of his own agential status. It will be argued that the argument is misguided, but before it is examined in detail we must first address Enoch's own conception of the nature of morality.

Enoch is a moral realist, in that he believes that certain moral disagreements require us to behave in a certain way and reject behaviour contrary to the requirements of morality.<sup>56</sup> He also believes that it is our ability to deliberate on such moral dilemmas which justifies our belief in normative facts,<sup>57</sup> and that such facts rest on an epistemic justifications which themselves are ultimately grounded in our basic belief-forming capacities.<sup>58</sup> It is therefore safe to say that Enoch locates the creation of norms within deliberative reasoning, making a direct comparison of his conception of morality and that of Gewirth an enterprise which is possible to undertake. For, like Gewirth, Enoch also sees moral commitments as non-optional as a result of their grounding in rationality:

Now, the pragmatic account invokes the non-optionality of the relevant project in order to block the second disjunct, thus leaving only the first:

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<sup>56</sup> David Enoch, *Taking Morality Seriously* (OUP 2011) 23-24

<sup>57</sup> *ibid* 50

<sup>58</sup> *ibid* 60

if discarding the project is not a rationally acceptable option, then employing the relevant method is the only rationally open option.<sup>59</sup>

Since reasoning itself is unavoidable, another point on which he and Gewirth would agree, Enoch argues that moral discourse is inescapable:

*A thinker T is prima facie epistemically justified in employing a belief-forming method M as basic if there is for T a rationally non-optional project P such that it is (pragmatically-relevantly) possible for T to succeed in engaging in P using M, and it is (pragmatically-relevantly) impossible for T to succeed in engaging in P without using M.*<sup>60</sup>

By undertaking deliberation, an agent therefore commits themselves to the belief that there are normative reasons which bear on that deliberation; and as deliberation is inescapable, all agents are therefore committed to behaving in accordance with the normative principles which they are committed to believing as necessary. To argue otherwise would be *prima facie* irrational along the following reasoning:

- (1) If something is instrumentally indispensable to an intrinsically indispensable project, then we are (epistemically) justified (for that very reason) in believing that that thing exists.
- (2) The deliberative project is intrinsically indispensable.
- (3) Irreducibly normative truths are instrumentally indispensable to the deliberative project.
- (4) Therefore, we are epistemically justified in believing that there are irreducibly normative truths.<sup>61</sup>

Enoch, to this point, appears to be writing in a way which is entirely consistent with Gewirth's PGC and its Kantian foundations; the inescapability of agency leads to the conclusion that agents are committed to recognising that there are irreducibly normative truths which should operate so as to restrict the scope of action available to us in any situation. The difference is first indicated in his claim

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<sup>59</sup> *ibid* 61

<sup>60</sup> *ibid* 63-64. Italics original.

<sup>61</sup> *ibid* 83

that some categorical imperatives would be improperly classed as moral, and that behaving rationally is one of these.<sup>62</sup> As compliance with the PGC is essentially a rational requirement for all agents, then Enoch would be loath to concede that its requirements are properly categorised as moral. It is difficult to see why this is the case. The four steps identified above which Enoch believes demonstrate a necessary connection between deliberation on action and morality apply to the PGC; to claim otherwise would be contrarian at best.

His earlier enterprise in dismissing agency as the foundation of normativity therefore appears to completely contradict his later work. This dismissal is at the core of the argument in his article *Agency, Shmagency*, a critique of which will be the purpose of the remainder of this section. He begins from the same starting point as his later work, arguing that desire for self-knowledge through action is an inescapable condition of agency, and that the reasons that derive from it are a-priori universal as opposed to dependent on subjective desires.<sup>63</sup> So far so good. But Enoch's point is that this is something which should not bother an agent – he asks whether an agent should be relieved to hear that they are acting in a way which is consistent with their own agency, or whether they would change their mind about the morality of an action after reading Korsgaard and realising that they would cease to be a rational agent if they did not?<sup>64</sup>

However strong or weak the reasons that apply to him and require that he be moral, surely they do not become stronger when he realizes that unless he complies with morality his bodily movements would not be adequately described as actions.<sup>65</sup>

Enoch therefore appears to be arguing that the label of 'agent' is one which is ultimately arbitrary, and makes no practical difference to the agent's ability to deliberate. To claim to act contrary to a moral principle would therefore defeat the agency of an individual is an empty claim which would not make an agent feel obliged to follow its requirements, as the change in status would make no

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<sup>62</sup> *ibid* 94

<sup>63</sup> David Enoch, 'Agency, Shmagency: Why Normativity Won't Come from What Is Constitutive of Action' (2006) 115 (2) *The Philosophical Review* 169, 174

<sup>64</sup> *ibid* 178-179

<sup>65</sup> *ibid* 180

practical difference to their life. A preliminary objection could be raised here that Enoch's characterisation of breaching moral codes grounded in rationality could equally be applied to all moral codes. It is not the practical difference that breaching a moral code has on an individual that should be seen to coerce them into following a moral principle, it is the exclusionary reason provided by the principle itself. Enoch is therefore artificially conflating a moral principle's existence with the consequences that might arise from breaching it, and in doing so dodges the implications of normative obligations that he himself agrees must be grounded in rational deliberation.

This contradiction is on an objection which Enoch believes can be made against his criticism, however. He does raise three which he believes might be raised before rebutting them in turn. We will here demonstrate why each of Enoch's replies to his critics fails. Firstly, he postulates a defence which argues that the moral principles' status as being constitutive of agency renders them non-arbitrary, and therefore normatively vindicated. This is, in essence, the claim being made by the PGC – the fact that our General Conditions of Agency are necessary for our action generates normative force through the fact that we must see them as rights. His response is to simply ask why their being constitutive of agency should render them non-arbitrary.<sup>66</sup> His dismissal is notable for not engaging with the normative issue raised by the PGC; he simply repeats his objection as if the answer had not been given. The reason why these things possess normative value and should therefore be seen to be non-arbitrary is because they are essential for the undertaking of any action. They are constitutive of us as agents in that they are necessary for any deliberative or practical reasoning. Since Enoch himself in his later work argues that deliberative reasoning is capable of producing normative claims, he appears to endorse such reasoning himself. His objection is therefore unfounded, and can be dismissed.

The second hypothetical objection raised by Enoch is the claim that we should care if we act in a way which rejects the importance of our own conditions of

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<sup>66</sup> *ibid* 181

agency, as it is axiomatic that they do matter to us. This claim is again one which is central to the PGC, and is dismissed by Enoch by the claim that it is not clear that we do value these conditions.<sup>67</sup> This rejection is incredibly weak, in that it can be demonstrated to be false by any action that an agent chooses to undertake. In choosing to act an agent necessarily must value the conditions which allow him to do so as, without these conditions, he would be unable to act. Since he values his end, he must value the means that allow him to attain it. Enoch's objection is therefore shown to be false.

The last objection Enoch suggests could be made to his conclusions is connected to the second, in that it claims that agency is self-vindicating. Reason is unavoidable, and therefore necessarily important – another claim central to the internal logic of the PGC. Enoch suggests this is again not obvious, and that a sceptic is entitled to use logic to deny logic because it is legitimate for him to do so.<sup>68</sup> The claim is absurd, in that it is analogous to a painter using paint to demonstrate that paint is not essential for the task of painting. The same paradox exists in Enoch's writing, and should be rejected for this reason.

Enoch does not leave his argument here, however. He attempts to demonstrate that the requirements of a principle like the PGC not be seen as categorical in their application, but contingent in their acceptance in the same way as the rules of a game of chess are only accepted by those who play the game. As you only have a reason to win a game of chess if you have a reason to play chess, you only need to value your Generic Conditions of Agency if you have an adequate reason to be an agent. The necessity of the situation is irrelevant, as – as one could play chess disinterestedly and not care about the pursuit being undertaken, one could equally be a disinterested agent.<sup>69</sup> The analogy fails for three reasons, however. Firstly, Enoch's disinterested chess player must presumably still have a reason to play chess otherwise the activity would not be being undertaken; the same cannot be true of agency, which is unavoidable. The PGC is similarly

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<sup>67</sup> *ibid* 182

<sup>68</sup> *ibid* 184

<sup>69</sup> *ibid* 185-186



unavoidable, and cannot be avoided by the fact that one does not have a reason to comply; the reason is necessarily present in the dialectical argument from noumenal agency. Secondly Enoch suggests that as one could be a disinterested chess player, one could be a disinterested agent. This argument misses the point, in that even a disinterested agent is necessarily an agent who is committed to valuing their Generic Conditions of Agency. Even if we were to take Enoch's disinterested agent as being one who no longer wished to be an agent and wished to commit suicide, their Generic Conditions of Agency would still be necessary for this end to be attained. One cannot therefore be a fully disinterested agent in the way Enoch suggests. Lastly, Enoch suggests that one could simply concede that, in breaching the PGC, one contradicts ones agency – but this does not matter, because an individual could re-categorise themselves as a 'shmagent' and thus avoid their agential duties. This objection also fails for semantic reasons. The concept being conveyed by the terms agent and shmagent is essentially the same, and the linguistic shift does nothing to change this. As 'The snow is white' has the same meaning as 'der Schnee ist weiß', so an agent is conceptually the same as the shmagent Enoch introduces. This claim follows from our discussion of linguistic normativity in Chapter Two of this thesis.

Enoch's denial that the PGC, in grounding morality in practical rationality, is incapable of providing moral norms has therefore been demonstrated to be false. It contradicts his own location of moral norms in reason, and fails to understand the operation of the PGC in its attacks. In the absence of any reason to disregard its requirements, the PGC should therefore be seen to be valid. This chapter will therefore move on to demonstrate how a necessary link between law and morality must exist if two classical positivist theories of law are to produce a coherent explanation of legal normativity.

### **3 Objections from Classical Positivism**

Ehrenberg correctly states that law itself is a human creation, yet he also recognises it as a necessary feature of legal systems that they presents themselves

as a system of norms.<sup>70</sup> Whilst Natural Lawyers can ascribe the existence of legal normativity to a necessary moral foundation, this is an option which legal positivists would reject. To allow a necessary moral explanation of legal normativity would, for them, open law up to what Rodriguez-Blanco characterises as the paradox of intentionality:

If we follow legal rules intentionally, then legal rules cannot be exclusionary reasons. If we do not follow legal rules intentionally, then legal rules do not have a reason giving character. Therefore, either legal rules cannot be exclusionary reasons or legal rules do not have a reason-giving character.<sup>71</sup>

Put another way, if the law perfectly mirrors our moral obligations then it is unable to claim to claim practical authority over us, as we already have a reason to act. This argument is similar to the ‘Practical Difference Thesis’, which will be addressed directly in chapters five and six of this thesis. For the time being though, we will concede that the above description of law is problematic, in that to thus connect law and morality seems to strip law of its reason-giving character. It is this problem that positivists aim to address when seeking an alternate explanation of legal normativity. Two classical examples of twentieth century positivism will be examined here to see whether or not they succeed in this task. We will first examine the success of Kelsen’s conception of a ‘Basic Norm’, before moving on to consider Hart’s idea of ‘Secondary Rules of Recognition’. It is hoped that this analysis will demonstrate that both theories fail to adequately locate a normative source for the obligations that they seek to create, and that the PGC is capable of filling the gaps identified in the way identified by Beyleveld and Brownsword’s application of the PGC in *Law as a Moral Judgment*.<sup>72</sup>

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<sup>70</sup> Kenneth M. Ehrenberg, “Law’s artificial nature: how legal institutions generate normativity” in George Pavlakos and Veronica Rodriguez-Blanco (eds), *Reasons and Intentions in Law and Practical Agency* (CUP 2015) 247

<sup>71</sup> Veronica Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Hart 2014) 157

<sup>72</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sheffield Academic Press 1994)

### 3.1 Hans Kelsen

Kelsen began his career in legal theory at the beginning of the twentieth century, believing that the theories of his contemporaries were too impure to adequately address the question of the normative force of law. According to Kelsen, the nineteenth century had contaminated jurisprudential enquiry by introducing elements of political ideology or natural and social sciences, thus requiring a complete reformulation – a ‘pure’ theory of law which would avoid such reductionism. At the heart of this was a recognition that ‘[t]here is no kind of human behaviour that, because of its nature, could not be made into a legal duty corresponding to a legal right.’<sup>73</sup> As such, it is important to state at the beginning of this analysis that, for Kelsen, all concepts of law have orders of human behaviour as their object:

An “order” is a system of norms whose unity is constituted by the fact that they all have the same reason for their validity; and the reason for the validity of a normative order is a basic norm – as we shall see – from which the validity of all norms of the order are derived. A single norm is a valid legal norm, if it corresponds to the concept of “law” and is part of a legal order; and it is part of a legal order, if its validity is based on the basic norm of that order.<sup>74</sup>

It is this concept of a ‘Basic Norm’ constituting the validity of all subsequent norms which stem from it which forms the foundation of Kelsen’s theory, and which – in the following analysis – will be demonstrated to be unsatisfactory in attaining this objective.

#### 3.1.1 The Pure Theory of Law

Firstly, it is worth noting the assumptions made by Kelsen and the limits he places upon his theory in order to fully understand the emergent features he identifies. Kelsen begins his discussion with a statement of intent; his theory is

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<sup>73</sup> Hans Kelsen, *General Theory of Law and State* (Transaction Publishers 2005) 113

<sup>74</sup> Kelsen n.2, 31

not to be seen as an interpretation of a specific legal system, but as a theory of the general nature of law itself. Its purpose is an attempt ‘to answer the question of what and how the law is, not how it ought to be.’<sup>75</sup>, the latter part of this distinction being something he believes to be a separate question mistakenly viewed as synonymous with the first by many adherents of natural law theories. For Kelsen, the task can be reduced through the observation that ‘The judgement that an act of human behaviour, performed in time and space, is “legal” (or “illegal”) is the result of a specific, namely normative, interpretation.’<sup>76</sup>

Such an endeavour requires Kelsen to define what he means when he speaks of ‘law’ or ‘legal’. In doing so, he confines his definition to that expressed by the German word ‘Recht’ and its respective equivalents in French and Italian (‘droit’ and ‘diritto’).<sup>77</sup> This is a narrow definition which may raise eyebrows in the English speaking world; the three languages identified above all have very different concepts of ‘law’ in a legal sense and ‘law’ which may concern nature and justice, and, as such, use different terminology for these concepts – a distinction we do not have in English.<sup>78</sup> To what extent, then, is this assimilation of concepts which are not directly equivalent<sup>79</sup> the root of the disagreement between followers of Kelsen and those who reject him? This is a discussion which will be considered later in this chapter and which, for the time being, will remain untouched in order to allow a fuller exposition of Kelsen’s work.

Kelsen’s identification of law describes a legal system as an order which is coercive in nature through the use of socially imminent, as opposed to transcendental, sanctions.<sup>80</sup> It should be noted however that:

The law is not a coercive order in the sense that it exerts a psychic coercion; but in the sense that it prescribes coercive acts, namely the forcible deprivation of life, freedom, economic and other values as a consequence of certain conditions.<sup>81</sup>

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<sup>75</sup> *ibid* 1

<sup>76</sup> *ibid* 4

<sup>77</sup> *ibid* 30

<sup>78</sup> *ibid*

<sup>79</sup> Kelsen’s original text suggests all four terms are directly synonymous: ‘...die Bedeutungsfeststeller, die das Was ‘Recht’ in der deutschen Sprache und seine Aquivalenten in anderen Sprachen (law, droit, diritto usw.) haben.’ *ibid*

<sup>80</sup> *ibid* 33

<sup>81</sup> *ibid* 35

Any psychic coercion which does emerge from a legal system then, ‘is not a characteristic that distinguishes law from other social orders.’ such as moral obligations to undertake X,<sup>82</sup> as such orders also impose a psychic coercion on those individuals who subscribe to it. Instead, law should be viewed as imposing two specific types of coercive act – sanctions and other forms of coercion (such as sectioning the mentally ill)<sup>83</sup> – in a manner authorised by a social norm imposing such coercive acts on opposite behaviour. Such a limitation is not a moral fact, in that it applies only to legal norms.<sup>84</sup>

Kelsen views it as axiomatic that any series of norms which seek to be seen as legal in character should be viewed as totally distinct from any attempt to categorise them as moral or ethical in nature:

The methodological parity of the science of law is jeopardised not only because the bar that separates it from natural science is ignored, but even more so because the science of law is not (or not clearly enough) separated from ethics – that no clear distinction is made between law and morals.<sup>85</sup>

Morals should be viewed as entirely non-legal norms regulating men’s behaviour to each other. This is not to say that law and morality might not be indirectly linked; for, according to Kelsen, if justice is a postulate of morals then the relationship of justice and law must also be subject to moral standards. But the law itself should remain entirely separate from this comparison, as there is no requirement that the law itself should subscribe to any standard of justice.<sup>86</sup> Neither, according to Kelsen, can morality be said to have a necessary connection with a legal order because the standards of objectivity involved. For him, morality is only objective because of reference to some form of faith or religion, whereas legal objectivity rests on the existence of a readily identifiable legal coercive sanction.<sup>87</sup>

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<sup>82</sup> *ibid*

<sup>83</sup> *ibid* 108

<sup>84</sup> *ibid* 115

<sup>85</sup> *ibid* 59

<sup>86</sup> *ibid* 60

<sup>87</sup> *ibid* 62 - 63

A further way in which Kelsen seeks to differentiate legal and moral systems for definitional purposes within his theory is by addressing the issue of factual causation. For him, it does not make sense to speak of causation between action A and sanction B within a legal setting, as causation has no fixed end point; further things may flow from it. He instead introduces the concept of imputation – a term he feels to be superior in that it has the fixed end point identifiable within a sanction which cannot be located in terms of causation.<sup>88</sup> From this shift in terminology, Kelsen is able to further distance law and morality. For if a moral norm is categorical, he argues it is impossible to link cause and consequences via the language of imputation due to the inherent nature of positive norms; for Kelsen, they cannot be categorical as action is only possible under certain conditions, a restriction which may also be placed on negative norms which impose conditions under which restraint should be exercised by other parties.<sup>89</sup>

Kelsen thus identifies a clear object of his theory, a set of norms governing human interaction which are enforced through coercive sanctions justified through a relationship of imputation between Action A and Sanction B. In doing so, he aims to clearly separate law and morality, and – by his definition – he partially succeeds. However, using his own terminology, his identification of his object remains partial. Firstly, it is descriptive of what he labels a ‘Static Theory of Law’ – namely, law as a system of valid norms; as such it fails to address the why the law possesses normative force, which is the question that Kelsen’s theory is ultimately designed to answer more convincingly than those put forward by Natural Law theories. Kelsen claims that this is not problematic, as such normative force should be addressed by a ‘Dynamic Theory of Law’ – one which is concerned with the process by which law is created and applied.<sup>90</sup> Kelsen here introduces the locus of his Pure Theory, that of the Basic Norm in reference to which all legal norms should be viewed.

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<sup>88</sup> *ibid* 76, 91

<sup>89</sup> *ibid* 100

<sup>90</sup> *ibid* 70-1

### 3.1.2 The Basic Norm

Kelsen suggests his Pure Theory addresses head-on the difficulty of answering the question of how a non-legal set of norms should attain legal character:

[T]he Pure Theory of Law asks: ‘How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?’<sup>91</sup>

He argues that the answer is simple. In order for the law to attain normative force, we must formulate a Dynamic Theory of Law which makes reference to a presupposed ‘Basic Norm’ from which all other legal norms gain validity.<sup>92</sup> Such a norm ‘contains nothing but the determination of a norm-creating fact’,<sup>93</sup> and all legal norms are only valid because their creation complied with the basic norm.<sup>94</sup>

Kelsen believes it to be vital that such a basic norm should not refer to moral claims in its operation for reasons identified above.<sup>95</sup> Instead, a purely legal chain must be acknowledged, whereby ‘The norm which confers upon an act the meaning of legality or illegality is itself created by an act, which, in turn receives its legal character from yet another norm.’<sup>96</sup> For example, an Act of the Scottish Parliament such as the Licencing (Scotland) Act 2005, only attains its legal force as it was enacted via the appropriate legislative process established as required for the creation of an Act of the Scottish Parliament. The Scottish Parliament derives its authority to create such legislation from a higher norm, namely the Scotland Act 1998. This Act is valid via reference to a higher norm, namely that it was created in accordance with the procedure required for the creation of an Act of the Westminster Parliament. The Westminster Parliament in turn derives its authority to create such legislation for a yet higher norm, that of Parliamentary Sovereignty – the legal (if politically constrained) ability of Parliament to pass

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<sup>91</sup> *ibid* 202

<sup>92</sup> *ibid* 193-5

<sup>93</sup> *ibid* 196

<sup>94</sup> *ibid* 198

<sup>95</sup> Problems of identifying an objective moral standard without reference to faith or religion and with the necessary step of imputation between Action A and Sanction B; Above, s.2.1

<sup>96</sup> Kelsen n.2, 4

any legislation it sees fit. For Kelsen, this would be the ‘Basic Norm’ of a Dynamic Theory of Law applied to the United Kingdom and, as such, requires no further justification.<sup>97</sup> Its existence should be presupposed, and accepted as a *prima facie* fact.

Kelsen argues that chains of legal validity would necessarily always reach such an end point, whether in domestic law or, should we wish to expand our search, in the norm of International Law that states should have legal and political control over their own territories.<sup>98</sup> To ask why such a norm is valid is to confuse ‘is’ and ‘ought’; is a norm efficacious in being followed by those whose legal system is guided by it versus the question of whether a norm ought to be followed.<sup>99</sup> To ask the latter of these two questions is to introduce a moral element to the Pure Theory of Law, and therefore to take into account an irrelevant consideration in a Dynamic Theory of Law.

This does not appear to be a satisfactory answer to the question of where a Basic Norm derives its normative validity. Firstly, what if the majority of the population in question would reject the Basic Norm on the basis that it creates unjust law that they do not feel bound to follow? If a legal system is not followed by those living under it, it seems nonsensical to continue to insist that creates valid norms. Kelsen in part acknowledges this, claiming that a ‘minimum effectiveness is a condition of validity.’<sup>100</sup> Yet in this acknowledgement, Kelsen question begs – if efficacy is required for the validity of a legal system, by what standard should individuals judge a Basic Norm in order to acknowledge whether or not they feel bound to follow it and the legal system it produces? It is this question which demonstrates the flaw in Kelsen’s argument; if efficacy is required for validity, a test for efficacy is also required. The easiest way for efficacy to be attained by a legal system would be for its requirements to be *prima facie* acceptable to all of its subjects as individual legal norms. It is suggested that such a test for the acceptability of individual norms may be provided by the dialectically necessary argument put forward by Gewirth’s Principle of Generic Consistency.

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<sup>97</sup> *ibid* 8

<sup>98</sup> *ibid* 215

<sup>99</sup> *ibid* 10

<sup>100</sup> *ibid* 11



### 3.1.3 Problems of Definition

By establishing a ‘Pure Theory of Law’, Kelsen attempts to put forward a positivist explanation of the normative grounding of law. Such a theory should be completely independent of any moral or religious justification for the normative force of law. He ultimately rests his theory of a ‘Basic Norm’ – a presupposed norm (which generally takes the form of a constitution or similar document) from which any legal system gains its ability to legislate. To ask *why* such a norm should be obeyed is possible, but should not be confused with the non-legal question of *whether* it should be obeyed.<sup>101</sup> Indeed, the very opening sentence of ‘The Pure Theory of Law’ is ‘The Pure Theory of Law is a theory of positive law.’<sup>102</sup> Yet, as suggested above, in conceding that a minimum level of acceptance (‘efficacy’) by a population is a prerequisite for the Basic Norm’s validity, Kelsen begs the question by what standard a Basic Norm should be judged as effective. It makes no sense to judge it according to its own standards, as this would yield no result. Yet to take into account an external consideration such as morality or religion would, in Kelsen’s view, go against the positivist account which his theory is intended to produce. Doing neither is not an option, as the efficacy of a Basic Norm is the means by which law is differentiated from a pure threat. Law states that an evil *ought* be inflicted under certain circumstances as prescribed by a Basic Norm accepted by society; a threat merely states that an evil *will* take place under certain circumstances. The legal ‘ought’ gains objective nature from the widely accepted Basic Norm, the threat is seen as an imposition merely because it lacks this grounding.<sup>103</sup> In order to identify whether accepting the Basic Norm or looking beyond it for its normative status appears the most attractive, it is worth looking further into how Kelsen views the nature of laws.

Firstly, we should look to the nature of the orders placed on us by the law. In not prohibiting a certain action, it is not the case that the law automatically commands the opposite behaviour. As such, the law can be seen as imposing both positive and negative liberties on individuals – the freedom to perform X

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<sup>101</sup> Kelsen, n.73, 116-117

<sup>102</sup> Kelsen n.2, 1

<sup>103</sup> *ibid* 44-7

and the freedom against having Y inflicted upon oneself. This, Kelsen might argue, differs from moral codes whose commands are generally negative in character. Beyond being characterised as providing both positive and negative liberty, Kelsen argues that there need not be any common features between legal systems whatsoever – although he does identify that one generally prohibited act is to interfere with another’s ability to perform an undertaking which is not specifically prohibited by law.<sup>104</sup> Yet in making this claim, Kelsen again begs the question of why such a norm can be identified as common to most, if not all, legal systems. This question can be answered with reference to morality and, specifically, Gewirth’s Principle of Generic Consistency;<sup>105</sup> such a feature is common because it corresponds to a rationally identifiable universal moral principle which applies independently of subjective concerns.

Such an answer would be rejected by Kelsen in that it introduces a non-positivist aspect to his theory – although, as will be discussed later in this piece, the reason for which this is a bad thing is not immediately clear. For the present however, we will accept Kelsen’s comparison with the Natural Law proposed by St. Augustine in *Civitas Dei*; that law is a just coercive order only because of the justice of its content. Kelsen suggests that reference to a principle with moral content, such as justice, makes reference to a subjective concern which – in St. Augustine’s case – creates a justice which is expressly Judeo-Christian in nature. Such a conception by definition excludes all non-Judeo-Christian law, and ‘A concept of law with such consequences is unacceptable by a positivist legal science.’<sup>106</sup> Whilst such a rejection may be true for a subjective moral code anticipated by Kelsen, the objection does not immediately carry to a moral principle that can rationally be proved to be universal in its application by a dialectically necessary foundation.

A second definitional difficulty faced by Kelsen is in identifying subjects who may be subject to his Pure Theory. He suggests that law tends to ascribe universal legal capacity to all individuals despite the fact that not all individuals possess the real capacity to act – thus necessitating statutory representation. Kelsen suggests that this distinction is neither beneficial nor complete,

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<sup>104</sup> *ibid* 42-3

<sup>105</sup> Hereafter ‘PGC’

<sup>106</sup> Kelsen n.2, 48-9

highlighting that should somebody who suffers from a mental deficiency fail to pay their taxes, their lack of actual capacity will not necessary be enough to overcome their legal obligations as it would do under criminal law.<sup>107</sup> At the same time, bodies (such as corporations) are granted legal personhood – a clear fiction with no real grounding in reality. As such, he claims that ‘The juristic person is neither a social reality nor, as is sometimes assumed, a creation of the law’; they are mainly constructions of legal science.<sup>108</sup> Such a problem of identifying those subject to the legal obligations established with reference to the Basic Norm could again be easily overcome by introducing a definition of the legal subject into the Basic Norm itself. This problem is again overcome by adopting the PGC as the norm by which legal validity is judged.

### **3.2 H.L.A. Hart and the Secondary Rule of Recognition**

A second broadly positivist justification for the normative basis of law was presented by the Oxford Professor of Jurisprudence, H.L.A. Hart, who felt that classical positivism, which took as its central tenet that a sufficient and necessary condition of law was one of a sovereign authority supported by threats, failed to address some of the nuances presented by a system of law: ‘[L]aw surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.’<sup>109</sup> Thus, similarly to Kelsen, he attempts to move his positivist definition of law beyond one which is comparable to a mere threat. In order to move beyond this conception, Hart introduced a distinction between two essential rules which, when in operation together, he argues are necessary and sufficient conditions for a legal system. These are Primary Rules, which create a duty or obligation, and Secondary Rules, which establish how Primary Rules are recognised and can be changed over time. It is the application of such Secondary Rules to Primary Rules, according to Hart, which is the step from a

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<sup>107</sup> *ibid* 158-9

<sup>108</sup> *ibid* 190

<sup>109</sup> H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) 71 (4) *Harvard Law Review* 593, 603

primitive, pre-legal state of affairs to a recognisable legal system.<sup>110</sup> In this sense he moves away from the Kelsenian stance that law should not be seen as a prohibition of certain action but merely the justification that circumstance X authorises sanction Y,<sup>111</sup> and closer towards a statement of the operation of law which would be more recognisable and acceptable to his opponents: “The most prominent general feature of law at all times and places is that its existence means that certain times of human conduct are no longer optional, but in some sense obligatory.”<sup>112</sup> At the same time however, the distinction drawn should be noted for its similarity with Kelsen’s distinction between Static and Dynamic Theories of Law. With this feature accepted by Hart, I will use this section of this chapter to establish exactly how his doctrine operates, before highlighting some key problems with the operation of his theory which – as with Kelsen – can be resolved by integration of the PGC into Hart’s writing.

### 3.2.1 The Purpose of the Doctrine

Hart is of the belief that the majority of historical difficulties relating to understanding the fundamental nature of law can be resolved through the differentiation of two different types of rules, the interplay between which is where the majority of disagreements arise. Once this interplay is understood, then we can have a clearer insight into exactly how law operates as a concept.<sup>113</sup> The two types of rule, whose interplay Hart suggests provide necessary and sufficient grounding for a system of law, are identified as follows:

- i) Primary Rules of Obligation. These are imposed from an internal point of view, in that individuals who live under a system of rules accept them as binding as a guide to their conduct. It would be difficult for a system of law to be comprised entirely of primary rules however as they would be unable to satisfactorily evolve over time. It would also be extremely difficult to resolve disputes

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<sup>110</sup> Hart n.3, 91-99

<sup>111</sup> *ibid* 35, 36

<sup>112</sup> *ibid* 1

<sup>113</sup> *ibid* 81

as to what a Primary Rule of Obligation requires under such an internally operative system of law.

- ii) Secondary Rules of Recognition. Such rules establish the means by which a Primary Rule of Obligation is identified, and help us to overcome the difficulties of identification, adjudication and evolution which surround a system comprised entirely of such Primary Rules.<sup>114</sup>

These two rules, as suggested in the introduction to this section, can be made analogous with Kelsen's concept of Static and Dynamic Theories of Law, in that the former identifies which laws should be obeyed as valid norms and the latter attempts to legitimise the process by which they are validated.<sup>115</sup> The important feature of such a Secondary Rule of Recognition for this paper is its indispensability in identifying what we should view as law. Their status is invaluable; according to Hart, such rules '...will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.'<sup>116</sup> Therefore, whilst Hart never explicitly locates the source of legal normativity within such Rules of Recognition, I am inclined to agree with those who suggest that such a claim is implicit within the operation of a Rule of Recognition as such defined.<sup>117</sup>

Hart suggests that it is a 'perfectly correct appreciation [that] where there is law, there human conduct is made in some sense non-optional or obligatory.'<sup>118</sup> If we accept that the purpose of Rules of Recognition is to assist us in our identification of which Primary Rules of Obligation should be seen to have the status of law, we must view them as providing the reason as to why we should see our compliance with such rules as an obligation.

I suggest that such a claim is fairly uncontroversial. Hart himself deliberately distinguishes his use of the word 'obligatory' in the quote at the beginning of the

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<sup>114</sup> *ibid* 91-94

<sup>115</sup> Above, s.3.2.1

<sup>116</sup> Hart (n 3), 94

<sup>117</sup> Torben Spaak, 'Kelsen and Hart on the Normativity of Law' in Peter Wahlgren (ed), *Perspectives on Jurisprudence; Essays in Honour of Jes Bjarup* (Stockholm Institute for Scandinavian Law 2005), 408

<sup>118</sup> Hart (n 3) 82

previous paragraph from the relation notion of 'being obliged'; the latter, he suggests, can apply to a situation where a victim, suffering a threat, hands his goods over to a robber. For Hart, law should be viewed as more than this.<sup>119</sup> His Rule of Recognition operates so as to grant legitimacy to the means by which Primary Rules are identified, thus tempering the excesses which may arise from a system of law comprised solely of a sovereign authority backed by threat.<sup>120</sup> It follows that, if the purpose of such a Rule is to grant legitimacy to Sovereign Authority, then such legitimacy must be accepted on an internal point of view by those living underneath such a system. As summarised by Leslie Green in the third edition of Hart's *Concept of Law*, the role of a legal system is to aid people in conforming to what they have a reason to do. Such a reason must necessarily be objective and intelligible, rather than being merely a perceived reason or grounded in self-interest.<sup>121</sup>

The problem therefore arises that, viewed as phrased by Hart – namely as a standalone principle which has no necessarily moral aspect to it – this internalised legitimacy which is crucial to the operation of a Secondary Rule of Recognition fails on its own terms. Individuals must have intelligible and objectively grounded reasons to accept the content of such a rule; if such reasons are absent, then the Primary Rules of Obligation governed by the Secondary Rule regress to the status of a sovereign command backed by threat. This is something Hart himself suggests is not on its own sufficient for a successful legal system. I am of the belief that the introduction of a moral component to the Rule of Recognition is the only way of overcoming such a difficulty. This is something with which Hart would disagree, so before I discuss in greater detail why I believe Hart's rebuttal to be false, it is worth spending some time discussing Hart's own views on the interplay between Law and Morality further.

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<sup>119</sup> *ibid* 82

<sup>120</sup> *ibid* 100

<sup>121</sup> *ibid* xliii

### 3.2.2 Morality and Law in Hart

Hart writes from the classical positivist viewpoint that there is no necessary connection between Law and Morality. He holds that there are four central features to any code which is able to be classified as moral which can be juxtaposed against features which are necessarily present in any legal system. These are as follows:

- i) The Importance of Moral Rules. Such rules must be valued as of supreme importance by those who accept them on an internal point of view in that moral obligations are prioritised despite the burdens they may place upon the individual. It is therefore vital that such rules be retained. Conversely it is not an essential feature of a legal rule that it be retained; if the community wishes to dispose of a law then it may do so according to the procedures laid out in its Secondary Rule of Recognition, but the law would remain valid and enforceable until a repeal following the established procedure took place.
- ii) Moral Rules' Immunity from Deliberate Change. It is a central feature of a legal system that new laws can be introduced and obsolete ones may be repealed. No such procedure for deliberate change can be said to exist in a moral code.
- iii) The Voluntary Character of Moral Offences. If a moral rule is breached by an individual who has done so either accidentally or unintentionally, then no moral blame can be attributed to them. This is not always true of legal rules, as demonstrated by the existence of legislation which operates on the basis of strict liability.
- iv) The Specific Form of Moral Pressure. Appeals made against conduct would breach a moral code are generally grounded in a warning of the immoral nature of the act itself. This can be contrasted with the warnings which generally surround conduct

which is categorised as illegal, which general takes the form of highlighting the sanctions enforced against such behaviour.<sup>122</sup>

In thus defining the specific features of a moral code, Hart hopes to differentiate them from those features which are commonly present within legal systems. He does, however, concede that the operation of both moral and legal obligations can share a common purpose:

Characteristically, moral obligation and duty, like many legal rules, concern what is to be done or not to be done in circumstances constantly recurring in the life of the group, rather than in rare or intermittent activities on deliberately selected occasions.<sup>123</sup>

In addition to making this concession, Hart also suggests that a narrower component of morality, Justice, is somehow intertwined within our idea of law. To help shed light on this connection, Hart defines Justice as having a dual aspect. Firstly, a constant feature which holds that all like cases should be treated alike, and secondly a more fluid notion that criteria must exist by which it can be decided which cases are and are not alike.<sup>124</sup> He suggests that the second notion is often present within legal systems in addition to the first, which allows us to apply laws in certain situations but not others whilst retaining an overall just result:

Laws which exclude from the franchise, or withhold the power to make wills or contracts from children, or the insane, are regarded as just because such persons lack the capacity, which sane adults are presumed to have, to make rational use of these facilities.<sup>125</sup>

Laws which have historically been discriminatory against a certain class also grounded this discrimination in the perceived inability of said class to possess an equal capacity to make decisions than that required to legitimately attain the desired outcome. Therefore, ‘...equal capacity for a particular function is the criterion of justice in the case of such law...’<sup>126</sup> He therefore limits the moral

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<sup>122</sup> *ibid* 173-180

<sup>123</sup> *ibid* 171

<sup>124</sup> *ibid* 160

<sup>125</sup> *ibid* 163

<sup>126</sup> *ibid* 163



scope of justice to ‘one segment of morality primarily concerned not with individual conduct, but with the ways in which classes of individuals are treated.’<sup>127</sup>

It is initially unclear why Hart attempts to limit the moral content of a perception of Justice in this way. Such a principle of treating like cases alike may be equally phrased in terms of non-discrimination, a concept which itself fits an analysis of the effect of moral duties given by Hart later in the same book; ‘It seems clear that the sacrifice of personal interest which some rules *demand* is the price which must be paid in a world such as ours for living with others.’<sup>128</sup> To attempt to understand why Hart sought to so limit the moral scope of Justice, it may be beneficial to remind ourselves of what Hart believes the principles upon which a Natural Law position which believes the concepts of Law and Morality are fundamentally intertwined would be:

- i) Human vulnerability. Of primary concern is the idea that, unless basic prohibitions exist which restrict our ability to harm others, no action would be possible. If people are harmed, they are unable to act; restrictions are therefore justified.
- ii) The Approximate Equality of Individuals.
- iii) Limited Altruism amongst Individuals.
- iv) Limited Resources available to Individuals.
- v) Individuals’ limited understanding of all outcomes of action and a flawed strength of will necessitates voluntary cooperation in a coercive system.<sup>129</sup>

This list of explanations which a Natural Law system may give for justifying the connection between law and morality deserves close attention. For reasons of space however, I am limiting myself to a brief discussion of two of these criteria. Firstly, I wish to make it explicit that his second criterion matches his definition of the purpose of a sense of Justice within a positivist legal system; it cannot therefore be said to be exclusive to Natural Law positions. Secondly, criterion five looks remarkably similar to what our earlier discussion discerns as necessary for

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<sup>127</sup> *ibid* 167

<sup>128</sup> *ibid* 181

<sup>129</sup> *ibid* 193-198

the acceptance of a Rule of Recognition, namely that it should be popularly accepted in order to temper the excesses of sovereign authority backed by threat.<sup>130</sup> It too, therefore, is not exclusive to the Natural Law position.

Hart, as previously discussed, would claim that this criterion for accepting a Rule of Recognition need not be moral. Such a claim may be supported by the discussion of the essential features of morality listed at the beginning of this section – but this list is something to which we should return. After laying out these essential features, Hart tells us that he has deliberately excluded a fifth feature commonly claimed by other theorists – that moral claims must survive rational criticism in order to constitute an obligation. He justifies this exclusion with the claim that moral claims frequently fail such a test, yet are still internally accepted as morally binding by those who accept them. To identify an objective moral standard which can survive rational criticism is impossible in a pluralistic world, and therefore should not be viewed as an essential feature of morality.<sup>131</sup>

In making this claim, Hart shows that his definition of morality is one which is collective, rather than critical in nature; he holds that a rule's observance is the key to its status as moral, as opposed to its philosophical validity. He thus has a very different conception of morality to that which has been put forward by Gewirth at the beginning of this chapter. In order to demonstrate the superiority of the Gewirthian account, we must therefore demonstrate why Hart's account is deficient and should be rejected. To do this, let us return to the claim in question – that practice is essential for moral validity, as opposed to rational identification. Such a claim is clearly nonsense, as will be demonstrated. Firstly, if true, the proposition requires that the concept of moral disapproval be one which could not exist; the adoption of a particular practice by the majority of a population should be enough to answer the question of whether it were morally permissible. It seems unlikely that Hart would endorse a practice as moral if it required the slaughter of all blue-eyed babies at birth, so we might reasonably discard this interpretation. Yet this rejection is impossible without recognising a normative element to moral obligation; one ought not to endorse this

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<sup>130</sup> s.3.1

<sup>131</sup> Hart n.3, 181

proposition, therefore a higher normative claim must exist which overrides it. This observation precludes the location of moral normativity in the collective practice of a norm, shifting its foundation to one of critical reflection and rational identification. This simple use of logic demonstrates that Hart's opening commitment to collective morality is too sweeping in its rejection of critical morality, and does not constitute a real engagement with the issue of whether or not an objective and categorically binding moral principle such as that identified by Gewirth may exist. Hart would, of course, claim that to impose such a moral criterion in a legal sphere would not correspond to legal reality:

It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept, as it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law.<sup>132</sup>

Yet again however, such a claim fails to fully engage with the possibility that an objective and categorically binding moral criterion has been identified in the PGC. Should such a principle exist, there seems no reason as to why it should be limited merely to the spheres of morality and Natural Law. Indeed, it can be argued that such a principle would function precisely as the Rule of Recognition within a legal system – thus endorsing the claim made by Beyleveld and Brownsword in Chapter Three.<sup>133</sup> For if both law and morality seek to restrict human conduct, laws must subscribe to a Rule of Recognition to temper their content from abuse by absolute sovereign power backed by threat, and those living under a Rule of Recognition must have a valid reason for following it beyond mere coercion, a categorically binding moral reason would provide just such a reason. Hart would, of course, disagree, arguing that this would limit unrealistically limit law to a narrow sphere which is not representative of its operation in the real world. The next section will attempt to establish that such a view is founded on Hart's reliance on a purely positivist definition of law as opposed to one which is truly neutral.

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<sup>132</sup> *ibid* 209

<sup>133</sup> Chapter Three, pp 83-94

### 3.2.3 A Circular Definition

Let us recap with a restatement of what Hart holds are the two minimum necessary and sufficient conditions required for the existence of a legal system:

On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.<sup>134</sup>

As I have suggested in the previous two sub-sections, this definition appears to be incomplete. Hart simultaneously suggests that a Rule of Recognition should be accepted as common public standards of public behaviour by the officials within a given system without identifying any reasons for which such standards should be accepted. If the purpose of such a rule is to provide a reason for popular acceptance of Primary Rules, we can infer that the reasons identified by a system's officials for following Rule of Recognition must themselves be accepted by the population subject to the Primary Rules in question; without this, they would not serve their function of tempering the excesses of sovereign authority backed by threats. By failing to provide such a reason for acceptance of the Rule of Recognition, Hart therefore introduces a circular definition to his argument which is skewed in favour of the positivist conception of law.

Let us expand upon this criticism with an identification of what form such a Rule of Recognition may take. Green summarises Hart's position that in the United Kingdom, the Rule of Recognition may take the form that whatever the Queen in Parliament enacts is law, but acknowledges that such a rule would differ from system to system. Significantly, he goes on to suggest that such rules may not be accepted purely by historical convention, but on a belief that it is central to our culture or serves a higher purpose such as democracy.<sup>135</sup> This exposes clearly exposes the flaw in Hart's definition, as appeals to such higher

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<sup>134</sup> *ibid* 116

<sup>135</sup> *ibid* xx, xxiii

purposes presupposes that they themselves hold normative importance as goods. This point is argued forcefully by Fuller, who holds that the Rule of Recognition must contain a moral standard, as its efficacy requires it to be derived from ‘a general acceptance, which in turn rests ultimately on a perception that [it is] right and necessary.’<sup>136</sup>

Hart would, of course, deny this necessary connection. Such a moral content would be possible, but not essential, to the valid operation of a Rule of Recognition. Indeed, the only circumstances in which a moral core would be present within such a Rule would be if the Rule itself stated such a connection was required.<sup>137</sup> Yet this does not address the central problem raised within the idea, that a positivist conception of law fails to give a normative reason as to why a such a Rule should be accepted beyond that of coercion. If we accept that Primary Rules of Obligation form an essential part of law, then we accept that a purpose of law is to control individual action. If nobody feels an obligation to follow such primary rules then, to use Kelsen’s terminology, they lack efficacy. What, then, is the point of claiming that a law exists when nobody follows it due to a lack of efficacy? Hart would claim that we should differentiate the inefficacy of a law from general disregard, but it is unclear what criteria he would take into account in making such a distinction.<sup>138</sup> It appears that any attempt to make such a distinction takes as its starting point a positivist definition of law, one which therefore means that the presuppositions upon which Hart establishes his theory are those which he hopes his theory will prove. The circularity of his argument is therefore evident.

Another reading of Hart is possible, however. He comments on his idea of Rule of Recognition that:

In a modern legal system where there are a variety of ‘sources’ of law, the rule of recognition is correspondingly more complex [than sovereign authority backed by threat]: the criteria for identifying the law are multiple and commonly include a written constitution, enactment by a legislature, and judicial precedents. In most cases, provision is made for

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<sup>136</sup> Lon Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1958) 71 (4) *Harvard Law Review* 630, 639

<sup>137</sup> Hart n.143, 103

<sup>138</sup> *ibid* 103

possible conflict by ranking these criteria in an order of relative subordination and primacy.<sup>139</sup>

In acknowledging that a normative hierarchy of sources may exist, Hart therefore presupposes that criteria must exist by which such a hierarchy may be established. He further backs up this assertion with his claim that the Rule of Recognition in any system is rarely expressed in a single and concrete rule, and that the use of such unstated Rules by, for example, Courts, is typical of the internal viewpoint necessary to feel bound to follow the law.<sup>140</sup> Again, by introducing the Internal aspect to the Rule of Recognition, Hart appears to presupposing shared norms on the part of Officials against which such decisions can be subjected. As previously suggested, Hart would argue that this connection may exist, but is not necessary for a Rule of Recognition to apply. I hope however that it has been established that it is not merely the application of a Rule of Recognition which Hart should aim to demonstrate, but its efficacy – and his theory has failed to demonstrate this on its own terms. The efficacy of the Rule of Recognition is, again, only ensured by its being compliant with the PGC.

#### **4 Conclusion.**

The purpose of this chapter has been twofold; to defend the PGC against philosophical attacks against its validity and to demonstrate that it necessarily operates as the normative source in two classical positivist accounts of the concept of law. It began by considering the sceptical positions taken by Bernard Williams, concluding that his scepticism as to the validity of the principle is misguided and based on mischaracterisations of the dialectically necessary argument. The same has been shown to be true for Nietzsche, Friedman, Foot, Leiter and Enoch. In the absence of any valid philosophical objections to the contrary, the PGC should therefore be seen to be valid. We should therefore see

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<sup>139</sup> *ibid* 101

<sup>140</sup> *ibid* 101-102

the PGC as providing a categorically binding exclusionary reason for us to act, necessitating that the statement  $(R_M x, - \Phi) > (R_L x, \Phi)$  must be true.

This chapter then attempted to identify the failures present in the theories of both Kelsen and Hart; namely, that their respective concepts of the Basic Norm and Secondary Rule of Recognition fail to provide a real normative reason as to why individuals should accept them as binding upon their conduct. Both rely on a circular, positivist definition of law, and therefore operationally rely on the separation of law and morality they later seek to prove. Should the PGC be identified as a supreme constitutional principle by which the validity of laws should be assessed, obeying a law which is compliant with its requirements becomes a rational obligation on the individual,<sup>141</sup> especially if such a system is legitimised through the electoral process envisaged by Gewirth.<sup>142</sup>

Such a principle becomes categorically binding on the individual through its reliance on reason rather than a subjectively identified supreme source. For Gewirth, this reliance on reason is irrefutable; for even if it is to be rejected by or checked for its validity against a subjective source such as religious faith, reason is still used in this process. The agent therefore still employs their agency, leading to the dialectically necessary argument contained within the PGC that the 'ought' is derived from the normative necessity of agency.<sup>143</sup> Only by reference to a dialectically necessary and categorically binding principle of morality can a truly universal normative foundation be identified in which the validity of law can be assessed regardless of the system being subjected to analysis. The PGC therefore should be seen as the plug in Kelsen and Hart's theories which legitimises the Basic Norm and Secondary Rule of Recognition for those who seek reasons for compliance with the Static Theory of Law or Primary Rules of Obligation.

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<sup>141</sup> Gewirth n.4, 300

<sup>142</sup> *ibid* 308-309

<sup>143</sup> *ibid* 22-23

# Chapter Five

## Reasons, Law and all that Raz.

### 1 Introduction.

No critique of contemporary jurisprudence would be complete without paying attention to the work of Joseph Raz. His writing has been hugely influential in the field, in a large part due to its almost all-encompassing scope – very few legal philosophers have paid as much attention to the entire breadth of legal enterprise as he has over the course of his long career. It is this very breadth that makes an overview of Raz’s work all the more pertinent in the current project as, like Gewirth, Raz has also seen the axiomatic connection between law and agency as one which has been overlooked in the traditional dichotomy between Legal Positivists and Natural Lawyers.

The present chapter will therefore be less concerned with where on this spectrum Raz’s theorising falls; indeed, due to the scope of his writing it would be incredibly difficult to thus categorise him – something he would undoubtedly be pleased with given his own irritation with the persistent urge of authors to categorise all jurisprudential theories as belonging wholly to one or the other camp. Instead, the focus of this section will be to explore Raz’s work from the bottom up. It will begin by examining his multiple writings on the nature of reasons for action. It will firstly explore Raz’s ideas of what it means to undertake action and what reasons can influence us, as agents, in our decisions on what course of action to undertake. This will lead us to a discussion of Raz’s conception of normativity, and to what extent normative reasons differ from non-normative reasons in our deliberations on action. Once any differences in the reasons thus described have been identified, the first part of this chapter will



conclude with an overview of Raz's beliefs on how reasons for action interact with one-another. Of particular interest in this last section will be the introduction of moral norms and the effect that they have on an agent's ability to choose multiple courses of action. Throughout this section on reasons, Raz's theories will be assessed for their conformity with the PGC as outlined in previous chapters. Should Raz's writings prove to be non-compliant with the PGC then these conflicts shall be identified and, where possible, remedied in order to ensure that Razian Reasoning (and any conflicts present within it) can operate in full compliance with the PGC.

Having established a PGC compliant explanation of reasons for action in the Razian tradition, we will have presented a unified conception of reasons for action in opposition to the distinct legal and moral reasons presumed by Raz. The second half of the chapter will, upon this unification, move to discuss the impact of this on Raz's writings on law with the aim of demonstrating that Raz's theories are, on a sympathetic reading, more consistent with Inclusive Positivism than the Exclusive Positivist tradition with which they are more closely associated. Conscious of the fact that Beyleveld and Brownsword have already dedicated time to a Gewirthian analysis of Raz's Theory of Law as expressed in his earlier work,<sup>1</sup> the main focus of this work will be on Raz's works which were published after *Law as a Moral Judgment*. Firstly, it will examine Raz's writings on the Nature of Law itself and how the concept, for him, interacts with that of Morality. This will lead into a critical view of Raz's focus on the importance of the Legal Point of View for any coherent theory of the nature of law – this point in particular will be critiqued with reference to the previous analysis of Raz's work on reasons as modified to be compliant with Gewirthian moral theory. An overview of Raz's conception of legal normativity will follow this critique, and will itself be assessed for its compliance with the requirements of the PGC. Once this conflation has taken place the chapter will move on to discuss the importance Raz places on Legal Systems and whether this can sidestep the Gewirthian critiques outlined in the previous section, before closing with a

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<sup>1</sup> Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sheffield Academic Press 1986)

discussion on whether such a modified theory would give rise to any prima facie obligation to follow the law.

It should be noted at the outset of this chapter that Raz has attempted to dismiss Gewirthian conceptions of legal validity,<sup>2</sup> but that his reasons for this rejection should not be considered to be a serious attempt to engage with the normative issue which forms the basis of the contention between Natural Lawyers and Legal Positivists. Raz begins by noting his scepticism of Gewirth's project to justify the existence of human rights, commenting that Gewirth's claim that we possess human rights by our status as human has 'long been recognised to be logically flawed.'<sup>3</sup> Yet Raz's hostility should be countered for two reasons. Firstly, Raz takes Gewirth's statement out of the context in which it was written, framing the quote as a given facet of Gewirthian theory rather than the question Gewirth originally posed it as. The true quote is merely a preface to Chapter One of Gewirth's *Human Rights*, and reads as follows:

We may assume, as true by definition, that human rights are rights that all persons have simply insofar as they are human. But are there any such rights? How, if at all, do we know what they are? What is their scope or content, and how are they related to one another? Are any of them absolute, or may each of them be overridden in certain circumstances?<sup>4</sup>

Secondly, even had the statement been one which Gewirth did hold himself to, Raz does not give any reasons as to why he believes it to be logically flawed – he merely states that it is. Nowhere in the essay does Raz engage with the substantive argument put forward by Gewirth in *Reason and Morality*, subsequently developed by Beyleveld and laid out in Chapter Three of this thesis. Instead, Raz merely criticises general features he believes traditional theories justifying the existence of Human Rights can be seen to possess:

1. Human Rights are derived from a basic feature possessed by humans which is necessary to all value in human life;

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<sup>2</sup> Joseph Raz, 'Human Rights Without Foundations' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press 2010)

<sup>3</sup> *ibid* 323

<sup>4</sup> Alan Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982) 41

2. Human Rights claim to be basic moral rights;
3. Traditional theories pay too little attention to the difference between the status of a claim as being valuable and its being a right; and
4. Traditional theories are individualistic in nature, and pay too little attention to the existence of community rights.<sup>5</sup>

Raz goes on to explain that he feels such theories necessarily fail because of a central misconception of the relationship between what it is to value something and to claim it as a right.<sup>6</sup> He suggests that he believes that Gewirth ‘ignores possibility of believing that certain conditions are essential to our life, and even of striving to secure such conditions, without either claiming or having a right to them.’<sup>7</sup> Unhelpfully for his argument, he does not provide examples of what such conditions might be. In the absence of a concrete example to the contrary we must acknowledge that the dialectically necessary argument proposed by Gewirth remains intact; that the fact of our agency requires us to claim our GCAs as rights. Instead of addressing this issue, Raz instead moves on to attack the GCAs Gewirth identifies – suggesting that the fact that slaves are still capable of exercising agency through performing actions is evidence that freedom is not a necessary condition of human purposive action.<sup>8</sup> Such a proposition again either misses its target or attacks a deliberately erected straw man, and fails for two reasons. Firstly, Raz ignores the purposiveness required by an agent for full exercise of their freedom; he therefore does not address the fact that a slave would not be able to truly engage in human purposive action, and is therefore not free in any meaningful sense of the term. Secondly, if Raz were to dispute this narrower conception of freedom, then his own statement must be taken to its logical conclusion; this would hold that, were freedom a necessary element of human purposive action, then the practice of slavery would be one that would not exist. Yet nowhere is this an argument that Gewirth has proposed; Gewirth is attempting to demonstrate that, in denying freedom to agents, the practice of slavery is one that should be regarded as morally impermissible were it to be practiced.

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<sup>5</sup> Raz (n 2) 323

<sup>6</sup> *ibid*

<sup>7</sup> *ibid* 324

<sup>8</sup> *ibid*

Having demonstrated that Raz's failure to engage substantively with the PGC requires us to disregard his criticism of Gewirthian theory, this chapter can continue on the assumption that Raz has not made a serious attempt to disprove the dialectical necessity of the PGC. It should therefore be seen to be valid unless Raz can demonstrate otherwise.

## 2 Raz on Reasons

Previous sections of this thesis have already highlighted the centrality of action to any successful theory of law. Gewirth's PGC itself chooses this as its starting point because of the centrality of agency and action to all aspects of life. If then, as Gewirthian theory claims, the simple statement of 'I do  $X$  for purpose  $E$ '<sup>9</sup> can be the foundation of a categorically binding limitation on action, then any theory of action must allow within it this same formulation. The starting point of our discussion of Raz will therefore focus on this same starting point; if an agent acts in order to attain a purpose  $E$ , what reasons can influence his right to attain  $E$  in the first place? More importantly, does an agent need to reason in a particular way in order to attain a given end; put differently, what is the connection between reason and rationality? And what impact, if any, does this connection have on any theory of action which either considers itself to be limited, or is necessarily limited, by the PGC? The former issues are ones which Raz tackles directly in his writing and will be outlined below, with comments made as the theories progress with regards to their compatibility with the PGC.

### 2.1 On the Nature of Reasons

Raz, as has been mentioned above, is particularly of interest to the Gewirthian project given the extensive writing he has undertaken on the idea of reasons for

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<sup>9</sup> Deryck Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1991) 14

action. In his early work he stated correctly that, in ordinary conversation, a single reason is very rarely provided for a course of action and, if it is, it itself rarely is the only reason on which we act; we more regularly only state some, as opposed to all reasons we have to act in a given way, dictated by pragmatic considerations such as the nature and scope of the conversation in question.<sup>10</sup> A complete reason for agent  $p$  to  $x$  would, he suggests, only exist if  $R(\Phi)_p, x$  also entailed  $R(\Phi)_q, y$  – or if the same reason to act ( $R(\Phi)$ ) exists for both  $p$  and  $q$  to attain end goal  $x$  and  $y$ , a perfect and complete reason exists.<sup>11</sup> Yet such perfect reasons are rare if not impossible, as even those reasons which would trump all others definitionally need to conflict with opposing reasons in order to come out on top. Reasons then, for Raz, are not clear cut and necessarily come into conflict with one another.

Following this scepticism to its conclusion, we may infer that Raz may also be sceptical of the simplicity of the first step of the dialectically necessary Gewirthian argument that an agent must  $X$  for purpose  $E$ ; the very fact that the agent desires  $E$  being the reason for him to  $X$ . If Raz's scepticism to this point holds, then Gewirth's argument fails. Section 2.1 of this chapter will therefore examine Raz's writings on the nature of reasons. It will firstly consider the problem of false beliefs, and whether these are capable of being valid reasons for action. It will then move on to discuss the conflict which Raz places on differing types of reasons to ask whether such a conflict is problematic for the Gewirthian project. Lastly, Raz's work on Exclusive Reasons for Action will be considered in light of the identified conflicts, in order to identify the logical foundations of Raz's thoughts on Normative Reasons to be discussed in section 2.2.

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<sup>10</sup> Joseph Raz *Practical Reason and Norms* (2<sup>nd</sup> ed Oxford 1999) 22

<sup>11</sup> *ibid* 24

### 2.1.1 Reasons founded on false belief

Bruno Celano asks us to consider the following question: 'If John takes an umbrella because he believes it will rain, is the reason for his taking it his belief it will rain or the fact it will rain?'<sup>12</sup> Put another way, when we act upon a belief as opposed to a fact, does this affect the validity of the reason for which we act? Raz suggests that this may affect the validity of the reason for action, arguing that 'If p is the case, then the fact I do not believe that p does not establish that p is not a reason for me to perform some action. The fact that I am not aware of any reason does not show that there is none.'<sup>13</sup> Yet Celano suggests here that in claiming that an objective fact would trump a mistaken belief as a reason even if the agent were unaware of the truism in question, Raz mischaracterises how agents normally behave. He claims that such objectivism cannot account for relations between reason statements (There is a reason for X to  $\Phi$ ) and judgements of practical rationality (Given the circumstances, X's  $\Phi$ -ing was rational). As such, Celano holds that beliefs to circumstances are more often motivations to action than are facts, and as such are more compelling reasons for action.<sup>14</sup>

This certainly appears to be a more accurate description of how agents behave than Raz's alternative; that an agent may be unaware of a reason to behave in a certain way, or be mistaken in his belief that a reason exists for him to behave in a particular way, but this does not mean an objective reason does not exist which provides a reason which overrides the unawareness of the agent or the mistaken belief he possesses.<sup>15</sup> Celano observes that such a characterisation suggests that practical rationality should not be assessed internally from the agent's perspective, but against an external and objective standpoint.<sup>16</sup> Yet this is not how agents behave; Celano claims that, should an agent be asked whether they

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<sup>12</sup> Bruno Celano 'Are Reasons for Action Beliefs' in Lukas H. Meyer et al. (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 25

<sup>13</sup> Raz (n 10) 17

<sup>14</sup> Celano (n 12) 25

<sup>15</sup> *ibid* 28

<sup>16</sup> *ibid* 30

$\Phi$  because of a belief in  $p$  or the fact that  $p$  exists, most would choose the former. The reason suggested is that expression of a belief in something necessarily contains a claim that our belief is true and that we view it as an objective fact; were this not the case, we would not hold it as a belief.<sup>17</sup>

Such a claim as to the validity of statements founded on a false belief is more satisfactory to a Gewirthian than Raz's insistence on a difference in the validity of the two; the first step of the PGC, that I do  $X$  for purpose  $E$ , makes no reference to the validity of the reason as to why the agent wishes to undertake  $E$ . As such, the truth or falsehood of the motivation bears no relation on the desire the agent to undertake the action in question. All that this first step of the dialectically necessary argument requires is that an agent is motivated, for whatever reason, to undertake a given action for the pursuit of a given end. Were Celano to be able to prove his assertion that this element of Raz's theory was founded on a mischaracterisation of agency, then this would be beneficial.

This is something which he attempts to do by identifying three hypothetical scenarios to demonstrate the link between reason statements and practical rationality – something he believes Raz's characterisation fails to account for:

1.  $X$  has no reason to  $\Phi$ , he believes he has one, and he  $\Phi$ -s
2.  $X$  has a reason to  $\Phi$ , he believes he has that reason, and he  $\Phi$ -s
3.  $X$  has a reason to  $\Phi$ , he doesn't believe he has one, and he  $\Phi$ -s

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Celano claims that hypotheses 1 and 2 both demonstrate how an agent would behave. The first demonstrates an agent acting on a false belief for a certain end. Such a statement should be read in light of Celano's earlier observation that a claim to belief necessarily contains a truth-claim; since the agent therefore believes he has a reason to  $\Phi$  then it would still be rational for him to act upon it regardless of the reason proving to be false. The second claim demonstrates that if an agent holds a true belief then it too would be a rational reason to  $\Phi$ .

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<sup>17</sup> *ibid* 29

<sup>18</sup> *ibid* 30

The third and final hypothesis is a statement of Raz's theory that an objective, true reason to  $\Phi$  should override the false belief which the agent has that he has no reason to  $\Phi$ , meaning the agent  $\Phi$ -s despite not believing he has a reason to do so. In demonstrating this, Celano thus identifies a flaw in Raz's argument that beliefs are not necessarily reasons for action. Mistaken beliefs, holds Celano, can still be reasonably held – it therefore follows that an agent who performs  $\Phi$  on a mistaken belief was acting rationally.<sup>19</sup> This is something which Raz would reject in that it ignores the objective nature of reasons.

This disagreement between Raz and Celano is therefore one which is of relevance to the Gewirthian project. Given that the PGC claims to provide an objective framework against which the permissibility of action should be assessed then one might expect a Gewirthian to be more sympathetic to the objective account of reasons given by Raz. Yet it is difficult to accept this given the inherent disconnect between reason statements and practical rationality identified by Celano in Raz's objection. Yet to accept Celano may be seen to concede that reasons are inherently subjective and cannot be constrained by an objective reason for which the agent is unaware. A critic may therefore raise an objection to the PGC in that, if Celano is correct, then if an agent does not believe that he should act in conformity with the PGC despite being obliged to do so, then as long as he had a good reason for acting on this belief then he has a valid reason to act against its requirements. This argument can be dismissed however, on two key misunderstandings of how the PGC operates. Firstly, the objection would be correctly directed at a stage of the argument which does not require a reason to be assessed for its validity. The first stage of the PGC is entirely value-neutral with regards to the action being undertaken; all it requires is that a desire exists which an agent acts upon in order for it to be satisfied. Any objection based on the rationality or reasonableness of the desire and the truth or falsehood of the motivating belief is then, at this stage, redundant – all that matters is that the desire exists and is acted upon. Secondly, even were we to allow for this misunderstanding and aim the criticism at the entire formulation then it would still fail. The objection relies on Celano's idea that an agent should

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<sup>19</sup> *ibid* 31



have a reasonable belief that the PGC does not apply to their action; yet, given that the PGC operates on a dialectically necessary argument stemming from a value-neutral statement of bare agency, it is impossible that such a belief could exist. In undertaking any action an agent is necessarily using their agency; they are therefore rationally committed to seeing it as important to them. In acting contrary to the PGC they are claiming that their agency is not important – something which is patently false as their very attempting to act contrary to the PGC entails making the opposite claim. It is therefore logically impossible for an agent to act contrary to the PGC based on a belief which is reasonable. We can therefore see that Celano’s argument appears to be PGC compliant, and that any claim to the otherwise is based on attacking a straw man.

This therefore demonstrates that a Gewirthian can accept Celano’s criticism of Raz without damaging the integrity of the PGC. This is important as a key problem does exist with Raz’s account of false beliefs. It does not make sense to suggest that an agent who does not believe he has a reason to  $\Phi$  would still  $\Phi$ , therefore creating a link between reason statements and practical rationality. Agents act rationally if they believe they have a reason to  $\Phi$  and  $\Phi$ , or do not believe they have a reason to  $\Phi$  so do not  $\Phi$ . All of this can be accounted for by the PGC.

### **2.1.2 Differing types of Reasons.**

Having identified that Raz is incorrect in claiming that there is no connection between practical rationality and reason statements, we should now move on to consider Raz’s ideas on different types of reasons which might exist. The idea of a plurality of reasons is central to Raz’s work. For although he simply defines reasons for action as ‘[F]acts that constitute a case for (or against) the performance of an action.’<sup>20</sup>, this definition is prior to the idea that reasons can wither be successful or unsuccessful depending on whether or not the agent

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<sup>20</sup> Joseph Raz, *From Normativity to Responsibility* (Oxford University Press 2011) 36

accepts them as the foundation upon which to  $\Phi$ . Action is therefore necessarily pursued after a process of deliberation during which competing reasons vie with one another for primacy. If reasons can compete in this way to be accepted by an agent, then it is reasonable to infer that different types of reasons might exist – some of which possess more weight than others. Raz believes such reasons can be classified in three broad categories:

1. Conclusive Reasons:  $p$  is a conclusive reason for  $x$  to  $\Phi$  iff  $p$  is a reason for  $x$  to  $\Phi$  (which has not been cancelled) and there is no  $q$  that overrides  $p$ .
2. Absolute Reasons:  $p$  is an absolute reason for  $x$  to  $\Phi$  iff there cannot be a  $q$  which overrides  $p$
3. Prima Facie Reasons: Ones which are neither conclusive nor absolute<sup>21</sup>

These three types of reasons therefore compete against one another until an agent chooses to act. Reasons which an agent considers when making this choice are labelled by Raz as operative reasons for action. Any reason which is not pertinent on their deliberation is held to be auxiliary. An operative reason therefore exists *iff* a belief in its existence entails having the practical critical attitude (defined as the necessary inference that if an agent believes in an ought-statement  $p$ , they necessarily do not believe conflicting beliefs),<sup>22</sup> and auxiliary reasons are any which are non-operative.<sup>23</sup>

For Raz then, an operative reason is one which an agent considers when choosing how to act. These can include ones which are ultimately relied on when choosing to act in a given way, such as absolute or conclusive reasons earlier described, or can be ones which are discarded as being outweighed by other reasons for behaving in the conflicting way. They can therefore be prima facie, normative<sup>24</sup> and complete<sup>25</sup> in their character (although, as stated at the

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<sup>21</sup> Raz (n 10) 27

<sup>22</sup> *ibid* 32

<sup>23</sup> *ibid* 33

<sup>24</sup> *ibid* 34; Normative Reasons are a special type of reason which will be discussed in much more detail in s.2.2 of this chapter.

<sup>25</sup> *ibid* 36

beginning of section 2.1, such complete reasons are rare). According to Raz, an operative reason is only adopted as a course of action if an agent can make the following claim of it: 'It is always the case that one ought, all things considered, to act for an undefeated reason.'<sup>26</sup> Such a statement encapsulates the conflict of reasons for action which Raz claims operates between what he labels first order and second order reasons. First order reasons for action are reasons for which we undertake a given action; second order reasons are reasons to act or refrain from acting on first order reasons. One should therefore only take up a course of action *iff* it is the case that their primary reasons for undertaking it are supported by second order reasons which justify it, and there are no second order exclusionary reasons to prevent us from choosing that course of action. The form that such exclusionary reasons are considered below in s.2.1.3; for the purposes of this section it is enough to simply acknowledge that, should an exclusionary reason exist, then it is not only operative on an agent's choice on how to act but should also be viewed as an absolute reason in Raz's earlier tripartite distinction.

In his later work, Raz argues that these conflicting oughts which an agent is forced to balance against one another can be generated from a variety of reasons which need not be epistemic in nature; empirical reasons can exist which might encourage us to behave in a certain way. He gives the example of a right to vote; if all citizens are entitled to vote and an agent is a citizen, has a reason to see himself as able to vote. Raz claims this reason to behave as though one is able to vote is different to one which is epistemic and based entirely on norms.<sup>27</sup> This further differentiation in reason types is justified by Raz by the types of justification which each possesses.

Empirical reasons are self-evident and do not need elucidation. Epistemic reasons however, are different; they are governed by one overarching concern (whether or not the belief which justifies the concern is true), but the concern can be founded on multiple values – friendship, justice and the like. If such

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<sup>26</sup> *ibid* 40

<sup>27</sup> Raz (n 20) 41

epistemic reasons conflict, then it follows that some desire will always be unsatisfied.<sup>28</sup> Yet Raz questions whether or not this is a true conflict; for if epistemic reasons conflict then the superior reason is the one which should be followed, with superiority being assessed by the relative value attached to each reason. If a reason of lesser value is discarded then it must be seen to be a deficient reason and, therefore, the agent suffers no loss – and may indeed benefit - from having this desire left unfulfilled:<sup>29</sup>

[B]ecause there is no possibility that the lesser reason for belief serves a concern that is not better served by the better reason there is no possibility of preferring to follow what one takes to be the lesser reason rather than the better one.

The point being made by Raz here can be summarised more neatly, however. Practical reason is, for him, a first order reason. Empirical reasoning therefore falls within the realm of practical reason in that it is presumptively sufficient on determining a course of action in and of itself. Raz outlines presumptive sufficiency thus:

‘[T]here is no other reason for or against so acting than (a)  $\Phi$ -ing at that time is justified, and (b) if the agent rationally believes that the reason applies, and that there is no other, then his failing to try to  $\Phi$  is akratic.’<sup>30</sup>

Epistemic reasoning, by contrast, is not presumptively sufficient; it is a second order reason which supports or defeats a first order reason. This is because coming to a belief based on an epistemic reason may be irrational as, presumably, there is no way of testing the validity of the epistemic belief in question.

The distinction made here between the scope of epistemic and empirical reasons however is one which should be questioned for its compatibility with Raz’s earlier work. Once an agent has balanced operative reasons using his practical critical attitude in order to identify a conclusive or absolute reason to  $\Phi$ , Raz

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<sup>28</sup> *ibid* 41

<sup>29</sup> *ibid* 42

<sup>30</sup> *ibid* 45

believes they are committed to recognising that this claim is logically equivalent, if not entirely synonymous with, a statement to the effect that they ought to  $\Phi$ .<sup>31</sup> This appears to be an epistemic jump, in that Raz is suggesting that there is normative value in successful reasons for action regardless of whether they are grounded in empirical or epistemic concerns. This statement appears contradictory at first, but a Gewirthian approach may help to resolve the defect in the reasoning. For in making this claim, we can conclude then that Raz would also be of the opinion that his description of reasoning described above is equally logically equivalent to, if not synonymous with, the claim made by the first step of the PGC; that if an agent does X for purpose E then they must view X as necessary for E. A self-reflexive ought is therefore created where, if an agent desires E, they ought to do X.<sup>32</sup> Both Raz and Gewirth recognise then that a successful reason to undertake an action imposes an 'ought' on the agent to pursue that course of action. This move from is to ought is one which Raz addresses head on, when he states that 'Statements of facts which are reasons for the performance of a certain action by a certain agent are the premises of an argument the conclusion of which is that there is reason for the agent to perform the action or that he ought to do it.'<sup>33</sup>

This is itself an epistemic claim, justifying that all reasons based on facts which support a course of action create a normative ought. As we established in s.2.1.1, such facts include all reasons which an agent believes to be true given the truth-claim that all belief necessarily entails. This is not to say that Raz's claims as to the deliberative nature of reasoning are false. But once the first step of the PGC is established as being equivalent to Raz's justification for action, the categorical imperative provided by Gewirthian ethics can then fulfil the ancillary function of providing a normative background against which this balancing of reasons for their respective values can take place. Since Raz concedes that both epistemic and empirical reasoning are directed towards action, thus engaging the PGC, this conflation of reason types is entirely possible. This realisation leads towards the conclusion that, whilst the taxonomy of reasons provided by Raz certainly exists,

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<sup>31</sup> Raz (n 10) 29

<sup>32</sup> Byleveld (n 9)

<sup>33</sup> Raz (n 10) 28

it is a value judgment which is simply not necessary for classifying reasons within the bare agency required for action to take place. Its importance for any theory of balancing reasons for action and, by extension, the nature of legal restrictions on our actions, is subsumed within the bare agency necessary for the PGC to operate. For if, as has been established previously in this thesis, the PGC does provide a categorical imperative against which the permissibility of all actions should be assessed for their permissibility, then the motivation behind choosing one reason as more inherently valuable than another is governed by that test and not an ultimately arbitrary distinction based on the nature of the reason in question. To insist otherwise is to misunderstand and overcomplicate the nature of what it is to act.

### 2.1.3 Exclusionary Reasons

Having identified so far that to overly distinguish between reasons for action is superfluous with regards the noumenal agency required for the PGC to operate, we turn now to one specific type of reason which Raz identifies which is highly relevant to any reformulation of his theory to be PGC compliant – the category of exclusionary reasons. Raz categorises these as a second order reason which we can use to discount first order reasons when assessing whether or not to act upon them.<sup>34</sup> Raz recognises that they may be moral in nature<sup>35</sup> and provide a prima-facie reason (using his own tripartite classification) to behave in accordance with a moral norm. The PGC could therefore be integrated into Raz's work as just such an exclusionary reason - but in his most recent writing on normativity he not only fails to endorse a particular moral principle, but also does not explore the issue of what form such a moral principle might theoretically take. He instead suggests a list of values which he implies are self-evidently morally valuable – things that are good for people and experiences which will improve their lives are but two examples.<sup>36</sup> So for Raz, an exclusionary reason could be that the proposed course of action would be bad for people;

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<sup>34</sup> Michael Moore 'Authority, Law, and Razian Reasons' (1989) S Cal L Rev 827, 829-830

<sup>35</sup> *ibid*, 829

<sup>36</sup> Raz (n 20) 221

this would then serve to trump all reasons which would contradict the exclusionary reason. The problem here is that Raz fails to provide any reason as to why agents should accept this particular example as valuable. Whilst we can conceptualise the notion of an exclusionary reason, it would be helpful if time were devoted to giving examples of an exclusionary reason which would apply to all action regardless of the subjective value judgments of the agent in question.

Raz's reticence here appears to be grounded in his previous distinction between first and second order reasons. For Raz an exclusionary reason is definitionally a second order reason given that it provides us with an absolute reason to not- $\Phi$ . If it is to be universal in its application however, Raz believes that an epistemic foundation is necessary in order to provide the normative force to act as a categorical imperative against which the permissibility of action can be assessed. This is something Raz believes normative discourse cannot achieve when it directed against providing the justification for practical reasoning, as our use of language is too flexible and context-dependent to adequately provide for such a universal principle.<sup>37</sup> Previous parts of this thesis have been dedicated to casting doubt on the idea that semantic vagueness necessarily casts doubt on the meaning of words and concepts, so the argument will not be repeated here. Instead, the point will be conceded *arguendo*. Let us assume that Raz is right and concede that semantic vagueness is problematic regarding a normative justification for practical reasoning. Here, slightly more detail is needed to determine exactly what Raz means by the term 'practical reasoning.' He appears to endorse John Broome's Aristotelian view:

Aristotle took practical reasoning to be reasoning that concludes in an action. But an action – at least a physical one – requires more than reasoning ability; it requires physical ability too. Intending to act is as close to acting as reasoning alone can get us, so we should take practical reasoning to be reasoning that concludes in an intention.<sup>38</sup>

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<sup>37</sup> *ibid* 107

<sup>38</sup> John Broome, 'Practical Reasoning' in J. Bermúdez and A Millar (eds.) *Reason and Nature: Essays in the Theory of Rationality* (Clarendon Press 2002) 85

Such a position appears sound for our present purposes. Raz appears to be suggesting based on this definition that the formulation of an intention is simply too subjective and variable to generate an objective and universal ‘ought’ in that we objectively ought to do what we have the best practical reason to do. This appears at first to contradict his earlier claim explored in s.2.1.2 that an agent recognising absolute or conclusive reasons to  $\Phi$  is logically consistent to, if not synonymous with, the agent recognising that they ought to  $\Phi$ . Yet Raz attempts to circumvent this contradiction by saying that instead of creating an objective ought, the best that a practical reason can do is to generate a rational ought – that ‘we rationally ought to do what we have best reason to believe we have best reason to do.’<sup>39</sup> Yet even this is something about which Raz is sceptical, claiming that the incommensurability of some reasons means that an ought is sometimes impossible. By extension, any normatively justified exclusionary reason which is grounded in practical reasoning also cannot be universal, as reasons’ incommensurability must also mean that in some situations a deliberation on reasons would remain balanced and no one course of action is preferable to another.

Such an argument against normative obligations arising from practical reason grounded on incommensurability and semantic vagueness again fails on two counts. Firstly, on a practical level, the incommensurability described by Raz simply does not fit with how agents act. He gives the example of ‘Jackson Cases’<sup>40</sup> or the more easily relatable problem of having to choose between identical cans of soup as an instance of incommensurability, as there is no reason to choose one more than the others. Yet if this were true then an agent would be stuck in a soup-based limbo, unable to decide which one to choose. When an agent is faced with this situation however, this is not what occurs – they generally do pick a can. It may be the closest can, the one on a higher or lower shelf or one chosen at random. Yet in picking one up an agent simply must have had a reason to choose that over the others (even if the reason was subsumed into a secondary bout of reasoning concluding in a decision to choose a random can),

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<sup>39</sup> Raz (n 20) 108-109

<sup>40</sup> *ibid* 120-128



otherwise they would still be in front of the shelf or would have walked away souless. And if an agent does the latter, they are presumably doing so because the equilibrium provided by incommensurable reasons becomes an exclusionary reason against acting arbitrarily, thus breaking the claim of incommensurability in any case. The same can be said of incommensurability of reasons generally; if reasons were truly incommensurable then action would be impossible. The fact that we do act suggests Raz's observation is founded on a false premise. Yet even were we to concede the point of incommensurability, a second reason for rejecting Raz's conclusions exists in the observation that it appears to be founded on a misunderstanding of what an exclusionary reason grounded in a categorical imperative is designed to do. The PGC in particular is not designed to provide a reason to act in a certain way, but to refrain from certain types of impermissible behaviour. Framing the PGC as providing a negative duty means that, when presented with incommensurable reasons that are permissible, then it simply does not matter which course of action is chosen. There does not, therefore, appear to be a valid reason to agree with Raz that practical reasoning is too context dependent to provide a normative basis for an exclusionary reason for action. This conclusion is only reinforced when the principle in question is one which is dialectically necessary from the position of bare agency prior to the attachment of any value to the reasons in question, as is the case with the PGC.

Having established that incommensurability of reasons is no barrier to the PGC acting as a valid exclusionary reason applicable to all occasions of practical reasoning, let us turn again to the question of whether the universal ought it creates is commensurable with the remainder of Raz's work. It has previously been stated that, for Raz, it is axiomatic that exclusionary principles are second-order reasons. He therefore believes that they are only of value when applied to a first-order reason; put another way, such exclusionary reasons only possess instrumental value. Such an exclusionary reason engages with a principle named by Raz 'the facilitative principle'. This holds that '[W]hen there is an undefeated reason to perform an action there is also a reason to facilitate its performance.'<sup>41</sup> Put differently, if a conclusive reason for action is not contradictory to an

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<sup>41</sup> *ibid* 144

exclusionary reason, then a reason exists to facilitate that action. Note that this again a weaker claim than the earlier statement that an agent's recognising absolute or conclusive reasons to  $\Phi$  is logically consistent to, if not synonymous with, the agent recognising that they ought to  $\Phi$ . It does, however, again echo an element of the PGC – namely that, if an agent does wish to attain end E and X is the means by which E is attained, then the agent is logically committed to viewing X as being as valuable to them as E. They must therefore value their Generic Conditions of Agency equally, as without these they could not perform X and, by extension, attain E. This Gewirthian claim as to the value agents should place is normative in that it obliges agents to value their Generic Conditions of Agency if they value E, and is therefore stronger than Raz's claim that facilitative reasons are not necessarily absolute and instead only possess value when directed to a specified end. Raz suggests his facilitative reasons are analogous to Gewirth's Generic Conditions of Agency when he makes the claim that:

To have an end involves believing that it is worth having (at least other things being equal). That belief explains why people pursue ends. They take what they believe to be reasons for the ends as reasons to pursue the ends, and, as explained by the facilitative principle, to take steps to facilitate them.<sup>42</sup>

He develops this reasoning into a stronger claim that agents are obliged to do X for E only when to not do X would be irrational.<sup>43</sup> In stating this, he concludes that such facilitative reasoning at the normative level is subject to the same rules of rationality as all other normative claims.<sup>44</sup> This claim commits Raz to endorsing the PGC as non-compliance with its dialectically necessary requirements would be the very definition of irrationality.

Raz is therefore committed to the idea that exclusionary reasons fall within the sphere of practical rationality in the same way as all other reasons for action. They are absolute reasons, in that they trump all other courses of action which are contradictory. This commits the Razian agent to accepting that the

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<sup>42</sup> *ibid* 150

<sup>43</sup> *ibid* 158

<sup>44</sup> *ibid* 165

exclusionary reason not to act contrary to the PGC applies equally to all reasons under their deliberation.

## 2.2 Normativity and Reasoning

Section 2.1 has established several problems with Raz's theories when viewed alongside the PGC. Some of these have been reconciled, some have been shown to be incompatible and yet more have been shown to be logically equivalent in their operation. It has been shown that all reasons, whether or not they are founded in a true or false belief, are all equally valid reasons for action as all beliefs necessarily contain truth-claims when made from the internal viewpoint of the agent. To categorise reasons as being normatively different depending on their empirical or epistemic foundation is to overcomplicate the fact of noumenal agency, as this is the exclusionary reason which Raz commits himself to recognising due to the overlap between his facilitative principle and recognising Generic Conditions of Agency as necessary for action as per the requirements of the PGC. These latter points show us that any conflict between reasons therefore takes place at the nexus between reasons for bare agency and any exclusionary reasons which might prohibit them. The second part of this section will therefore explore this nexus in greater detail, examining the how the oughts produced by reasons for action attain normative value and can therefore become true exclusionary reasons.

Let us first return to an idea from Raz which was mentioned in s.2.1.2 – that reasons necessarily conflict with one another. This implies a normative hierarchy of reasons whereby whichever reason you have the strongest reason to act on is the one you ought to pursue.<sup>45</sup> The question then arises – which reason should be followed in the event of a conflict? For Raz, the answer is whichever reason is seen to be objectively stronger than another.<sup>46</sup> Such a test must necessarily be objective as, as has been previously seen, the same rules of practical reason must

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<sup>45</sup> Rüdger Bittner, 'Stronger Reasons' in Lukas H. Meyer et al. (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 17

<sup>46</sup> Raz (n 10) 25

apply equally to all agents; the reasons which an individual may believe to be the most important could potentially be overruled by an exclusionary reason if certain circumstances apply.<sup>47</sup>

Such a claim opens practical reasoning to mandatory normative claims. We might therefore engage in a semantic shift, as normative reasons contain a claim that they might legitimately be used to direct behaviour away from that which is provided for by other reasons. They therefore constitute an ‘ought’ which might be appropriately labelled a rule rather than a bare reason. This is a point which will not be stressed at this stage as differing rules carry different normative weight thus rendering the semantic shift obfuscatory at this stage, yet the idea is worth mentioning nonetheless. What is not obfuscatory is that the idea of an ‘ought’ is a special type of reason which merits a more in-depth discussion. Much has been made in s.2.1 of the fact that Raz believes that an ‘ought’ is a spectral presence in any kind of reasoning, in that if an agent has an absolute reason to  $\Phi$ , Raz believes they are committed to recognising that this claim is logically equivalent, if not entirely synonymous with, a statement to the effect that they ought to  $\Phi$ .<sup>48</sup> Norms are therefore omnipresent within reasoning.

Before this connection is detailed further, we must ascertain what is meant by the term normativity in Raz’s work. For him, the following definition applies:

Aspects of the world are normative in as much as they or their existence constitute reasons for persons, that is, ground which make certain beliefs, moods, emotions, intentions, or actions appropriate or inappropriate.<sup>49</sup>

Such a definition of normativity is incredibly broad – Raz appears to be stating here that he believes all reasons are normative in that they make a claim to truth which is capable of directing an agent to one course of action over another. Explaining the concept of normativity is therefore the practice of explaining

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<sup>47</sup> Harry Frankfurt, *Necessity, Volition, and Love* (Cambridge University Press 1999) 162

<sup>48</sup> Raz (n 10) 29

<sup>49</sup> Joseph Raz, *Engaging Reason: On the Theory of Value and Action* (Oxford University Press 1999) 67

what it is to be a reason for action.<sup>50</sup> The true depth of this statement is even greater for Raz, however – he defines rationality as the ability to recognise and respond to such normative demands, and furthermore holds that rationality is the very foundation of personhood.<sup>51</sup> It is worth highlighting at this point that this appears to introduce one more similarity between Raz and Gewirth – both appear to hold that rationality expressed through agency is the foundation of a special status which distinguishes us from those beings which are not capable of responding to rational demands. Both perceive that a necessary connection exists between the capacity for rationality and normativity.

Raz claims that there are four main observations which can link capacity rationality with normativity. Firstly Raz claims that we need capacities which do not directly contribute to rationality in order to act upon our rational decisions - he gives the examples of Perceptual Ability and the ability to control our movement at a bare minimum level. Secondly, he holds that the idea of rationality is more than an ability to reason but to understand inferences and premises as reasons for action in an abstract sense. Thirdly, rationality goes beyond our ability to engage in deliberative reason and applies reasoning to all functions which we undertake. Lastly, Raz believes that rationality is a unified concept which is identical in its operation regardless of whether it is directed towards practice, theory, substantive or procedural ends.<sup>52</sup> Before we continue with our discussion, two things here should be examined. The first is that, in his primary observation, Raz seems to be continuing to agree with Gewirth that agency and normativity are intertwined, as the examples of capacities which are necessary for rational action without directly contributing to it appear to be categorizable as Generic Conditions of Agency which all agents are committed to recognising as necessary for action. The second is that Raz's unified theory of rationality is not universally accepted. Derek Parfit, for one, argues that a large difference exists between substantive and procedural rationality; the former requires us to rationally desire certain things (such as our own wellbeing), whereas the latter merely obliges us to follow certain methods of reasoning

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<sup>50</sup> *ibid*

<sup>51</sup> *ibid*

<sup>52</sup> *ibid*

whereas our end goal is irrelevant.<sup>53</sup> A Gewirthian should reject such a separation, however. For in separating reasoning thus, Parfit suggests that it would be rational for an agent to deny the importance of his own wellbeing in choosing to act. Yet a core facet of action is that all action is impossible without a minimum level of agential wellbeing; without this no action can take place. All agents are therefore committed to a minimum level of substantive rationality which preserves this wellbeing, at least until the action they are undertaking has been completed. If this minimum level of substance is always necessary, then Parfit's distinction can be seen to be flawed. Raz defends his unified rationality thesis in what is, again, a remarkably Gewirthian sounding manner – he claims that rational beliefs can be identified by their opposite component of irrational beliefs, itself definable as existing 'if and only if holding [such beliefs] displays lack of care and diligence in one's own epistemic conduct.'<sup>54</sup> This sounds logically similar to Gewirth's claim that an agent should not act so as to contradict the necessity of their own agency, as to do so would be irrational – the only difference being that Gewirth builds this claim upwards using a dialectically necessary argument from bare agency whereas Raz makes a weaker claim of self-evidence.

This conception of rationality is tied to normativity simply – if reasons are normative aspects of the world, rationality thus described is conceptually linked with how an agent responds to these reasons.<sup>55</sup> Reasons stemming from emotion, desire, intention or belief can be rational, for Raz, iff they belong to rational agent, they are under the control of that agent and they are appropriate and intelligible given the reasons for and against them as perceived by the agent.<sup>56</sup> As was concluded in s.2.1.3, incommensurability of these reasons is no bar to them holding normative force – all reasons should be seen as operating on the same plane of rationality. All reasons then are sources of normativity in that they

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<sup>53</sup> Derek Parfit, 'Reason and Motivation', *Aristotelian Society*, suppl.71 (1997), 99, at 101.

<sup>54</sup> Raz (n 49) 75

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*

motivate us to act according to a given directive. Thus the link between rationality and normativity has, for Raz, been established.<sup>57</sup>

Yet if all reasons are normative in that they are action focussed, we may question how they may carry differing strengths. How can exclusionary reasons discussed above overrule other reasons if all get their normative force from the same idea of bare agency? How can two oughts originating from the same nexus override one another? Here, Raz turns to John Broome to highlight another categorisation of reasons beyond his original tripartite classification of conclusive, absolute and prima facie. Broome suggests two types of reasons exist. Firstly:

[A] perfect reason for you to  $\Phi$  is...a fact that explains why you ought to do  $\Phi$ . Other reasons are *pro tanto* reasons: 'A *pro tanto* reason for you to  $\Phi$  is a fact that plays the for-  $\Phi$  role in a potential or actual weighing explanation of why you ought to  $\Phi$ , or in a potential or actual weighing explanation of why it is not the case that you ought to  $\Phi$  and not the case that you ought not to  $\Phi$ .<sup>58</sup>

Broome suggests that these reasons are respectively explanatory and normative, and that normative *pro tanto* reasons cannot exist independently of a specific desired outcome. Raz endorses this distinction – only with reference to a specific outcome can a balancing act of reasons truly take place.<sup>59</sup> These normative reasons for and against the action in question outweigh one another, in case of conflict, by simple mathematics:

[T]here are reasons for you to  $\Phi$  and reasons for you not to  $\Phi$ . Each reason is associated with a number that represents its weight. The numbers associated with the reasons to  $\Phi$  add up to more than the numbers associated with the reasons not to  $\Phi$ . That is why you ought to  $\Phi$ .<sup>60</sup>

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<sup>57</sup> Raz (n 20) 13

<sup>58</sup> John Broome, 'Reasons' in R.J.Wallace et al (eds) *Reason and Value* (OUP 2004) 41

<sup>59</sup> Raz (n 20) 22

<sup>60</sup> Broome (n 58) 36-37

This should be questioned for two reasons. Firstly, the operative distinction between epistemic and empirical reasoning put forward by Raz has already been called into question in s.2.1.2. Since it is not immediately obvious how Broome's distinction between perfect and *pro tanto* reasons differs from Raz's as previously discussed, we should reject it for the same reasons. Secondly, it is not immediately apparent how Broome proposes the relative value weightings to his *pro tanto* reasons are assigned. If, as his distinction suggests, these reasons are only conceptually sound when proffered with regards to a specific end, then are they to be judged by reference to this end? If so, then what measure is being used to assess the desirability of the end in question? Value is therefore either presupposed by Broome as self-evident, or a reference point for normative value external to the distinction is necessary. To identify what this might be, we should look back to Raz to ask whether any absolute oughts are capable of existing. He suggests there are only two – definitionally conceptual truths and absolute moral truths.<sup>61</sup> Raz here welcomes that an absolute moral truth, if identifiable, could act as such a reference point against which such *pro tanto* reasons could be assessed for their validity. For our purposes then, we have found yet another example of where the PGC could be successfully integrated into Raz's theories of reasons and rationality in order to provide value to the reasons considered by agents in their deliberations. This must feed into the normative/explanatory nexus as an explanatory feature which is recognised by the agent as a reason for thus acting.<sup>62</sup>

To summarise so far, Raz holds that normative reasons are ones which guide agents' actions. He does not, however, believe that normativity and rationality are necessarily linked as he holds there is no reason to act rationally.<sup>63</sup> This seems odd in light of the discussion which has taken place so far. To demonstrate why this premise is not one which we should necessarily accept, the opposite position shall be put forward here with reference to Raz's writings with the aim of demonstrating that Raz's writings should in fact recognise a normative reason to act rationally in order to remain logically consistent. A good point to begin an

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<sup>61</sup> Raz (n 20) 24

<sup>62</sup> *ibid* 28

<sup>63</sup> *ibid* 94-95



examination of the claim that normative reasons are connected with rationality is to suggest that, in order to be a strong motivational factor a normative reason must be rational as central to the idea of the rationality of the motivating factor is that the agent recognises the motivational force inherent in the norm.<sup>64</sup> In order for a normative reason to motivate us to action then, agents must be imbued with reason to recognise that the norm provides a reason for action.<sup>65</sup> Reason and rationality are therefore conceptually linked. Raz partially accepts the definition of reason provided by Paul Grice to arrive at this conclusion:

No less intuitive than the idea of thinking of reason as the faculty which equip us to recognize and operate with reasons is the idea of thinking of it as the faculty which empowers us to engage in reasoning... Indeed if reasoning should be characterizable as the occurrence or production of a chain of inferences, and if such chains consist in (sequentially) arriving at conclusions which are derivable from some initial set of premises, and for the acceptance of which, therefore, these premises are, or are thought to be, reasons, the connection between these two ideas is not accidental.<sup>66</sup>

Reasoning is therefore necessary for reasons to be recognised as having normative force and for it to be viewed as rational to follow them. Indeed, Raz defines irrationality thus: '[W]hen and because one non-accidentally fails to respond appropriately to reasons, and the failure is, is due to, a failure or malfunction of one's rational powers.'<sup>67</sup> Some may criticise this idea of irrationality as being derivative from external stimuli, so to remove this potential ambiguity Raz further defines non-derivative irrationality as existing when:

People who recognize a conclusive reason to  $\Phi$ ...and who fail to respond to it at all, fail ... to form an intention to  $\Phi$ , have no positive attitude at all towards  $\Phi$ -ing, do not respond appropriately to other people  $\Phi$ -ing, e.t.c., are non-derivatively irrational.<sup>68</sup>

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<sup>64</sup> *ibid* 27

<sup>65</sup> *ibid* 86

<sup>66</sup> Paul Grice, *Aspects of Reason* (OUP 2001) 5

<sup>67</sup> Raz (n 20) 89

<sup>68</sup> *ibid* 93

Such a failure to respond to reasons takes place on the plane of reasoning, and is therefore within the realm of reason rather than derivative of a value ascribed to an end. Yet Raz would claim that such a connection of non-derivative irrationality (and by extension non-derivative rationality) is applicable to norms, thus proving the starting point of this admittedly long paragraph - that rationality and normativity are not necessarily connected. This is because he believes that norms can only be conditionally valuable in that they provide a justification to pursue a specific course of action – they are simply incapable of possessing independent value.

Such a conclusion presupposes however that this is the only way in which normativity and rationality can be connected by necessity. Raz does not consider a second means – that the two might be linked if all action, regardless of the specific aim being pursued, is governed by a single norm. Such would be the function of a categorical imperative. The existence of such absolute moral truths is alluded to by Raz, yet he does not endorse a principle as demonstrably fulfilling this function. Yet he has conceded that, should one be identified, it would be an absolute ought.<sup>69</sup> If such an absolute ought could be identified that would therefore apply to all action regardless of the specific end being pursued, then Raz would be forced to do one of two things in order to maintain the validity of his argument: establish that to ignore the requirements of the categorical imperative would not be definitionally irrational, or concede that a necessary connection does indeed exist between normativity and rationality. Since the PGC has already been suggested as a standard which provides such a categorical imperative, then we can conclude that the first of these two options is closed to Raz as it has already been established that for an agent to act contrary to the requirements of the PGC would be to deny the importance of their own agency, which is *prima facie* irrational. This is something which Raz would be forced to accept given his prior acknowledgement that some capacities are necessary for us to act upon our rational desires, and that we have seen that these are broadly analogous to Gewirth's Generic Conditions of Agency. The consistency of his argument on rationality therefore logically requires him to drop his objection

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<sup>69</sup> Raz (n 49) 67

that there is no necessary connection between normativity and rationality; his argument rests on a presupposition that there is no necessary reason to act rationally,<sup>70</sup> yet given the PGC provides just such an exclusionary reason then this foundation is not sound.

Having established that, if the PGC is valid, a necessary link between rationality and normativity exists, this one last characterisation of normative reasons remains to be explored before this part of the chapter moves on to its concluding section on how competing reasons for action are resolved – that is Raz’s distinction between non-mandatory and mandatory norms. These are broadly analogous to conclusive and absolute reasons respectively as per Raz’s previous categorisations, or – since his theories have been modified to be PGC compliant – second order conclusive and absolute exclusionary reasons. Since the PGC acts as a second order absolute exclusionary norm, it is this category which will be briefly analysed before we conclude our discussion on the link between reasoning and normativity.

Mandatory norms, for Raz, must possess four elements. They must be a deontic operator which directs a subject towards a given act under certain circumstances.<sup>71</sup> Mandatory norms are more appropriately labelled rules due to these characteristics, thus providing our semantic shift alluded to earlier. These are different to normal reasons in that they comprise an exclusionary reason which exists independently of it being followed.<sup>72</sup> This is not to say that Raz believes all mandatory norms, as he includes some seemingly odd caveats to his categorisation. In order to be valid, it must be issued or supported by an authority which lends it its exclusionary force.<sup>73</sup> Additionally, they must also be successful in order to be viewed as valid. Therefore:

A person follows a mandatory norm only if he believes that the norm is a valid reason for him to do the norm act when the conditions for

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<sup>70</sup> Raz (n 20) 95

<sup>71</sup> Raz (n 10) 50

<sup>72</sup> *ibid* 58-59

<sup>73</sup> *ibid* 65

application obtain and that it is a valid reason for disregarding conflicting reasons, and if he acts on those beliefs.<sup>74</sup>

The quote from Raz here could simply be read as claiming that mandatory norms only apply when the circumstances under which they should be followed pertain. This is axiomatic in the definition of such mandatory norms however, and it seems unusual that Raz should have included this statement were it only expressing a mere tautology. The other way of reading the claim is to see it as introducing an odd contradiction in Raz's work – that a mandatory norm possesses its mandatory character independently of whether or not it is observed, but that it still need only be treated by agents as possessing exclusionary force if they see a valid reason for them to follow it and go on to act upon it. This therefore suggests that mandatory norms are themselves still subject to practical reason; agents can recognise them as valid yet still rationally choose to ignore them without damaging their status as mandatory norms. It is suggested however that, were an agent to do this, the norm in question would either not be appropriately classed as a mandatory norm or would not apply in the given situation. An example here could again be the normative guidance provided by the PGC. This norm is mandatory in that it applies to all action; an agent could therefore not rationally choose to not apply it to their undertakings. It is therefore unclear what Raz intends by introducing this analysis of mandatory norms. This thesis will therefore disregard the dichotomy as not being logically consistent with the operation of a true mandatory norm.

### **2.3 Resolving Conflicts within Reasons for Action**

Having established that there is a necessary connection between normativity, reason and rationality and that some norms are capable of possessing mandatory character, the final part of s.2 will discuss something which has so far been alluded to but not engaged with directly. This is Raz's claim that reasons for action are inherently pluralistic and may require opposing course of action;

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<sup>74</sup> *ibid* 72-73

therefore when an agent chooses to act for a certain reason, he chooses to act on certain reasons and discards others. This suggests that a hierarchy of reasons exists within which differing reasons possess differing weights, and those which possess the greatest weight will be accepted by the agent at the expense of those seen to be inferior. The purpose of s.2.3 is therefore to establish what kinds of reasons necessarily form the top of this hierarchy and act so as to exclude all other reasons, taking into account the previous discussions around the connection between reasons and normativity. This will allow us to create a benchmark against which we can assess the competing normative claim provided by legal obligations to assess whether or not they are able to surpass other normative obligations as reasons for action.

The starting point for this discussion will therefore be what Raz calls the Basic Belief – he holds it axiomatic to agency that such a competing range of reasons exists and that an agent chooses which to act upon based on a rational process of elimination. Raz argues that it would not be outside the realm of reason to reject any of these reasons<sup>75</sup> yet, as was established at the end of s.2.2, this appears to be founded on an incorrect belief that it is not *prima facie* irrational to reject a mandatory norm when it ought to apply. This claim has been demonstrated to be implausible due to the fact that it is axiomatic that mandatory norms should always be followed and, as was demonstrated by the example of the PGC, to act against them is *prima facie* irrational. Raz's theories of action therefore should be modified to recognise that his account of the basic belief, while being descriptive of how agents do act, does not describe how agents rationally should act. A rational agent would be incapable of acting in a way which saw all reasons as *prima facie* equal in weight, as irrational considerations should be rejected before the process of reasoning takes place. Having established this, we are able to examine the four main groups of normative and evaluative propositions which Raz believes exist:

1.  $\Phi$  is good simpliciter;
2.  $\Phi$  is good for someone, thus a sufficient reason to  $\Phi$  exists;
3. Someone has an appropriate reason to act in a certain way

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<sup>75</sup> Raz (n 49) 100

4. If an agent must do  $\Phi$  and is acting irrationally if they do not, a conclusive reason to  $\Phi$  exists.<sup>76</sup>

The first of these suggests that an end is prima facie good. Since the PGC holds that all GCAs are necessarily viewed as prima facie goods due to their necessity for agency, this first part of this discussion will focus on how Raz treats such moral truths – a discussion which will also encompass the fourth type of evaluative position based on rationality. The second of his evaluative positions is based on a subjective good of perceived value, an analysis of which will be provided in second part of this section. The last section will be a discussion of authority, which for ease will be conflated with the third idea that agents are given an appropriate reason to behave in a certain way. The section will conclude by revisiting the idea of incommensurability of reasons previously identified in order to establish how these evaluative propositions can compete so as to defeat one another as possible courses of action.

### 2.3.1 Reasons based on Morality

We have already identified that Raz fails to endorse a specific system of moral principles based around the idea of a categorical imperative. He also rejects any system of morality which is grounded in the idea of inalienable rights. This is based on his belief that such systems prioritise individual action over the collective and that they presuppose a common global culture which plays a constitutive role in their formulation.<sup>77</sup> Such beliefs appear to be grounded in empirical observation; collective rights are often as important as individual rights, and a common culture cannot be identified on which such individual rights can be maintained. He instead endorses a humanistic principle, that goodness derives from the consequences of action and its contribution to the quality of human life.<sup>78</sup> Yet central to the idea of Gewirthian ethics is the idea that all agents are rationally committed to making rights-claims on their Generic Conditions of Agency based on their status as noumenal agents. We therefore appear to have reached an impasse. Yet several of the comments made by Raz

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<sup>76</sup> *ibid* 106

<sup>77</sup> Joseph Raz *The Morality of Freedom* (Oxford University Press 1986) 193

<sup>78</sup> *ibid* 194

in justification of his humanistic approach appear to operate on a similar logical framework to the PGC. This overview of the role of reasons based on morality will therefore explore these similarities and aim to demonstrate that Raz commits himself to recognising that the PGC does exist as a supreme moral principle. This will be established by examining more closely his rationale for endorsing the humanistic principle, firstly exploring his justification for the existence of collective rights before moving on to discuss his objections to the existence of a common culture based on individual respect.

As has been alluded to, Raz rejects rights based theories of morality for their individualistic focus and claims that they necessarily only see collective goods as having instrumental value.<sup>79</sup> This contingency in the value of collective rights is, for Raz, a statement which is not true. For him it is self-evident that collective rights exist independently of individual rights if the following three conditions are met:

1. An aspect of the interest of human beings justifies holding some person(s) to a duty;
2. The interests in question are of individuals as members of a group in a public good and the public good serves their interest as members of group; and
3. The interest of no single member is good sufficient to create duty in itself.<sup>80</sup>

Such a definition itself appears circular however – Raz merely presupposes that it is possible that a situation is possible where criterion number three is present without devoting time to justify how such a circumstance could be possible. It may therefore be countered that Raz should instead try and justify why he holds that individual interests are not always sufficient of themselves for the creation of rights based norms. This may be difficult for him to do given that we established in s.2.2 that several of Raz's thoughts on individual rationality and reasoning only operate when integrated with the PGC. To this point Raz

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<sup>79</sup> *ibid* 198

<sup>80</sup> *ibid* 207

counters that 'It is difficult to imagine a successful argument imposing a duty to provide a collective good on the ground that it will serve the interests of one individual.'<sup>81</sup>

Just such a justification can be provided from Raz's concession that our ability to recognise reasons as reasons for action is what gives us our rationality and therefore sets us apart as beings deserving of a special status. This is an individual reference point which is broadly similar to Gewirth's starting point for his discussions of bare agency – that to claim that I do X for purpose E requires an agent to view their Generic Conditions of Agency as necessary to fulfilling their desires, and to therefore value them to the point where they make a claim that they are indeed rights. In making the claim that individuals possess a special status by dint of their ability to reason, Raz therefore commits himself to recognising that intrinsic value necessarily exists on an individual level. Moral subjects are therefore necessarily individuals, and any collective moral rights and duties must also respect the rights of individuals. Such a requirement arises from the dialectically necessary argument of the PGC whereby to act contrariwise would be to deny the importance of one's one agency. To therefore claim that a collective right can exist prior to an individual right ignores this claim – a point Raz commits himself to recognising when he concedes that individuals possess moral value through their agency. Collective rights then can only be good if they are also good for the individuals which make up the collective. This is not to say that they cannot better achieve that good by operating on the level of the collective, but the good necessarily exists prior to the collective in that it is also of benefit to the individual. This is a starting point which Raz accepts to a certain extent when he claims that some collective goods are only desirable if personal autonomy is intrinsically desirable.<sup>82</sup>

The claim being defended by this thesis is a stronger one, however – that such a claim cannot operate on a contingent level, but must operate as a dialectically necessary precondition. Collective rights must be in conformity with individual

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<sup>81</sup> *ibid* 203

<sup>82</sup> *ibid*



rights. Raz appears to suggest that the opposite is true and that collective goods are necessary for autonomy.<sup>83</sup> Yet as was alluded to this is not the case – goods might be ameliorated on the collective level, but cannot exist without recognising their importance to individual action. Raz may again object and claim that such an individualistic claim incorrectly conflates an ought and a duty, in that it relies on a claim that we ought to do what we have a duty to do as leading us to believe we therefore have a duty to do what we ought to do.<sup>84</sup> If we have a duty to respect rights then we ought to do this, but it does not necessarily follow that because we ought to respect rights (as to do so is in the interest of the rights bearer) that we have a correlative duty to do this. But this does not dismiss a claim to rights which originates from the PGC – this is because the ought created by the PGC rests on a self-reflexive foundation. One ought to respect the rights of others as they are claimed on the same foundation as an agent makes claims to their own rights. One has a duty to oneself to protect ones own Generic Conditions of Agency as to do otherwise would be to deny the importance of ones own agency; therefore one cannot deny rights to others without equally denying the importance of ones own agency. The duty we owe to ourselves is therefore universalised to all agents.

This is not to say that Raz would believe that individuals are not worthy of respect – it is just that he does not necessarily believe that such respect can be grounded in a theory based on individual rights. This scepticism has been seen to be unfounded in the above analysis, but Raz’s reasoning for giving respect to individuals will still be considered in order to see whether it remains compliant with a grounding in the PGC. We shall begin with an analysis of Raz’s reasons for seeing those capable of valuing others – for our purposes, agents capable of undertaking action based on reason – are valuable in and of themselves. His argument has three main steps, the first of which suggests that there is a mutual yet asymmetric dependence between things which are intrinsically good in that they can be used for a given end, and those which are unconditionally good. Intrinsic good can only be released by those who are capable of reasoning and

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<sup>83</sup> *ibid* 207

<sup>84</sup> *ibid* 195

therefore engaging with the object in the correct way – Raz provides the example of oranges, which are only perceived to be of value if they are eaten. If an object is capable of possessing value via a process of recognition, then it follows that there are things which a valuer must necessarily perceive as good. In order to demonstrate that a valuer is capable of possessing value in themselves then they must be able to be valuable regardless of being good for another agent, and this unconditional good is, according to Raz’s second step, evidenced by their ability to create intrinsic value in another object external to themselves. The third step needs to assess why this stage makes valuers valuable. At this point Raz claims the argument is axiomatic – something must possess value in order to be able to relate to value. Our very ability to reason and perceive value therefore singles us out as being of special concern.<sup>85</sup> This is a conclusion which a Gewirthian ought to accept, allowing us to move onto Raz’s subsequent discussion of why we ought to respect others who we recognise as possessing this unconditional good.<sup>86</sup> Sadly here the argument somewhat loses its force, with Raz locating this step that the unconditional value is worthy of respect. – he draws the analogy of a painting, which can be recognised as valuable without being fully engaged with.<sup>87</sup> Whilst somebody who possesses unconditional value would undoubtedly endorse this conclusion, it is not immediately apparent why this circular move requires an agent to respect something which possesses value. An agent can appreciate that a painting possesses aesthetic value and yet still wish to destroy it. Here Raz’s theory can be rescued with reference back to the PGC, which does provide a framework for this step of recognising and respecting value – for the value which Raz is describing appears to be analogous to the bare agency from which Gewirth builds his rights based moral theory.

Since Raz’s attitude to respecting individuals as possessing moral value can be rescued with reference to the PGC, we can thus see that reasons based morality should be seen to be a high-order reason – to adopt Raz’s previous nomenclature, an absolute exclusionary reason. To act contrary to the moral principle of the PGC is *prima facie* irrational as it includes the claim that an agent

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<sup>85</sup> Joseph Raz, *Value, Respect, and Attachment* (Cambridge University Press 2001) 153 - 157

<sup>86</sup> *ibid* 158

<sup>87</sup> *ibid* 164

does not value their own agency – a statement which is paradoxical as it entails them using their agency to make it. The high value ascribed to moral reasoning is therefore guaranteed by Raz's writing.

### **2.3.2 Reasons based on Personal Interest**

A second category of reasons which Raz describes as extant in his hierarchy would be those motivated by subjective value perceived in an object. It is worth noting at this stage that this heading is again similar to intrinsic value described above in s.2.3.1, and is therefore covered by the PGC's starting point of bare agency. The subjectivity of the end is therefore not immediately relevant at this stage as the PGC applies to all action regardless of the value of the end being pursued. Nevertheless, personal wellbeing is highlighted by Raz as being an end of particular importance to an individual from his own perspective. This section will first discuss this concept as a personal motivator for action, before moving on to discuss other things in which an agent may perceive value.

Personal wellbeing for Raz should be assessed by judging the success or failure of an agent's life as opposed to assessing the means by which that success or failure is reached.<sup>88</sup> The things which contribute to a person's wellbeing are therefore relevant, but separable from the overall success or failure. Raz claims that '[A] person is better off when well fed, in moderate temperature, with sufficient sensory stimulation, in good health, etc., whether he adopts these as his goals or not.'<sup>89</sup> These are seen to be criteria which are necessary for a life to be pursued at all, and – if they are present to an adequate extent, can greatly increase an agent's ability to pursue whatever goals he wishes to attain. Raz is deliberately open about what he means by the term 'goal', defining it thus:

In these initial clarifications, 'goals' is used so broadly that if a person wants something then it is his goal to get it. But the result of these clarifications is that the term is used more in keeping with its ordinary implication of a longer-term objective. Goals are not

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<sup>88</sup> Raz (n 77) 289

<sup>89</sup> *ibid* 290

necessarily desirable or desired for themselves. But they are nested in larger goals, or are larger goals themselves. *At no point do I wish to suggest that the fact that a person wants something is in and by itself a reason for action either for him or for others.*<sup>90</sup>

The long quotation here is provided to establish a point which over which Raz's theory again appears confused. The criteria which a person needs listed above this definition appear to be broadly similar to the Generic Conditions of Agency upon which the PGC relies. It therefore seems odd that Raz should suggest that these are helpful to attain a goal, but that agential desire is not itself a sufficient reason to motivate an agent to act. Indeed, earlier in the same text during a discussion on the four conditions of wellbeing, Raz holds that the only reason for goals to be adopted is because they possess independent value,<sup>91</sup> value which is presumably desired by the agent. If these conditions are beneficial for an agent to undertake action, then they must necessarily be of value to the agent in order to achieve his desires. If he values these conditions as an intrinsic good which can help to attain a further desire, it is axiomatic that the agent must also desire the outcome being pursued and the obtaining of which these conditions facilitate. Such is the nature of agency. It does not matter whether or not the end desired is objectively desirable or of value; all that matters is that the agent perceives it as valuable. It is compatible with the theory that this belief is false, as, as was established in s.2.1.1, such expressions of belief necessarily contain truth claims. We can therefore see that all desires based on a perceived personal interest must be seen as an adequate reason for the agent to act to attain that end. The pursuit of the goods described by Raz is just one example of things that there is a reason to pursue.

This difficulty is something which Raz attempts to reconcile in his later work without making the above concession, in claiming that the formula that '[V]aluable aspects of the world constitute reasons.' constitutes what he calls the 'Classical Approach' to reason – an approach he believes to be flawed in that it

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<sup>90</sup> *ibid* 291 fn 1; emphasis mine

<sup>91</sup> *ibid* 308 - 309

falsely claims a necessary connection between reasons and value.<sup>92</sup> A Gewirthian would need to reject this criticism as itself flawed, as the PGC is grounded in the Classical Approach in holding that an agent perceives value in his ends and, by extension, the circumstances necessary to obtain them. Raz holds, then, that we ought to distinguish between features that show an act to be a choice and ones that show it to be of value. Reasons, he believes, are part of the former category of choice rather than one of value. He gives the example of an agent doing something which is designed specifically to hurt or damage another, claiming that this can be a reason for action but that it would be incorrect to describe it as possessing value – thus demonstrating that a connection is not necessary.<sup>93</sup> Yet this statement conflates value for the agent in question with an objective, measurable value – something that is not necessary for action. Murderers, for example, might be motivated by revenge in targeting a particular victim. The satisfaction of this desire is certainly of value to the person committing the act; otherwise, they would not be seeking to act upon it in light of other reasons that might exist to not murder. It is therefore unnecessary to prove that an act must be objectively valuable in order to provide an agent with a reason to act – all that is required is that an agent either perceives it to be of subjective value or that they falsely believe it to be of objective value. It is this perceived value that the agent necessarily uses as one of the reasons upon which he bases his choices; value is therefore essential for an action to be desirable for an agent and, by extension, for it to be chosen as a course of action. This is something that Raz's differentiation between different approaches to reason fails to circumvent; reasons based on personal interest are required for action to occur, thus requiring only the bare agency upon which the PGC is grounded.

### **2.3.3 Reasons based on the Recognition of Authority**

The third type of reason that Raz attempts to demarcate is the category of reasons based on the recognition of authority. Raz argues that deference to

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<sup>92</sup> Raz (n 49) 22-23

<sup>93</sup> *ibid* 25

authority, in many circumstances, is the best way to maximise our own personal interests. This is because a coordinating authority is often better placed to coordinate the activities of multiple individual agents, thus minimising the potential for conflict and maximising the overall good that can be achieved.<sup>94</sup> The authority in question must be *de facto* authority in order to effectively coordinate the actions of those living underneath it and therefore generates a duty to be obeyed<sup>95</sup> but *de facto* authority need not be legitimate. Legitimate *de facto* authority is a special kind of authority that can be appropriately described as serving those living underneath it. This is something Raz labels the ‘Service Conception’ of authority, yet it is a view of authority which he concedes suffers from both theoretical and moral problems.<sup>96</sup> On the theoretical level Raz questions whether a duty to obey an authority can exist if based entirely on the will of another,<sup>97</sup> and on the moral level, he asks how submission to authority can be valid should it circumvent our own independent capacity for moral reasoning.<sup>98</sup> Helpfully for our purposes, he believes he has identified answers to these concerns – their success can be dealt with in turn.

Firstly, he believes his theoretical objections can be answered with sufficient reference to reasons; for a duty to follow an authority to exist there must be sufficient reasons to submit to it.<sup>99</sup> Yet such a piece of reasoning is, at best, circular – amounting to a statement that one needs a reason to do something. Such a statement is one of bare agency and can be applied to any action which an agent may wish to undertake; it does not give an adequate explanation of why one ought to submit to the will of another. This problem is similar to those highlighted in the previous discussion of Hans Kelsen’s Basic Norm or Hart’s Secondary Rule of Recognition<sup>100</sup> – to say a reason exists to follow an authority merely shifts the normative question upwards to one of why this reason is one which an agent should accept. Raz does not deal with this question directly, yet

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<sup>94</sup> Joseph Raz ‘Facing Up: A Reply’ (1989) 62 S Cal L Rev 1153, 1192

<sup>95</sup> *ibid* 1194

<sup>96</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 134

<sup>97</sup> *ibid* 134-135

<sup>98</sup> *ibid* 136-137

<sup>99</sup> *ibid* 136

<sup>100</sup> Chapter Four

it is immediately obvious why such a theoretical justification for submission to an authority should be of interest in any complete discussion of the nature of law. The claimed solution to the second moral objection fails for a similar reason; Raz suggests this problem can be circumvented if an agent would better comply with reasons which already apply to him by following the directive of an authority, and it would be better for him to reason to follow the authority than to reason independently.<sup>101</sup> Such a description again begs the question of why one ought to accept that reasons can be better complied with by following a directive. It does not explain why to abandon moral reasoning might be a derogation of one's responsibilities as a moral agent.

This failure appears to be founded partially on Raz's characterisation of reasons that stem from Authority. For he argues that it should be seen as '[N]ot a denial of people's capacity for rational action, but simply one device, one method, through the use of which people can achieve the goal (telos) of their capacity for rational action, albeit not through its direct use.'<sup>102</sup> This suggests that Raz sees reasons based upon authority as conclusive at best, as they can provide a good reason for behaving in a certain way but should not be seen as exclusionary. Yet this characterisation does not sit well with his claims that authority must be *de facto* in order to be valid. For Raz is correct in suggesting that, in order merit the label, authority must be *de facto* in that it makes a claim that it ought to be obeyed – yet this *ought* is somewhat undermined if Raz concedes that it is not an exclusionary ought which agents can choose to obey or ignore as they see fit. How then, can these two contradictory statements be reconciled? The simplest way of doing this would be to claim that authority can only be legitimate if it conforms with an external means against which it can be assessed as legitimate. Put another way, if it is not exclusionary in itself, then can an external source be located which grants authority legitimacy and, by extension, provides the exclusionary normative reason needed to enable it to claim to be *de facto*. Such legitimisation can be found in the moral realm. An authority can be said to be legitimate if it fulfils Raz's earlier requirements and does not contradict the

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<sup>101</sup> Raz (n 96) 136-137

<sup>102</sup> *ibid* 140

requirements of the PGC. Any proclamations of the authority are therefore morally permissible and, by extension, possess the external legitimisation required for an authority to be acceptable to those against whom it is directed. Raz may attempt to claim that such a moral rule, grounded as it is in logic, is merely constitutive in that it only applies to those situations where logic apply.<sup>103</sup> Such a criticism can again be attributed to a misapprehension of the PGC – it is contingent in that it only applies to action, yet since action is the foundation of all human activity then it applies universally to the acts of all agents. It is therefore somewhat inaccurate to describe it as truly contingent if its scope is categorical. We can therefore see that Raz’s ‘Service Conception’ of legitimate authority can be seen to be present if it is issued in compliance with the PGC. Any authority which acts otherwise would not be making exclusionary claims on its subjects, and therefore would fail as a *de facto* authority in suggesting that its requirements are able to be rejected.

#### 2.3.4 Incommensurability Revisited

The three previous subsections have each concluded that the reason concerned – based in morality, in personal interest or in authority – are only necessary and sufficient reasons if they can possess some kind of moral foundation which grants them legitimacy. Yet, as Raz points out, it is difficult to see how rules grounded in the same justification can be seen to exclude others with the same grounding.<sup>104</sup> It is therefore worth briefly revisiting the problem of incommensurability of reasons previously discussed, before we move in section three to apply our amended Razian theories of reason and rationality to his theory of law. The idea of incommensurability of reasons was briefly explored in section 2.1.3, but will here be laid out in more detail. Raz holds that it is an inescapable fact of human agency that there is widespread incommensurability of options.<sup>105</sup> Consequently, if reasons are incapable of supplanting one-another

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<sup>103</sup> *ibid* 206

<sup>104</sup> *ibid* 145

<sup>105</sup> Raz (n 49) 46



due to their incommensurability, how is it possible that an agent can choose one course of action over another based on reason alone?<sup>106</sup>

Such scepticism is grounded in what Raz perceives to be the connection between value and action. Since the potential incommensurability of reasons currently being considered is of that between competing permissible actions according to the PGC, the following analysis of the validity of the connection Raz traces will also need to be PGC compliant or it will fall below the standard required and be incapable of providing a reason of the same level. It will therefore be assessed for this compliance during the course of this analysis. For Raz then, it is the ultimate paradigm that action must be aimed at achieving some good or averting some bad:

The capacity for human action is ... the capacity to act knowing what one is doing and doing so because something in one's situation makes this action a reasonable, or a good or the right thing to do.<sup>107</sup>

Raz's starting point in linking value and action is identical to that of the PGC in that it claims that an agent acts in order to attain an end which he has reasons to attempt to attain – values therefore control reasons in that they only hold if the end under consideration can produce something the agent perceives as good or avert something which they perceive as bad.<sup>108</sup> Yet here Raz departs, suggesting it is false that human agency is so easily definable. Instead he suggests two competing conceptions, Rationalist and Classical. According to the Rationalist conception, action takes place because, of all the options available, an agent believes they have the strongest reason to  $\Phi$ . The Classical approach, by contrast, states that of all the options available to them an agent simply chooses to  $\Phi$ . The difference here is not immediately obvious, but Raz locates what he perceives to be three key differentiations:

1. Rationalism holds that a reason is needed in order to require an action; the Classical Approach holds a reason merely renders an option eligible to be chosen.

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<sup>106</sup> *ibid* 46

<sup>107</sup> *ibid* 47

<sup>108</sup> *ibid* 47

2. Rationalism holds agential desire to be a reason; the Classical Approach holds will to be an independent factor.
3. Rationalism is committed to the claim that incommensurability is very rare, if not impossible; the Classical approach presupposes widespread incommensurable reasons.<sup>109</sup>

In holding that widespread incommensurability of reasons is an axiomatic truth, Raz commits himself to a classical conception of agency; by extension he must also accept the claims that reasons are not needed to require an action and that agential will is not in itself a true reason for action. Based on the discussion of the nature of reasons already present in this chapter, the validity of these latter claims should be questioned. In order to explain why they should be rejected, let us return to Raz's previous example discussed in s.2.1.3 of choosing between identical cans of soup in a shop. It has been claimed that an agent must rationally prefer one over the others in order to act, otherwise the agent would either abandon the choice or be stuck in front of the shelf unable to choose which can to take to the cashier. Raz however would contest this, arguing that rather than choosing a particular can for a given reason, it is more appropriate to believe that the agent is choosing to simply give the other cans up in favour of the one they ultimately decide to purchase. The reason for acting is thus independent from the desire for a can of soup, in that my action is to discard whereas my intention is to acquire. In thus reversing the rationalisation, Raz suggests that action can still take place in light of incommensurable reasons, as reasons are separate from action.<sup>110</sup> Yet, as has been previously stated, this is an account of agency which Gewirthians, committed to Rationalism, must reject – Raz puts the point well when he summarises that, for the rationalist, '[I]ncommensurability is inconsistent with the fact that intentional actions are under the control of the agents, that they are determined by their choices.'<sup>111</sup>

In order to overcome Raz's objection to this rationalist conception of agency, we must first delve deeper into understanding why he raises his objection to begin with. Firstly, he holds that – as reasons are multiple and competing – it is simply not the case to claim, as a rationalist does, the only reason an agent has

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<sup>109</sup> *ibid* 47-48

<sup>110</sup> *ibid* 48

<sup>111</sup> *ibid* 49

with regards to action is to do what will satisfy his brute desires.<sup>112</sup> This simple view of agency holds that only desire can be a reason for action, but Raz observes that this does not account for conflicting desires where an agent may want several inconsistent outcomes. A rationalist might claim that this is an obfuscatory account of reasoning; competing reasons have already been weighed against one another before an agent has decided which one they desire the most and this is the one upon which they decide to act. Yet Raz rejects this as artificial, claiming that the thought of people deliberating what they would like the most out of several desirable outcomes is itself peculiar.<sup>113</sup> Such scepticism arises in turn from his conception of desires as only possessing value due to their being contingent on a particular end as opposed to being valuable in and of themselves. And as the value of a desire is contingent on the end which it is directed towards, they presuppose a normative value external to the fact that people desire to pursue them.<sup>114</sup> It is at this point that Raz's argument demonstrates its weaknesses. Such a conception of agency relies on objective value being the only thing capable of motivating an agent to act. To demonstrate this is incorrect, it must be demonstrated that an agent can act to attain something which does not possess objective value. Let us return to the example posited by Celano in s.2.1.1 of agents acting on a false belief, and hypothesise a situation where an agent believes that an end is of value to them but this belief is false. Raz would be forced to argue in this situation that the agent has no reason to act to try to attain the end goal, yet – as was concluded *supra* – this seems to be a false description of how agents act. For in making a claim to believe that an item is of value to them, even if this belief is false, the agent still believes it to be true as such truth-statements are implicit in the nature of belief. The agent therefore only needs to perceive subjective value in the end in order to see it as valuable enough to motivate action. Therefore bare desire itself can motivate an agent to act independent of whether or not the end in question possesses objective value. In re-establishing that desire possesses subjective value to an agent we therefore reject Raz's claim that agential desire cannot be itself a reason for action and return to the starting point of the PGC that *I do X for purpose E*.

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<sup>112</sup> *ibid* 50

<sup>113</sup> *ibid* 51

<sup>114</sup> *ibid* 51 - 52

Having rejected the second of Raz's justifications for a Classical Conception of agency, we can turn our attention to the first – that a reason need only render a desire eligible to be chosen and need not necessitate action as a rationalist would hold. Such a claim appears to be a mischaracterisation of rationalism, which does not hold that all reasons should be acted upon but that any reason which corresponds to an agent's desires provides a reason to act upon them. This does not exclude the possibility of a hierarchy of desires, but merely holds that the desire which comes out on top following a weighing of these desires necessarily contains a claim there is a reason for an agent to pursue it by dint of its outweighing of all other reasons. Raz alludes to this fact when he concedes later that, if desires are reasons, then a rational agent – when faced with incommensurate reasons – follow the desire which corresponds to the most stringent reason.<sup>115</sup> This latter term for Raz should be defined as the reason that possesses the most weight, presupposing an external measure against which the desire should be assessed for its stringency.<sup>116</sup> The desire therefore only possesses contingent value and cannot require an action for which it is contingent. This statement however seems to be founded on a misinterpretation of what reasons are. Returning to our example of soup, when an agent chooses one from many similar cans they must have a reason for doing so or they would be unable to act. The fact they do suggests that they have a reason for choosing one over the others – such a connection is simply axiomatic in that all action is connected to a purpose that an agent necessarily desires and, as has been shown, desire is a reason for action in itself. If desire is a prerequisite for all action and can constitute a reason for action, a reason based on desire is also a prerequisite for all action. This is a point which Raz rejects, but claims that there is not enough room in the volume which addresses the issue to justify why he holds this belief.<sup>117</sup> Since the assertion is unsupported and the counterpoint appears grounded in the axiomatic starting point of bare agency, a rationalist should prefer the latter evidenced point over an unsupported assertion. We can therefore reject Raz's primary distinction that reasons are not a prerequisite for action.

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<sup>115</sup> *ibid* 58

<sup>116</sup> *ibid* 58

<sup>117</sup> *ibid* 65

Having established that reasons are necessarily linked to desire and that agential desire is itself sufficient reason for action, we can come back to our starting point of incommensurability. Should reasons compete with one another for primacy when an agent is deliberating action, we can indeed assume that the weightiest reason is the one upon which the agent should act upon. Such a statement requires an external reference point against which an agent can assess the validity of their options as being good or bad respectively.<sup>118</sup> Should this reference point exist, it would allow us to sidestep the problem of incommensurability discussed above. It will be of no surprise at this point that the PGC is suggested as a dialectically necessary reference point against which reasons can be thus judged for their validity. As has been established throughout this first half of the chapter, it applies equally to all steps of Raz's writing on reasons equally, and can provide a solid foundation for all reasons for action – whether based on morality, personal interest or authority. All such reasons are only valid if they are not excluded by the exclusionary reason provided by the PGC. Beyond this, incommensurability is not problematic as all actions are permissible within these confines.

### **3 Raz on Law**

The first half of this chapter has attempted to demonstrate several things with reference to the writings of Joseph Raz on the subject of reasons for action. Such a discussion is necessary as the PGC being defended in this thesis claims to be what Raz would label an exclusionary reason for action, in that it claims to overrule all reasons which do not conform with its requirements. Such is the nature of any categorical imperative. In order to show that the PGC can withstand the scepticism implicit in Raz's philosophy, it has therefore been necessary to demonstrate that there are flaws in his conception of the very nature of reasons. Having highlighted in s.2.1 where these inaccuracies can be found, the section moved on to highlight the normative nature of reasons in s.2.2 before, in s.2.3, moving on to demonstrate how different reasons can motivate

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<sup>118</sup> *ibid* 65

agents in different ways. It concluded with a discussion of Raz's idea of incommensurability, arguing that the PGC should be used as an external reference point against which reasons should be assessed in order to side-step the problem which Raz believes exists. Yet if we accept that the categorical imperative provided by the PGC acts as an absolute exclusionary reason, we should now move into the second part of this chapter. This section will discuss how the PGC can interact with Raz's writings on Law, which – for Raz – also claims to be an absolute exclusionary reason on action. The purpose of this section will therefore be to demonstrate that Raz is incorrect in his belief that the PGC should not override legal obligations.

Helpfully, Raz provides a guideline for Natural Lawyers to follow when arguing against positivist conceptions of law. He suggests that any successful theory of natural law needs not to disprove the separation thesis – the claim that law and morality are necessarily separate realms – but to disprove the contingency thesis. The latter holds that a connection between morality and law conceptually exists, but that is merely contingent as opposed to necessary in all instances.<sup>119</sup> Raz therefore somewhat defines himself as an inclusive positivist, and therefore condones the school that this thesis is attempting to demonstrate is a logically inconsistent standpoint, holding that the central theme of positivism which he believes to be correct is the statement that '[D]etermining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be in the relevant circumstances.'<sup>120</sup> This is therefore the central idea which this part of this thesis will attempt to disprove. In attempting to do so Raz suggests that it will definitionally fail to be a coherent theory of law; for in proving a necessary link between morality and law Raz suggests that the theory becomes '[A] general thesis about intentional actions and their products, thus denying that it says anything special about the law.'<sup>121</sup> Such a statement is made from the starting point of positivism however, and does not adequately engage with the normative requirements of any

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<sup>119</sup> Joseph Raz, *The Authority of Law* (2<sup>nd</sup> edn, Oxford University Press 2009) 318

<sup>120</sup> Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press 2001) 71

<sup>121</sup> Raz (n 119) 325

necessary connection. Should a connection prove necessary therefore, this secondary objection can be dismissed as question begging.

Before the substantive form of the chapter is outlined, it would be beneficial here to outline Raz's conception of what a legal system necessarily is in order to ensure that our starting point is one upon which we agree:

The three most general features of the law are that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force...Naturally, every theory of legal system [sic] must be compatible with an explanation of these features.<sup>122</sup>

This quote neatly outlines the three features which must necessarily exist within any legal system and is a definition which this chapter of the thesis will adopt as the foundation of its critique of Raz's theory of law. It will firstly examine Raz's conception of what law is – what sets law apart from other obligatory systems and how, if at all, legal reasoning can be said to differ from other forms of reasoning which have been discussed in the first half of this chapter. Secondly, we will explore the importance which Raz places on the 'Points of View' argument and ascertain whether or not the 'Legal Point of View' upon which his theory of law rests merits a separate status from other forms of reasoning. This will lead into a discussion of the status of legal normativity and how such normativity interacts with other normative claims, before turning to the importance of the systemic nature of legal claims. The chapter will conclude with a discussion of Raz's thoughts on whether or not law truly claims to be an exclusionary reason by critiquing his thoughts on whether or not a *prima facie* obligation to obey law truly exists. As has been the case throughout this chapter so far, when Raz's theories diverge from the PGC this divergence will be explored and ascertained for its validity. The chapter hopes to demonstrate that Raz's position does not

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<sup>122</sup> Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System* (2<sup>nd</sup> edn, Oxford University Press 1980) 3

adequately engage with the normative requirements of the PGC, with the hope of proving that Raz does not adequately explain away the necessary connection between law and morality which the PGC logically requires.

### 3.1 On the Nature of Law and Legal Reasoning

It is worth noting at the outset of any examination of Raz's writings on law that he would reject the previous categorisation of himself as an inclusive positivist, as he believes that the traditional dichotomy between natural law and positivism is unhelpful and overblown. For despite spending the majority of his career arguing for the sources thesis, an inherently positivist idea, he nonetheless believes that three obvious connections between law and morality can be identified:

1. That no legal system can be stable without attempting to adequately protect life and/or property;
2. Acts contrary to bodily integrity (such as rape) cannot be committed by law or by legal institutions; and
3. The fact of value pluralism renders it impossible for a state to manifest either virtue or vice to the highest possible degree.<sup>123</sup>

Given that Raz does not provide a sound moral foundation for these assertions it is not immediately clear why he believes such conditions to be either moral or necessary features of legal systems, but the very statement is indicative that he believes the complex relationship between law and morality is not one that can be easily resolved. Nonetheless, he does believe that the natural law position that law and morality are necessarily connected across all levels to be conflating the issue of what law is with what it ought to be; in this sense, his outlook should certainly be judged as being grounded in a positivist separation of law and morals.<sup>124</sup> At best, he sees the purpose of law to be one of good maximisation; to '[S]ecure a situation whereby moral goals which, given the current social situation in the country whose law it is, would be unlikely to be achieved without

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<sup>123</sup> Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 Am J Juris 1, 2-3

<sup>124</sup> *ibid* 13



it, and whose achievement by the law is not counter-productive, are realised.<sup>125</sup> The veracity of this claim will be examined first with reference to an expanded account of Raz's writing on the possibility of adequately describing the nature of legal authority, followed by an exposition of his thoughts on the nature of legal reasoning.

### 3.1.1 The Nature of Legal Authority

It should first be noted that Raz fundamentally rejects any idea that theories of law can be purely semantic in nature; rather than being directed at the meaning of the word 'law', any jurisprudential enquiry should instead be focussed at explaining the nature of law and of legal institutions and practices.<sup>126</sup> As has been noted previously in this thesis such a distinction is not immediately apparent, as the word 'law' necessarily conveys a particular concept – we should therefore see any conceptual definition as being grounded in a particular semantic quandary.<sup>127</sup> Unless we accept this, then any theory as to the meaning of law as a concept could be rejected on the basis of being founded in a different meaning of the word 'law'. Conceptual arguments necessarily explain a semantic meaning. Yet this is an argument of secondary importance – one can attempt to explain the concept of law without agreeing to this claim. A good explanation of a concept, for Raz, '[C]onsists of true propositions that meet the concerns and the puzzles that led to it, and that are within the grasp of the people to whom it is (implicitly or explicitly) addressed.'<sup>128</sup> Unusually, Raz doubts this is possible for law. He has instead suggested that there can be a large number of correct alternative explanations for the concept,<sup>129</sup> a claim which – if true – would make the task of this thesis exceptionally difficult. Yet for the semantic reasons alluded to already, that the concept necessarily is contained within the meaning of the word law, we will assume that the word 'law' does have a single conceptual meaning. Our evidence for this will be the impossibility of communication about

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<sup>125</sup> *ibid* 12

<sup>126</sup> Joseph Raz, 'Two Views on the Nature of the Theory of Law: A Partial Comparison.' (1998) 4(3) *Legal Theory* 249, 251

<sup>127</sup> Chapter Two

<sup>128</sup> Raz (n 126) 256

<sup>129</sup> *ibid* 257

the topic without such a unified foundation, an impossibility which we can reject given Raz's own extensive writing on the concept in question. We might reject this simple dismissal by asking who may benefit from such a precise definition of the nature of law; Raz himself expresses scepticism that such a definition would be of use to the legal institutions whose role it is to apply the law on a day to day basis.<sup>130</sup> Yet this scepticism too should be rejected; it does not make sense to state that courts, for example, should not take an interest in the nature of the societal role in which they are engaging. At the very least they should be interested in the sources of the law which they are applying, and how to properly extend or introduce principles in order to deal with lacunae which arise within disputes upon which they are adjudicating. Thus they can be demonstrated to have an interest in being aware of what the boundaries of law are in order to satisfactorily fulfil their function.

Having established that establishing the nature of law is itself a valuable enterprise which is not only possible but necessary for the correct and consistent application of the law, we can begin to ask which is the best approach to take to achieve this end. Raz identifies three main approaches. The first is linguistic<sup>131</sup> – which is valuable, but necessarily must entail a conceptual analysis to be meaningful. Secondly we can approach the problem from the Lawyer's Perspective, whose starting point Raz labels the Basic Intuition – that the law is concerned with that '[W]hich it is appropriate for courts to rely on in justifying their decisions.'<sup>132</sup> This approach does not, at this stage, tell us very much however – it is as acceptable to Natural Lawyers as it is to Positivists in that it merely shifts the question of what law is one step upwards. Thirdly, Raz suggests the Institutional Approach, whereby the law is what legal professionals believe it to be when they apply it. The focus on the profession rather than the concept itself can be justified as they are the ones who govern how the concept interacts with the rest of society. The latter two criteria significantly overlap, focussing as they do on legal practice, so central to any analysis of these approaches favoured by

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<sup>130</sup> *ibid* 278

<sup>131</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Rev. ed. Oxford University Press 1994) 195

<sup>132</sup> *ibid* 199

Raz is a definition of what legal institutions, namely, the courts, actually do. He claims their role is threefold:

1. They deal with disputes with the aim of resolving them.
2. They issue authoritative rulings which decide these disputes.
3. In their activities they are bound to be guided, at least partly, by positivist authoritative considerations.<sup>133</sup>

By positivist in this sense Raz does not mean a positivist conception of law *per se*, but merely that the law being considered has been passed through the proper legislative procedure of the system in question. A Natural Lawyer need not reject this definition then, as, as was explored previously in our analysis of Hart and Kelsen,<sup>134</sup> the nexus between law and morality can be located at this legislative stage. It is of note however that Raz concedes that the extent to which the courts are bound by positivist considerations is only partial. Firstly, this leaves open the possibility that the courts may use non-legal moral reasoning when they adjudicate legal disputes – particularly where a lacuna is present. This is conceded by Raz, who claims that all theories of adjudication are moral in nature, as it does not damage his overall stance as an inclusive positivist.<sup>135</sup> Secondly, and more pertinent for our purposes, is his affirmation that the positivist considerations applied by the courts must be authoritative in nature. This raises the question of what grants these positivist considerations the authority which they need to be accepted by the courts; what point of reference should be used in order to assess whether the claim to authority is one which is legitimate or misplaced?

We have discussed in s.2.3.3 that authority must be *de facto* in order to provide a sufficient reason to guide conduct, but that only legitimate *de facto* authority can fulfil the ‘Service Conception’ required by Raz to be fully accepted by those against whom it is addressed. It was concluded that an external reference point is therefore needed to assess whether or not the authority in question is legitimate, otherwise no reason exists for an individual to submit to it, and that conformity with the PGC can provide this legitimacy. Since Raz claims that all law must definitionally be legitimate in order to succeed in its claim to

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<sup>133</sup> *ibid* 204-205

<sup>134</sup> Chapter Four

<sup>135</sup> Raz (n 131) 209

authority,<sup>136</sup> we can commit Raz to recognising that all law must be passed in conformity with the PGC in order to possess the legitimate authority necessary for it to be viewed as an authoritative positivist consideration which can be considered by the courts. Such a conflation would have the effect of creating a necessary link between law and morality, so it should not be of surprise that it is a legitimisation of authority which Raz might be surprised to find himself committed to. Instead, he would argue that practical authority can be legitimised as law by three main theses. These are the Dependence Thesis, the Normal Justification Thesis and the Pre-emption thesis,<sup>137</sup> and each will be analysed in turn for their necessary conformity with the PGC as per s.2.3.3.

Firstly, the Dependence Thesis holds that directives should be based on reasons which apply to those subjects to whom they are addressed and bear on circumstances covered by the directive in question. This thesis necessarily must incorporate the PGC, as the PGC – being grounded in bare agency – is applicable to all actions which agents might undertake. In that it acts as a categorical imperative it is necessarily an absolute exclusionary reason which overrules all competing reasons whose outcomes would not be in conformity with its requirements. Directives should therefore be based on reasons which are in conformity with the requirements of the PGC otherwise they are necessarily supplanted by its requirements and cannot be seen to impose a legitimate claim on an agent's behaviour. Such legitimacy is required by law, therefore any directive based on non-PGC compliant reasons cannot be viewed as law in that it would lack legitimate authority.

Secondly, the Normal Justification Thesis rests on efficacy, arguing that an authority is legitimate *iff* an agent to whom its directives are addressed would be more likely to comply with the reasons which apply to him already if he were to accept the authority as binding and as providing a reason superior to his own. As with Raz's first thesis, this conception of authority must also necessarily incorporate the PGC in order to succeed. As was established in s.2.3.3, in order to circumvent the theoretical and moral concerns which Raz raises with the

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<sup>136</sup> Raz (n 123) 15

<sup>137</sup> Raz (n 131) 214

nature of authority then any authority must issue directives in order to be accepted as providing a reason superior to that an agent is capable of formulating himself. To argue otherwise is to misunderstand the absolute exclusionary nature of the imperative provided by the PGC. In order to ensure that an agent is more likely to comply with his pre-existing obligations therefore, any encouragement must be PGC compliant.

Lastly, the Pre-emption Thesis argues that directives of an authority must be accepted because they necessarily replace all other reasons for action. This claim again fails in that it does not adequately account for the absolute exclusionary reason provided by the PGC. A directive can only be accepted if it is in compliance with these requirements, as it is axiomatic that a reason prohibited by a categorical imperative cannot be overridden by a contradictory reason. We can therefore see that, despite objections he might raise, Raz cannot circumvent the requirements of the PGC in attempting to explain the legitimate authority which positivist law necessarily claims. This is not to say that his Sources Thesis is not one which should be outright rejected; it merely requires that all law passed according to the legislative processes of a legal system must be in compliance with the PGC in order to possess the legitimate authority axiomatic in the nature of law.

This is the only way in which the law can be said to possess the legitimate moral authority it claims in binding its subjects, and therefore justify the shared terminology present in both law and moral considerations.<sup>138</sup> Before our section moves on to consider the nature of legal reasoning in light of this necessary moral connection however, we must first address the objection which might still be raised that the terminology which is shared by both law and morality is one which is aspirational, in that it is aimed not at what the law is but at what it aspires to be.<sup>139</sup>

[F]or the law to be able to fulfil its function, and therefore be capable of enjoying moral authority, it must be capable of being identified without

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<sup>138</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press 2009) 111

<sup>139</sup> *ibid* 111

reference to the moral questions which it pre-empts, i.e. the moral questions on which it is meant to adjudicate.<sup>140</sup>

Such a statement is misguided. If moral questions are the subject of adjudication, then an identifiable moral content must be required in order to add value to the adjudicative process or to remove the possibility of any harm from arising as a result of non-compliance with the moral requirements of the legitimate authority claimed by law. The law must therefore be operatively moral, and take account of this moral reference point in all its deliberations. The PGC is therefore not merely an aspiration for law to reach, but a necessary condition for its authority. Here Raz might object along the lines of his Sources Thesis, holding that this means that law is no different to morality. If the content of law is dictated by a moral reference point then law cannot be seen as possessing an additional independent level of authority. Since we generally perceive that law does possess this independent authority, it cannot depend on morality. This objection should be rejected in turn for two reasons. Firstly, the PGC does not dictate the content of law *per se*. It makes no claims on what specific form the law should take. It merely requires that laws which are passed have a content which does not contradict its requirements. Beyond this, there is enormous scope for legal pluralism, allowing the law to take a distinctive form independent of a specific moral requirement. Secondly, the objection again fails to understand the categorical nature of the PGC. If it applies to all action, and law is a means of guiding action, then it too must be in conformity with the requirements of the PGC. Such an all-encompassing scope is axiomatic to the nature of a categorical imperative, and to claim that a particular type of action cannot be incorporated within it is to misunderstand what a categorical imperative requires. A theory of legal authority which incorporates the necessary moral component of the PGC is therefore compliant with Raz's sources thesis.

Raz may finally attempt to object to this necessary connection by highlighting the idea of moral pluralism and variance; moral standards fluctuate over time and these changes can be unpredictable. Such a necessary connection is therefore unsuitable for a legal standard which is necessarily stable and predictable so as

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<sup>140</sup> *ibid* 115

to allow people to plan their lives according to it.<sup>141</sup> This objection again fails for the reasons outlined above. The PGC provides an objective and fixed moral reference point which does not fluctuate over time, based as it is on a dialectically necessary argument build from the constant fact of the noumenal agency of those to whom it is addressed. It also allows for a level of value pluralism which can reflect the varying social norms of the society whose legal system it underpins, in that it tests for permissibility rather than a single rigid set of legal rules which should exist regardless of social norms. Such a viewpoint is therefore consistent with the Sources Thesis and with Raz's general assertion that changes and developments in the law necessarily require input from sources external to legal institutions;<sup>142</sup> the moral standard of the PGC can provide this very reference point to guide developments so that they retain the claim to legitimate authority axiomatic to legal norms.

### 3.1.2 Legal Reasoning

It has been established in the preceding subsection that law necessarily makes a claim to legitimacy, and that it can only possess legitimate authority if its directives are not contrary to the requirements of the PGC. This necessary connection between law and morality at the legislative stage has implications not just for the nature of legal authority, but also for legal reasoning. Raz claims that such a general theory of legal authority cannot succeed due to the complex nature of moral reasoning that this would require:

The main reason why there cannot be a general theory of legal interpretation is, however, different. It results from the fact that there cannot be a moral theory capable of stating in specific terms which do not depend on a very developed moral judgement for their correct application what is to be done in all the situations possible in a particular society.<sup>143</sup>

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<sup>141</sup> *ibid* 118

<sup>142</sup> *ibid* 238

<sup>143</sup> *ibid* 118

Yet as has been demonstrated in the preceding subsection, such scepticism can be rejected on two accounts. Firstly, the PGC provides a simple test for moral permissibility which can be applied equally to all legal authority; the claim to complexity of moral reasoning does not apply here. Secondly, even were the point of moral complexity to be conceded to Raz, this criticism does not adequately address the normative issue that is being raised. Complexity is not a binding reason to reject a valid argument. We would question the rationale behind the rejection of a scientific theorem based entirely on its complexity if the theorem could be proven to be true. The same scepticism should be applied to this rejection; if a connection between morality and legal authority can be established as necessarily true, then to reject it as being too complicated is to fail to appropriately engage with the issues raised.

We should therefore accept that the link should be seen as necessary unless it can be normatively disproved and, as has been demonstrated so far, Raz's writings on both reasoning and the nature of law fail to circumvent the necessary connection between law and morality inherent within the PGC. Such a connection can therefore be applied to legal reasoning in addition to legal authority, as Raz believes that there is no special species of logic inherent in the enterprise. For him, legal reasoning is reasoning either about what the law is or how disputes should be settled, and is therefore subject to the same rules of reasoning as other enquiries or disputes.<sup>144</sup> He disputes, however, that it is analogous to claim that it is reducible to a type of moral reasoning aimed at addressing the concerns of how one should act.<sup>145</sup> Such a distinction can be highlighted by the example of civil disobedience, where the question '[H]ow should a case be decided according to the law?' could have a different outcome to the question '[H]ow should be [sic] case be decided, all things considered?'<sup>146</sup> Legal Reasoning must, Raz claims, take place from a particular starting point of a 'Legal Point of View', whereas morality can only be one of the factors we should consider when engaging in such reasoning. The exclusionary claims made by law therefore should override exclusionary moral claims.<sup>147</sup> This is evidenced

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<sup>144</sup> Raz (n 131) 327

<sup>145</sup> *ibid* 327

<sup>146</sup> *ibid* 328, fn 1

<sup>147</sup> *ibid* 329



by the fact that the law necessarily comprises conflicting values, goals and aims, whereas moral claims are necessarily universally consistent in their scope.<sup>148</sup>

This observation does not hold. As has been stated repeatedly, it is the nature of a categorical imperative that it is exclusionary to all action, and overrides all other reasons which contradict it. Legal reasoning is no different. Such a claim becomes stronger if, as has been established already, the incorporation of the PGC into the law is necessary due to the claim to legitimate authority inherent with in legal norms. Raz's distinguishing how cases should be decided according to law and how they should be decided all things considered does not account for this necessary connection. This is because the claim that we should separate reasoning about law and reasoning according to law rests on the positivist assumption that the sources thesis should be distinguished from moral reasoning.<sup>149</sup> As was discussed in s.2 of this chapter, such a distinction between types of reasoning fails due to the categorical nature of moral imperatives; they exclusionary to all forms of action, including law. The civil disobedience Raz introduces should therefore be seen as more legitimate than the law should the law in question not conform with the PGC. Indeed, if the law in question fails the test for permissibility presented by the PGC, it necessarily lacks the ability to claim legitimate authority Raz believes to be inherent in the concept of law and, by his own test, cannot be considered to be law in the true sense of the concept.

This conclusion is necessary by Raz's own writing on the subject. He claims that courts are able to have discretion to modify legal rules and that they '[O]ught to resort to moral reasoning to decide whether to use [their discretion] and how.'<sup>150</sup> This ought is not absolute for Raz however, as he claims that morality can be too vague to give an answer or to be of use in settling a bilateral dispute. This suggests that legal reasoning should instead be viewed as somehow independent to morality and not bound to its requirements.<sup>151</sup>

Doctrinal reasons, reasons of system, local simplicity and local coherence, should always give way to moral considerations when they

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<sup>148</sup> *ibid* 331

<sup>149</sup> *ibid* 332-333

<sup>150</sup> *ibid* 335

<sup>151</sup> *ibid* 335

conflict with them. But they have a role to play when natural reason runs out.<sup>152</sup>

He gives the example of laws concerning emigration, suggesting that it would be unusual to hold that moral reasoning should play a decisive role in any decision on this topic that was the subject of adjudication by the courts.<sup>153</sup> It should be countered however that this characterisation of legal reasoning misrepresents the nature of moral claims. It is perfectly sensible to say that morality should form the foundation of all legal disputes in that it sets a boundary beyond which decisions lack legitimate authority. The courts are still able to engage in doctrinal reasoning within the realms of the pluralistic moral permissibility which is enabled by the PGC. To deny this would again claim that the courts can issue doctrinal interpretations which, if contrary to the PGC's requirements, lack the legitimate authority axiomatic to law and therefore cannot be seen as belonging to a coherent concept of law at all.

### 3.2 The Importance of Points of View

At this point, the chapter should move on to discuss in more detail exactly what Raz means by his previous assertion that what separates Legal Reasoning from moral reasoning is that it must necessarily begin from the starting point of a 'Legal Point of View.' This concept requires that the law be seen and analysed as it is perceived by legal practitioners and institutions. Inherent here is Raz's view that judges necessarily view legal rules that they lay down become morally binding as a result of their being thus proclaimed. The importance of this concept to his overall views on the concept of law require necessitate an admittedly long quotation:

[R]ules telling other people what they *ought* to do can only be justified by *their* self-interest or by moral considerations. My self-interest cannot explain why they ought to do one thing or another except if one assumes that they have a *moral* duty to protect my interest, or that it is in *their*

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<sup>152</sup> *ibid* 339-340

<sup>153</sup> *ibid* 335 - 336

interest to do so. While a person's self-interest can justify saying that he ought to act in a certain way, it cannot justify a duty to act in any way except if one assumes that he has a *moral* reason to protect this interest of his. Therefore, it seems to follow that I cannot accept rules imposing duties on other people except, if I am sincere, for moral reasons. Judges who accept the rule of recognition accept a rule which requires them to accept other rules imposing obligations on other people. They, therefore, accept a rule that can only be accepted in good faith for moral reasons. They, therefore, either accept it for moral reasons or at least pretend to do so.<sup>154</sup>

A legal point of view therefore must necessarily be based on moral reasoning as this is a claim which judges, in adjudicating decisions, believe the law makes on those to whom their decisions are addressed. McBride helpfully breaks down the argument thus:

1. Judges accept their legal system's rule of recognition.
2. If judges accept a rule of recognition, those judges accept rules imposing obligations on other people.
3. If one accepts rules imposing obligations on other people, some or all of one's reasons for doing so are moral.
4. Therefore [from (1), (2), and (3)]: Judges accept rules imposing obligations on other people, and some or all of their reasons for doing so are moral.
5. Therefore: Judges accept the rule of recognition, and some or all of their reasons for doing so are moral.<sup>155</sup>

McBride perceives difficulty in this argument. He accepts that the second step, what he labels 'Acceptance Closure' – that 'If one accepts  $\Phi$  and  $\Phi$  validates  $\Psi$ , then for every  $\Psi$  one accepts  $\Psi$  (or for most instantiations of  $\Psi$  one accepts  $\Psi$ ).'<sup>156</sup> is valid as a general statement of logic, and this is a claim that we are able to accept in light of the PGC compliant account of reasons as discussed in s.2 of this chapter. What he disputes is the generalisation which occurs to step 5 -

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<sup>154</sup> Joseph Raz, 'Hart on Moral Rights and Legal Duties' (1984) 4 OJLS 123 at 130

<sup>155</sup> Mark McBride, 'Raz on the Internal Point of View' (2011) 17 Legal Theory 227, 228 - 229

<sup>156</sup> *ibid* 229

*Reverse Closure*: If one accepts  $\Psi$  for reason-type R, and one accepts  $\Phi$ , and  $\Phi$  validates  $\Psi$ , then one accepts  $\Phi$  for reason-type R.<sup>157</sup> Such a claim, for McBride, only accounts for single reasons to influence decision making, whereas judges often balance doctrinal and moral claims in making decisions; it cannot adequately explain a judicial decision which considers both moral reason R and doctrinal reason R2.<sup>158</sup>

This criticism can be rebutted however if it can be established doctrinal reason R2 as necessarily incorporating moral reason R. This has been the argument put forward in s.3.1 of this chapter – that if Raz is committed to holding that law necessarily makes a claim to legitimate authority, this legitimacy can only be provided by the law being created in conformity with the PGC. The Legal Point of View therefore holds judges too must deliberate in accordance with this moral foundation, otherwise their judgments could make no legitimate claim upon those to whom it is directed. The legal point of view is therefore committed to holding that moral obligations created by law only exist if the law is legitimate, in that it conforms to the requirements of the PGC. The legal point of view proposed by Raz as being of central importance can therefore be seen to be hollow without this moral justification, casting doubt on the separateness of normative systems which Raz believes exists due to the differing view points required by each.<sup>159</sup> It is because of this moral legitimacy that courts are able to view themselves as exclusionary as Raz believes that they do.<sup>160</sup>

### 3.3 Legal Normativity.

Much has been made so far of Raz's claim that law necessarily possesses legitimate authority – without this it would be incapable of making claims on the behaviour of its subjects that they would treat as valid and therefore choose to follow. This claim relies on a normative foundation – that the law is constructed around a series of exclusionary 'oughts' which are designed to guide the conduct

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<sup>157</sup> *ibid* 230

<sup>158</sup> *ibid* 230 -231

<sup>159</sup> Raz (n 10) 143

<sup>160</sup> *ibid* 144

of its subjects. It is the intertwined nature of the legitimate authority that is necessary for legal normativity to be a coherent force that will be examined here. We will first examine how legal normativity might be derived from the PGC, before discussing Raz's own Sources thesis in light of this analysis.

### 3.3.1 Legal Normativity from the PGC.

As has been cursorily mentioned in ss. 2 and 3.1, Raz believes that the idea of authority appears to be paradoxical in nature:

To be subjected to authority, it is argued, is incompatible with reason, for reason requires that one should always act on the balance of reasons of which one is aware. It is of the nature of authority that it requires submission even when one thinks that what is required is against reason. Therefore, submission to authority is irrational. Similarly, the principle of autonomy entails action on one's own judgment on all moral questions. Since authority sometimes requires action against one's own judgment, it requires abandoning one's moral autonomy. Since all practical questions may involve moral considerations, all practical authority denies moral autonomy and is consequently immoral.<sup>161</sup>

By extension, we can infer that if Raz believes that an authority always acts in conformity with the demands of morality, then it is not a true authority – in limiting its ability to make demands only in line with moral reasoning, it has ceded its exclusionary power and cannot be truly said to be an authority. Such a claim would mean that the account of legitimate legal authority thus developed is not an account of authority at all. In order to prove that this is not an accurate conclusion, we must explore in further detail Raz's account of four common methods of explaining of how authority can be said to exist. Firstly, an explanation can attempt to specify the conditions necessary or sufficient for effective, *de facto* authority – a method he rejects as being purely descriptive of why authority is possessed as opposed to what authority actually is.<sup>162</sup> Secondly,

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<sup>161</sup> Raz (n 119) 3

<sup>162</sup> *ibid* 5

an account could specify the conditions for legitimate, *de jure* authority – an account Raz also rejects at it fails to account for what one has when one has authority.<sup>163</sup> Third would be an account that equates *de facto* authority with having power over people, power which – if legitimate – is also *de jure*. This account is rejected as all *de facto* authority necessarily claims legitimacy, as without this it would be unable to influence its subjects.<sup>164</sup> Lastly, an authority can exist because it is conferred by a system of rules – an explanation which again conflates possession of authority with what it is to have authority. It does not provide a means of telling which rules are capable of conferring authority to the body in question.<sup>165</sup>

Having rejected these four common explanations of authority, Raz needs to find an alternative means of justifying how authority arises. To do this he turns to the simple explanation offered by John Lucas, that ‘A man, or body of men, *has authority* if it follows from his saying “Let *X* happen”, that *X* ought to happen.’<sup>166</sup> To clarify that authority must necessarily be over others, this statement is modified to become ‘*X* has authority over *Y* if his saying ‘Let *Y*  $\Phi$ ’, is a reason for *Y* to  $\Phi$ .’<sup>167</sup> Such a statement is, for Raz, correct in its main insight that to possess authority is to have the power to change reasons for action – but lacks the normative explanation as to how this change can occur.<sup>168</sup> Raz suggests any such normative power must be directed at special types of reasons he labels ‘Protected Reasons for Action’, which he characterises as a combined reason for action and an exclusionary reason to disregard all other reasons against it. Normative Reasons therefore possess two characteristics:

1. There is reason for regarding them as a protected reason or as cancelling a protected reason; AND
2. The reason is that that it is desirable to enable people to change protected reasons by such acts, if they wish to do so.<sup>169</sup>

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<sup>163</sup> *ibid* 6-7

<sup>164</sup> *ibid* 7-9

<sup>165</sup> *ibid* 9

<sup>166</sup> John Lucas, *The Principles of Politics* (Oxford University Press 1966) 16

<sup>167</sup> Raz (n 119) 12

<sup>168</sup> *ibid* 16

<sup>169</sup> *ibid* 18

As reasons which are made from positions of authority claim both these characteristics, they therefore possess normative character. Raz is therefore able to define *X has authority to  $\Phi$*  as entailing that there is some Y and some Z such that:

1. Y permitted X to  $\Phi$  or gave him power to do so;
2. Y has power to do so;
3. X's  $\Phi$ -ing will affect the interests of Z and Y has authority over Z<sup>170</sup>

To apply this to legal authority:

1. Y permits a law maker to make law or gives him power to do so;
2. Y has power to do so;
3. A law maker's making of a law will affect the interests of a subject of the law, and Y has authority over the subject of the law.

Our enquiry must therefore be directed to the nature of Y – what can simultaneously enable a law-maker to make law whilst also possessing an authority over the subjects of law prior to the law-making taking place? The classical response from positivism here would be that Y is a norm generator which gives the bodies it applies to the power to make law. It could be the Basic Norm proposed by Kelsen, or the Secondary Rule of Recognition proposed by Hart. These are social facts which possess this power and need no further legitimation. The satisfactoriness of this claim has been disputed in earlier chapters as merely question begging, however; what gives such a norm-creator the power to create norms itself? Put another way, if law makes a claim to legitimate authority, what is it that legitimises the norm-creator?

Raz partially addresses this concern in recognising that law can never be fully isolated from other disciplines – his inclusive positivism allows for an overlap with morality, for example, as a means of generating the necessary normative foundation of law.<sup>171</sup> Law makes direct normative statements which create oughts and duties upon those to whom they are addressed.<sup>172</sup> A legal system must therefore be comprised of these normative statements of the general form

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<sup>170</sup> *ibid* 20

<sup>171</sup> Raz (n 122) 44

<sup>172</sup> *ibid* 49

that ‘*p* ought to be the case, and that it is true if, and only if, there is, in a certain normative system, a norm to the effect that *p* ought to be the case.’<sup>173</sup> Normative statements must rest on a justificatory norm, so legal norms must also rest on a legitimising norm in order to be valid. The simplest way of locating such a norm would be for it to be a pure norm, the existence of which is itself enough to make it true.<sup>174</sup> Such a pure norm can be found with the PGC, in that the ought which stems from it exists by the bare fact of agency. Any legal system thus founded on the normative system provided by the PGC can channel this normative force into individually, legally binding norms.

Positivists may here argue along a similar line as Jules Coleman, and propose the Practical Difference Thesis to reject such a foundation. This thesis holds that to claim that legal normativity is provided by a moral foundation is to mischaracterise the claims made on us by law. Law is an exclusionary reason in itself, and its claim to authority presupposes that it overrides all considerations capable of being made by an agent individually – including moral reasoning.<sup>175</sup> If the law makes no difference to how people would act, then it is not capable of acting as an authority which people would defer to.<sup>176</sup> This argument will be considered in more detail later.<sup>177</sup> Instead, we will here respond to an argument that we have previously discussed in Raz’s ‘Normal Justification Thesis’, which claims that authority is legitimate if its subjects are more likely to comply with reasons that already ought to justify their behaviour if they follow the authority, than if they were to act independently.<sup>178</sup> We have already established that in order for this to be possible this requires the authority to not act contrary to the reasons which the agent possesses independently and, since the PGC offers a foundational moral principle which applies to all reasons an agent might possess, any legitimate authority must also be PGC compliant. In doing so it also addresses the problem of social coordination,<sup>179</sup> in providing space for a plurality

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<sup>173</sup> *ibid* 47

<sup>174</sup> *ibid* 49

<sup>175</sup> J. E. Penner, ‘Legal Reasoning and the Authority of Law’ in Lukas H. Meyer et al. (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 71

<sup>176</sup> *ibid* 71

<sup>177</sup> Chapter Six

<sup>178</sup> Penner (n 175) 72

<sup>179</sup> Raz (n 94) 1190-4



of legal solutions which are acceptable to all regardless of their subjective concerns by providing a universally acceptable moral foundation upon which society can function. It thus enables a normative framework in allowing an orderly community to exist which respects legitimate differences of opinion:

The point is that an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly different outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct.<sup>180</sup>

By reflecting shared practices in a morally grounded normative framework guaranteed by law, the PGC thus enables the law to claim legitimate authority. Such coordination is necessary for law to possess efficacy and be accepted by those to whom it is addressed. For, as has been asserted previously, every *de facto* claim to authority necessarily includes a claim that it is also *de jure* legitimate,<sup>181</sup> and the simplest way for an authority to make claims to both statuses is for it to meet the requirements of both. This can be achieved through conformity with the PGC. Such legitimate status can be enjoyed by all forms of law – customary, statutory and common – provided that all are compliant with this requirement.<sup>182</sup>

PGC compliant law then, no matter what its source, should be seen as possessing a legitimate authority. The very fact of its validity provides us with a reason to follow it – something which Raz would readily admit.<sup>183</sup> Yet we would still express doubts that Natural Law can adequately justify legal validity in that it views a valid rule as one that its subjects are ‘[R]equired to observe and endorse.’ prior to it becoming law.<sup>184</sup> This is a mischaracterisation of the PGC compliant legal normativity which has been outlined here. Law which is PGC compliant can still give rise to additional legal obligations given that the PGC is not a method for creating obligations, but for assessing the permissibility of maxims. It provides normative force to rules which are permissible, rather than requiring specific sets of rules be in force. In this sense, the theory thus presented

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<sup>180</sup> Raz (n 77) 58

<sup>181</sup> Raz (n 119) 28

<sup>182</sup> *ibid* 29

<sup>183</sup> *ibid* 146, fn2

<sup>184</sup> *ibid* 149

conforms entirely with Raz's description of a valid legal rule as being '[O]ne which has the normative effects (in law) which it claims to have.'<sup>185</sup>

Before we move on to apply this normative grounding to Raz's own ideas on the sources of law, some final clarifications must be made. Firstly, we should note that Raz remains committed to the claim that law is necessary a higher exclusionary force than all other considerations.<sup>186</sup> He suggests that this is self-evident in that we can imagine a situation whereby neither a citizen nor a judge want to conform to a particular rule, but must do so because that is what the law requires.<sup>187</sup> He recognises that it is a moral defect in the law that such a situation might occur, but argues that it is an inevitable defect due to the fact that '[I]t is practically impossible for the law to recognize all the considerations relevant to the cases which it applies.' due to the fact that legal certainty requires legal rules to be general, rather than specific, in their application.<sup>188</sup> Such an argument may seem appealing, but can be dismissed in that it again mischaracterises the theory of legal normativity outlined above. The fact the PGC provides a point of reference to assess the validity of rules allows for the generality which Raz suggests any moral foundation would preclude. It is therefore not a necessary feature of a legal system that a judge and subject may be faced with a situation where they do not want to conform to a particular rule but must do so because the law requires it. If this situation were to arise, several rebuttals could again be made. Should the judge and subject wish to act contrary to a PGC compliant law but feel unable to do so, we can reject their scepticism as not being morally grounded. It might be a pragmatic concern, but it is paradoxical to suggest that a moral reason can exist for not applying a morally permissible rule. Alternatively it might be the case that the judge and subject wish to act in a PGC compliant way which the law forbids, and they choose to follow the law because of its overarching exclusionary nature. This again would be irrational and contrary to the nature of legal normativity outlined above. If it is axiomatic that legal normativity can only exist if it can be viewed as a legitimate authority, and

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<sup>185</sup> *ibid* 149

<sup>186</sup> *ibid* 30

<sup>187</sup> *ibid*

<sup>188</sup> *ibid* 31, 33

that the concept of legitimate authority incorporates compliance with the PGC, it is again paradoxical to suggest that a non-PGC compliant rule can possess legal normativity. There is therefore no valid legal reason for the judge and subject to feel bound to follow the non-PGC compliant rule as it does not meet the legal criterion of being a legitimate authority. One final objection could be raised here from Raz's writing, in that he could claim the above argument conflates the existence of a legal rule, which is an exclusionary reason to abide by it, with the claim that the law requires conformity 'motivated by recognition of the binding force, the validity of the law.'<sup>189</sup> Yet it is not obvious how this differentiation can be supported should we accept Raz's earlier insistence that a legally valid rule must claim legitimate authority. Assessing whether a legal rule possesses such legitimate authority necessarily entails assessing its binding force and validity, thus allowing us to discard this distinction as oxymoronic when viewed alongside his earlier claims.

### **3.3.2 PGC Compliant Normativity and the Sources Thesis**

Having established that legal normativity, should it possess legitimate authority, must be in conformity with the requirements of the PGC, we can now move on to defend this characterisation against Raz's central theories on the sources of law. These theories would form the largest, and as yet unaddressed, objection which Raz would raise against the necessary connection between law and morality outlined above, namely that he believes that law is necessarily a social fact as opposed to being a creature of morality or metaphysics. He believes this is a necessary foundation due to the law requiring both efficacy and in that it possesses a positive source and positive means of removing its own legal authority.<sup>190</sup>

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<sup>189</sup> *ibid* 30

<sup>190</sup> *ibid* 151

This claim is central to Raz's Social Thesis. If law can only exist as law due to its being created by an appropriate source, then any moral connection that exists can only be contingent in character and any semantic similarities, such as emphasis on rights and duties, are not identical in nature in both spheres.<sup>191</sup> Raz characterises his sources thesis as a strong variant of the social thesis – that:

A jurisprudential theory is acceptable only if its test for identifying the content of the law and determining its existence depend exclusively on facts of human behaviour capable of being described in value-neutral terms, and applied without reason to moral argument.<sup>192</sup>

In order to fully explore Raz's claim here, we will ignore for the time being the fact that this definition includes a positivist assumption without attempting to justify the exclusion of morality as a viable source of legal norms. We will instead examine why Raz believes this definition is one we should accept beyond this definitional problem, a belief that rests on the fact that it is inescapable that law is a social phenomenon. This claim can be supported by the joint tests of efficacy, institutional character and sources. Raz holds, like Kelsen, that law can only truly exist where it possesses efficacy on a systemic level. These systems are comprised of standards which are connected to adjudicative institutions whose purpose it is to resolve disputes as to how they are applied, and the standards which are subject to adjudication must have the relevant institutional connection to a source which is capable of producing them.<sup>193</sup>

It is this final step which demonstrates, for Raz, the positivist nature of law. Without being properly enacted or otherwise given legal status by a body capable of doing so, any rule or standard can possess neither legal efficacy nor be subject to legal adjudication. As such, it is the primary tenet of any account of why norms possess legal character. Raz's own formulation of the Sources Thesis holds that 'A law has a source if its contents and existence can be determined without using moral arguments...The sources of law are those facts by virtue of which it is

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<sup>191</sup> *ibid* 38

<sup>192</sup> *ibid* 39-40

<sup>193</sup> *ibid* 42 - 45

valid and which identify its content.’<sup>194</sup> This is a definition Raz believes we should accept because it adequately reflects and explicates our conception of what law is, and there are sound reasons to believe this is so,<sup>195</sup> namely:

It is an essential of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups within it, ceases to be their private view and becomes... a view binding on all members notwithstanding their disagreement with it. It does so and can only do so by providing publicly ascertainable ways of guiding behaviour and regulating aspects of social life.<sup>196</sup>

Such sources cannot contain moral foundations because the law necessarily possesses its own exclusionary character. Raz suggests that this character necessitates that the law must be clearly and totally identifiable without reference to further justificatory argument.<sup>197</sup> A counter which is regularly made at this stage to such arguments is that this appears to be a reductionist statement which holds that law is nothing but an expression of power and of the will of certain individuals in society. This is particularly true of situations where courts are obliged to rule on disputes where the law does not provide a solution, and as such are forced to fill a lacuna by their judgment. Such an argument rests on the premise that a legal proposition is only a proposition because it stems from a recognised source:  $\vdash p \leftrightarrow S(p)$ . To avoid this reductionism, this formula is one that the Sources Thesis must guard against. A simple way to do this would be to reject Raz’s previous insistence that sources must be free of moral considerations as a circular definition relying on an as yet unproven positivist assumption. Section 3.3.1 has argued that legal normativity is guaranteed by an incorporation of the PGC as the justification for the legitimate authority to which the law makes a claim. Should we therefore accept that legal sources, including courts, are bound to follow the PGC to guarantee the legitimate authority required by exclusionary claim inherent in law, the reductionist argument can be rejected. Yet this is not a step which Raz would endorse, as he rejects the argument that – should courts rely on moral considerations in forming their judgments – moral

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<sup>194</sup> *ibid* 47-48

<sup>195</sup> *ibid* 48

<sup>196</sup> *ibid* 51

<sup>197</sup> *ibid* 52

considerations are not law at the point at which they are incorporated into the legal system. They only possess legal character once a law-creating source has confirmed that they do. Such sources are therefore not obliged to apply a non-legal consideration, but are able to do so at their own discretion.

Instead, Raz attempts to circumvent the reductionist argument by positing the situation where two laws which are valid according to the sources thesis contradict one another, thus creating the legal gap in question.<sup>198</sup> Such a statement is said to contain a contradiction – two laws, each of which possess normative exclusionary character, cannot both be valid as two exclusionary reasons cannot operate in contradiction of one another:  $\vdash \neg(R_c x, \Phi \ \& \ R_c x, -\Phi)$ .<sup>199</sup> Neither can the formulation  $(R_c x, \Phi) \vee (R_c x, -\Phi)$  hold, as the extent of R must be different in each of these situations in order to avoid the paradox of contradictory exclusionary reasons.<sup>200</sup> Instead, the Sources Thesis holds that it must be true that ‘Statements of the form  $p \ LR \ x, \Phi$  are true only if statements of social facts specifiable without recourse to moral argument are substituted for  $p$ .’<sup>201</sup> Since these statements of social facts must be specific in nature, this circumvents the possibility of conflicting exclusionary reasons. This argument would still be equally valid however if the term ‘without recourse to moral argument were removed’, meaning that the Sources Thesis cannot exclude morality stemming from the PGC in this formulation. Raz might argue that the rejection of the PGC is axiomatic, believing as he does that it is impossible that a source can exist for a negative statement such as  $\neg LR \ x, \Phi$ .<sup>202</sup> Since the PGC operates on a basis of permissibility rather than committing an agent to a specific end, it cannot be said to be a source of positive obligations. Whilst this statement appears to hold, it can be shown to rest on a mischaracterisation of the principle. If the courts are able to incorporate non-legal considerations at their discretion, then Raz has already suggested that the sources of law may feel themselves to be bound by non-legal considerations when declaring what the law is. In doing so, he renders the Sources Thesis to be a statement of Inclusive Positivism which

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<sup>198</sup> *ibid* 62

<sup>199</sup> *ibid* 64

<sup>200</sup> *ibid* 64

<sup>201</sup> *ibid* 66

<sup>202</sup> *ibid* 69

may take the PGC to be a relevant factor in creating law or filling legal gaps if it feels it is appropriate to do so. If this is true, then Raz allows sources to consider a Categorical Imperative as a factor which can shape the development of the law. Once this concession has been made, the nature of a Categorical Imperative renders adherence to it not just discretionary, but necessary. It is therefore axiomatic that legal sources, if they are able to incorporate the PGC into the law, must do so. To claim otherwise is to misunderstand the nature of how a Categorical Imperative operates.

This argument has sought to demonstrate that, should the possibility of incorporating moral principles into law through the Sources Thesis be conceded, the nature of the PGC requires that incorporation be a necessary feature of any legal system in order to provide the legitimate authority which law necessarily claims. Such a claim is axiomatic in Raz's earlier observation that two contradictory legal principles cannot exist. Similarly, if the law requires moral content in order to claim legitimate authority, then it cannot be true that a legal reason  $X$  requiring  $\Phi$  can exist if a moral reason based on the PGC  $X$  requires us to not  $\Phi$ . Thus the statement  $\vdash - (R_L x, \Phi \ \& \ R_M x, - \Phi)$  is true. The absolute exclusionary reason inherent within the nature of a categorical imperative requires statement  $R_M x, - \Phi$  to take primacy. It is therefore necessary that  $(R_M x, - \Phi) > (R_L x, \Phi)$ . This argument is also alluded to by Raz, if not expressly endorsed, in his claim that – due to the fact that morality, unlike law, has no jurisdiction, it applies to legal institutions and practitioners in their actions equally to those of all agents who are aware of their existence.<sup>203</sup> Yet this step, put by Raz as the belief that the principles which establish the legitimacy of governments and positive law are moral,<sup>204</sup> leads to a paradox of incorporation. If '[M]an-made legal duties bind their subjects only if moral principles of legitimacy make them so binding.'<sup>205</sup> then we are led to question what the process of legal incorporation adds if judges, as agents, are already bound to act according to moral requirements.<sup>206</sup> Raz partly answers this question himself,

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<sup>203</sup> Joseph Raz, 'Incorporation by Law' (2004) 10 *Legal Theory* 1, 2

<sup>204</sup> *ibid* 6

<sup>205</sup> *ibid*

<sup>206</sup> *ibid* 10

establishing that the institutionalisation provided by law advances moral concerns by enabling their adjudication and enforcement.<sup>207</sup> Yet the objection is partly founded in a mischaracterisation of the nature of the moral requirement proposed by the PGC and by categorical imperatives more generally. Legal systems get their validity from these principles, but this is not to say that these principles prescribe that the law needs to take a definite and specific form. Legal Pluralism is permitted insofar as the specific rules claiming the status of law do not contradict the principles contained within the moral principle. This leaves scope for a variety of legal norms to exist. Law can therefore be seen as a system of norms resting on a moral foundation, but with scope for its own distinct content within these foundational constraints.

### 3.4 Systemic Functionality

Another central idea which is fundamental to the nature of law is that it exists on a systemic level. It would be unusual to claim that a law can exist in isolation; they instead exist as part of a system of creation, adjudication, enforcement and repeal. The systemic nature of law has therefore led some theorists to suggest that legal normativity, and therefore validity, exists at a systemic level rather than being depended on the validity of individual legal norms which make up the system. The purpose of this section is to assess the validity of claims to systemic normativity.

Our starting point in the discussion will be Raz's belief that it is not necessary that all individual laws are norms. For him, all legal philosophy is '[N]othing but practical philosophy applied to one social institution.'<sup>208</sup> This insight goes some way to explaining his hostility to the idea of any necessary connection between law and morality, as such claims tend to operate on a presumption to the opposite. He argues that legal normativity is provided by the system as a whole:

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<sup>207</sup> *ibid* 9, 12

<sup>208</sup> Raz (n 10) 149



[T]he law is normative because its function is to guide human behaviour, and that it guides human behaviour in two ways: either by affecting the consequences of a certain course of conduct in a way which constitutes a standard reason for avoiding that course of conduct, or by affecting the consequences of a certain course of conduct in a way which constitutes a reason for pursuing or avoiding it, depending upon one's wishes.<sup>209</sup>

Such a reading that normativity exists on a systemic level appears to fit well with his Sources Thesis which, in turn, is heavily influenced by Hart's concept of a Secondary Rule of Recognition. These theses hold that individuals do not regularly engage in legal reasoning about whether or not a law should apply to them in a given circumstance. Instead, the applicability of legal rules to a given situation is decided by the officials whose job it is to adjudicate upon and enforce them. Since the ultimate arbiters of legal validity are working within the system rather than representing individual norms, claims to legal validity are grounded in their understanding of the law and, by extension, must also be systemic.<sup>210</sup> Whether or not a norm ought to be followed by dint of its legal nature can therefore only be assessed with reference to its systemic validity.<sup>211</sup>

Such a view is also supported by two features Raz claims law necessarily possesses – efficacy and institutions capable of adjudicating and of enforcing their decisions with sanctions.<sup>212</sup> Each of these features will be assessed in turn with the aim of establishing whether their existence evidences the claim that legal normativity exists on the systemic level. Before a discussion of efficacy can take place, it is worth reminding ourselves that Raz begins from the starting point that Inclusive Positivism is a fundamental tenet of the Sources Thesis. The existence of legal reasons, and therefore of legal normativity, can be established by social fact alone; there is no need for morality to be the foundation of such legal normativity.<sup>213</sup> As such, law can only exist in a society which recognises

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<sup>209</sup> Raz (n 122) 168-169

<sup>210</sup> *ibid* 199

<sup>211</sup> Raz (n 10) 155

<sup>212</sup> Raz (n 122) 232

<sup>213</sup> *ibid* 212

that, when they decide how to act, individuals necessarily engage in two stages of reasoning. Firstly, they deliberate between the competing reasons they have to either  $\Phi$  or not  $\Phi$ . Secondly, they decide which reason is the strongest before utilising it to justify  $\Phi$ -ing. In this latter executive stage of action, no further deliberative assessment takes place; the agent merely acts according to the reason they have decided is the strongest reason to act based on their prior deliberation.<sup>214</sup> For Raz, moral reasons are necessarily present at the deliberative stage in that they can be used to justify a decision to either  $\Phi$  or not  $\Phi$ . Legal reasons are necessarily different in that they direct an individual agent away from deliberation, but instead act as authority to dictate to them which course of action is required. They should therefore be seen as being located at the executive stage of action rather than the deliberative.<sup>215</sup> Courts, in adjudication, are able to engage in moral reasoning at their deliberative stage of determining the content of a legal rule, yet it only gains legal authority at the executive stage.<sup>216</sup> When agents grant law efficacy therefore, they must do so at the systemic level due to legal authority being present at the executive stage as opposed to the deliberative.

Such an argument does not flow naturally from the rest of Raz's writings on reasons as explored in s.2 of this chapter. It was ascertained *supra* that legal reasoning should be viewed as no different to other types of reasons. It is therefore safe to assume that legal reasons should be viewed as existing at the deliberative stage of when an agent chooses whether or not they wish to either  $\Phi$  or not  $\Phi$ . To suggest that an agent considers whether or not to submit to a legal system after they have already decided what course of action they have a reason to undertake seems strained and artificial; it makes more sense to see a legal reason as one which forms part of their general deliberation on action. If this is the case, it seems equally strained to suggest that the legal reason being deliberated upon should be whether to submit to the authority of a system. Action is by definition aimed at specific goals and objectives, meaning that the legal reason under deliberation must also be an individual norm aimed at a

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<sup>214</sup> *ibid* 213

<sup>215</sup> *ibid* 214

<sup>216</sup> *ibid* 215

specific type of conduct which is the goal of the agent. Should this be the case, then we can hypothesise a situation where a reason which claims to be law, and therefore claims to possess exclusionary force, might conflict with a moral reason which also claims the same exclusionary force. Such a conflict re-introduces the paradoxical formulation raised in s.3.3.2, that  $(R_L x, \Phi \& R_M x, - \Phi)$ . Since the moral foundation of all reasons and actions is necessarily the categorical imperative provided by the PGC and categorical imperatives by their nature apply to all action, including action, then the conclusion that  $(R_M x, - \Phi) > (R_L x, \Phi)$  again necessarily follows. It therefore follows that an agent, in deciding whether or not a legal norm possesses exclusionary force over a moral consideration, is deliberating over a specific action. This assessment takes the shape of a deliberation of whether or not the individual norm possesses legitimate authority, meaning that agents make decisions relating to legal efficacy must also take place with regards to individual norms. Systemic efficacy could therefore only exist if the individual legal norms within them possess the legitimate authority required to provide an exclusionary reason to act in a certain way.

Having established that the necessary fact of efficacy is not proof that legal systems possess normative force through their systemic nature, we shall move on to consider whether or not the existence of institutions whose role it is to adjudicate upon disputes and apply sanctions to enforce compliance is evidence of systemic normativity. Raz begins his thoughts on the subject by attempting to distinguish sanctions from force. Sanctions need not be forceful in themselves, yet force can be used to ensure a sanction is carried out. It is this claim to legitimately regulate force which he suggests is necessarily claimed by all legal systems; at the very minimum they would prohibit violence against legal officials in the undertaking of their duties and would allow force to allow enforce compliance with sanctions. Force should therefore be seen as a tool with which ensures that sanctions will be complied with. The necessary link between force and sanctions therefore requires us to accept that all legal systems are capable of providing sanctions for intentional violations of rules which are addressed to

ordinary individuals.<sup>217</sup> Interestingly, Raz concedes that this leaves open the theoretical possibility that sanctions are not necessary for a legal system to function effectively if it possesses complete efficacy. He concludes however that it would be impossible for such a wholly efficacious system to exist in practice, meaning that any working system must necessarily resort to sanctions to ensure compliance. Yet this conclusion raises interesting questions. The foremost of these is linked to a secondary claim of Raz's that sanctions are, at best, auxiliary reasons for compliance rather than primary reasons.<sup>218</sup> We must assume that the primary reason for compliance is the normative foundation of the rule resting on its legitimate authority. Should sanctions be an auxiliary reason, then the rule under consideration must not possess true legitimate authority as, if it did, then would be an absolute exclusionary reason which did not need an auxiliary reason for compliance. The reason they would provide would amount to a tautology. In presenting this paradox, we aim to again shift the justification for legal sanctions away from the systemic level to that of individual norms. A sanction could only serve as a reason for compliance with a norm if the norm to which it is attached is imperfect. It is therefore incorrect to describe them as operating on a systemic level if they provide an auxiliary reason to follow an individual legal norm.

This discussion has attempted to demonstrate that the systemic requirements of efficacy and institutional adjudication operate on the level of individual norms in that they are fundamentally linked to providing individuals with reasons for compliance with rules governing specific acts. It is their operation at this level which allows a legal system to claim legitimate authority as a whole. Yet Raz may still object and claim that it is simply inaccurate to describe the law as only possessing authority in this way. Their role as a social institution requires that they be viewed as a whole rather than a collection of individual norms.<sup>219</sup> If we view law in this way, then Raz holds that three characteristics become apparent. Firstly, that law claims to be comprehensive in that systems claim the legitimate authority to regulate any and all behaviour. Secondly, they make a claim to supremacy in that they claim to be an absolute exclusionary reason. Lastly, they

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<sup>217</sup> Raz (n 10) 157-158

<sup>218</sup> *ibid* 161

<sup>219</sup> *ibid* 166

are necessarily open in that they can give binding force to non-legal norms by including them at the systemic level.<sup>220</sup> Since the coherence of the legal system is the basis of Raz's claim to systemic normativity, the final part of this section will be focussed on his account of legal adjudication. It is hoped that this will demonstrate that the legitimate authority of a system can only be generated should the individual norms contained within it themselves possess legitimate authority, and that systemic authority cannot provide a reason for compliance with an illegitimate norm.

We will begin by outlining some general characteristics of interpretation of any kind before moving on to apply these characteristics to Raz's account of how the courts interpret legal norms. Raz believes that any interpretation requires four key features in order to be successful: an original object must be the subject of the interpretation; the interpretation must demonstrate the meaning of the original object; the interpretation itself is subject to an assessment as to its correctness; and interpretations must be a deliberate enterprise.<sup>221</sup> The primary feature that will be considered here will be the third, namely that any interpretation must be able to be assessed for its correctness. Raz labels this aspect of interpretation the 'Intention Thesis'; that any interpretation can only be viewed as valid if it correctly captures the intention of the author of the original.<sup>222</sup> Raz moves on to question whether this observation can apply to legal considerations, noting that it is not immediately apparent that judicial practices and legal doctrine which develop over the years can be attributed to a single author in the way that this account requires. Assuming for the time being that such an author can be located however, he proposes a modification of the Intention Thesis which can apply to legal interpretation. He calls this maxim the Radical Intention Thesis, which holds that 'An interpretation [of a legal principle] is correct in law if and only if it reflects the author's intention.'<sup>223</sup> This, for Raz, is an adequate description of how legal interpretation operates. Nevertheless, he suggests three objections which might plausibly be raised to

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<sup>220</sup> *ibid* 150-154

<sup>221</sup> Joseph Raz, 'Intention in Interpretation' in Robert P George (ed) *The Autonomy of Law: Essays on Legal Positivism* (Oxford University Press 1996) 249, 252

<sup>222</sup> *ibid* 256

<sup>223</sup> *ibid* 257

this account. The first is that no reason exists to base an interpretation on the author's intention. Tied into this is a secondary objection initially raised earlier, that it is not always possible to establish authorial intent for a legal doctrine which been developed by several different institutions.<sup>224</sup> Raz rejects these conjoined objections as being nonsensical. Since the Sources Thesis holds that all law making power rests with legal institutions, these institutions are necessarily authors of the law. As authors, they cannot create legal norms without intending to do so, thus demonstrating that an intention exists. The third objection hypothesised by Raz addresses this rejection of the previous two, holding that legal institutions themselves do not always seek to establish the authorial intent of the principles which they establish or apply; they are merely applied as they exist.<sup>225</sup> Yet this is also dismissed for the same reasons; that principles necessarily contain authorial intent as they are applied, in that the authors intend them to possess binding authority. This is Raz's Authoritative Intention Thesis. The law must be intelligible in the authoritative claims that it makes on its subjects.

This generalized argument for The Authoritative Intention Thesis is an example of an argument with significant results for the understanding of the law which makes no stronger assumption than that the law is morally intelligible – that is, that people's attitude to the law is morally ineligible, that it is intelligible that they believe the law to be morally binding.<sup>226</sup>

This, for Raz, must be the authorial intention underpinning all legal interpretation and, by extension, adjudication. He holds that the normative force that is intended is still claimed by law even when the individual norm is morally defective as a result of the efficacy of the system as a whole.<sup>227</sup> He therefore appears to be claiming that authors can intend that a law can be morally deficient yet still possess legitimate authority due to systemic efficacy. Such a conclusion fails for two reasons. Firstly, it relies on a description of efficacy which has been demonstrated *supra* to be misguided. The formula  $(R_M x, - \Phi) > (R_L x, \Phi)$

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<sup>224</sup> *ibid* 257

<sup>225</sup> *ibid* 258

<sup>226</sup> *ibid* 260-261

<sup>227</sup> *ibid* 261

demonstrates that assessments of efficacy take place at the level of the legitimate authority possessed by individual norms as opposed to being made against the system of which they are part. Even if this were not the case, systemic efficacy itself can only arise based on the efficacy of individual norms within the system in question. Secondly, the account requires authors to intend to act in a way which they recognise that the norm they are attempting to create would not possess legitimate authority. Since Raz holds that all legal norms necessarily must possess legitimate authority, this requires the authors to be acting *prima facie* irrationally. It is paradoxical to suggest a legal institution would intend to create a rule which claims to possess legitimate legal authority to control the actions of those to whom it is addressed without imbuing that same norm with the legitimate authority it requires to do so. These claims demonstrate that legal intention itself cannot be described without reference to the legitimate authority which it intends to create, and therefore that all legislative intent must be passed in accordance with the requirements of the PGC in order to possess legal effect.

### 3.5 An Obligation to Obey the Law?

The final subsection of this chapter is designed to address a curious element of Raz's account of law; namely his belief that there is no *prima facie* obligation to submit to obey the law.<sup>228</sup> Raz defines an obligation to obey the law thus:

[An obligation to obey the law] includes admission that the reasons to obey have the weight and implications which the law determines for them. In other words, it entails a reason to obey in all circumstances defeated only by the considerations which are legally recognised as excusing from prosecution or conviction.<sup>229</sup>

It may be surprising that this is not a principle he would accept given his previous suggestions that the law's recourse to normative language itself implies that the validity and bindingness of legal rules is something that should be accepted.<sup>230</sup> Yet to characterise the law this is to conflate the normative reason which it

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<sup>228</sup> Raz (n 119) 233

<sup>229</sup> *ibid* 236

<sup>230</sup> Raz (n 122) 235

provides; any duty to obey, for him, conflates exclusionary and absolute reasons.<sup>231</sup> To say that an obligation to follow the law exists is to say that the rule in question is itself justified by reference to a higher principle; if this is the case, then it is this higher reason which one has a reason to obey rather than the law itself.<sup>232</sup> In order to demonstrate this objection, Raz hypothesises an obligation to keep rivers clean. He says such an obligation exists iff the obligation is one which is already accepted by the majority of the population, and that if '[M]ost people pollute them and they are badly polluted there is normally no reason why I should refrain from polluting them myself.'<sup>233</sup>

In providing this example, Raz appears to suggest that his rejection of an obligation to follow the law rests on the efficacy of the norm in question. If the rule is one which the population rejects then an agent has no reason to follow it himself. It is difficult to reconcile this view of efficacy with the one established in s.3.4, however. In order to possess efficacy then a rule must be perceived being a legitimate authority. For this to be the case it cannot operate contrary to the moral principle contained within the PGC, as a law creating institution must incorporate this into the rule in question as rules which do not possess legitimate authority are incapable of behaving as binding reasons. This fact is acknowledged when Raz claims that all law necessarily is a legitimate authority. It is therefore irrational for an agent to perceive a rule possessing legitimate authority as an exclusionary reason as one which they should not follow. Raz would here raise the objection that if, as has been suggested, all law is necessarily morally perfect then the obligation is again not a legal one but a moral one. To claim the law has its own obligatory force is a tautology.<sup>234</sup> He concedes that in certain situations the law does create an obligation to be obeyed, but that any general obligation to obey would vary from person to person:

1. A duty exists to comply with Health and Safety Regulations. These possess legitimate authority in that they are designed by experts who possess more knowledge than the layman as to how to work safely.

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<sup>231</sup> Raz (n 119) 236

<sup>232</sup> *ibid* 245

<sup>233</sup> *ibid* 248

<sup>234</sup> Raz (n 131) 342



Submission to this authority would therefore better enable an agent to pursue his goal of working safely than he may do were he to reason independently.

2. A regulation designed to reduce specific examples of pollution. The example given would ban barbecues from being used in the countryside in all but a few designated areas. Since this would reduce overall environmental degradation more effectively than individuals' own reasoning, a reason exists to obey the rule. by banning bbqs in all but a few areas. Would reduce damage, should follow.
3. Should the government have a policy to construct nuclear power stations that an agent disagrees with, the agent should still not engage in Civil Disobedience. To do so would encourage others to do the same when they disagree with another government policy, meaning that it would be impossible for the government to function effectively. It is therefore in my interests to obey this rule in order for social institutions generally to continue to function.<sup>235</sup>

The last of these three examples stands out as worth of attention, as taken to its logical extent it could be read as being an example of the general obligation to follow the law which Raz is attempting to disprove. If an obligation exists to not protest against a law which is perceived as illegitimate, it is true that an obligation exists to respect that law. This point is itself made by Raz in other writings, where he claims that the Rule of Law necessitates the claim people should obey the law and consent to be ruled by it by virtue of its status as law.<sup>236</sup> He supports this claim by contrasting the Rule of Law with the exercise of arbitrary power, which he defines as: '[Power which is exercised] with indifference as to whether it will serve the purposes which alone can justify use of that power or with belief that it will not serve them.'<sup>237</sup> If we accept Raz's earlier idea that law necessarily is a legitimate authority, and define legitimate authority as one which does not contradict the requirements of the PGC, then arbitrary power becomes the imposition of rules which are contrary to the requirements of the PGC in that such rules cannot serve the purposes which justify the power's existence. The

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<sup>235</sup> *ibid* 347

<sup>236</sup> Raz (n 119) 212

<sup>237</sup> *ibid* 219

Rule of Law then must necessarily comprise of power to the opposite – a series of rules in conformity with the PGC which should be followed by dint of their possession of legitimate authority. Raz claims the Rule of Law necessitates this obligation on a pragmatic foundation rather than a moral one however; it exists purely to allow for stable social relations and allow individuals to plan their lives.<sup>238</sup> This further allows the law to better respect Human Dignity by allowing such planning to take place.

By thus connecting the Rule of Law with the value of Human Dignity, Raz introduces a moral element beyond the pragmatism which he relied on previously. This again allows the PGC to be introduced as a test for the moral permissibility of the actions. As a dialectically necessary obligation exists for all agents to follow the requirements of the PGC, this obligation can be transferred to law which possesses legitimate authority in its concurrence to the PGC. This statement is entailed in the following quote from Smith on when an obligation to follow the law exists, where X represents an obligation to follow the law:

I shall say that a person S has a prima facie obligation to do an act X if, and only if, there is a moral reason for S to do X which is such that, unless he has a moral reason not to do X at least as strong as his reason to do X, S's failure to do X is wrong.<sup>239</sup>

Since the absolute and exclusionary nature of the PGC precludes the possibility of a moral reason to not conform with its requirements, evidence exists to suggest that there is a prima facie obligation to follow law which, through its own compliance with the PGC, possesses the legitimate authority to claim this status.

#### **4 Conclusion.**

This chapter has been ambitious in its primary aim of scrutinising the coherence of the writings Joseph Raz pertinent to the concept of law. Since the overall aim of this thesis is to demonstrate that Inclusive Positivism fails to provide a

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<sup>238</sup> *ibid* 220

<sup>239</sup> M B E Smith 'Is there a Prima Facie Obligation to Obey the Law?' (1973) 82 Yale LJ 950, 951

satisfactory account of legal normativity in light of the categorical imperative provided by Gewirth's Principle of Generic Consistency, this chapter has split Raz's writings into two distinct parts. Given the PGC operates on a foundation of rational action, an analysis of Raz's own conceptions of reasons and rationality was required in order to assess whether his account of agency, and therefore of the nature of agents who are subject to the law, was itself logically consistent. It was found to be lacking for several reasons. Central to this was the mischaracterisation of moral reasoning prevalent throughout Raz's own thoughts on the nature of exclusionary reasons. The chapter has shown that, once Raz's writings take account of the reasons for action inherent within the first stage of the PGC, he must accept it as being an absolute and exclusionary reason to not act contrary to its requirements. To do so would be *prima facie* irrational and, as agents are committed to acting in what they perceive to be their own interests (whether or not this is founded on a false belief), they have no valid reason to act in an irrational manner. In his writings on reasons it has thus been demonstrated that Raz has provided no valid reason which would allow an agent to disregard the PGC and, in the absence of such a rebuttal, should acknowledge its status as a categorical imperative which takes normative superiority over all other norms which may exist within an agent's deliberative reasoning.

The second half of the chapter has taken this conclusion and applied it to Raz's writings on the nature of law. Raz's Sources Thesis holds that, as a social fact, legal status is only attained by a norm being created by a body capable of doing so. This body is able to incorporate moral principles into the law if it feels it should do so, but is under no obligation to thus act. This statement has been shown to be deficient if the moral norm in question is one that has been proven to act as a categorical imperative to all action. Since Raz has provided no evidence to rebut the PGC it should be accepted as operating as such. The distinction between legal and moral points of view introduced by Raz therefore fails in that it does not acknowledge the axiom that, as agents, members of legal institutions which create and enforce the law are also bound to follow the PGC as a result of their status as agents. Following from this, if Raz's claim that all law is necessarily a legitimate authority is true, it becomes necessary to see that

this statement is synonymous with the claim that all law must be compliant with the PGC. Rules which are not PGC compliant are definitionally irrational. We must therefore conclude that, if law is necessarily a legitimate authority which is created by a law making body, and that this law making body is comprised of moral agents who are subject to the PGC's requirements, these agents are not simply permitted to incorporate the PGC into the law which they create but are in fact obliged to do so. A necessary connection between law and morality has therefore been established in that the PGC necessarily possesses a higher normative force than all other norms, including the law. It therefore cannot be true that  $(R_L, \Phi \ \& \ R_M, \neg \Phi)$ . Since this formula operates with reference to individual legal norms as opposed to the system as a whole, it also follows that efficacy as a necessary condition of a legal system must also be located at the level of individual legal rules as opposed to with reference to the system as a whole. Legal systems can therefore only be accepted as possessing legitimate authority if they individual norms they contain are PGC compliant, and – by extension – the Sources Thesis itself can only remain intact if the option to incorporate moral principles into the law is replaced with an obligation on the part of law-creating institutions to do so.

# Chapter Six

## Accepting the Trojan Horse: The Necessary Collapse of Inclusive Legal Positivism

### 1 Introduction.

This thesis has already considered in depth the writings of several prominent legal philosophers who may all be broadly categorised as Positivists, in that they all – for several reasons – deny the necessary connection which exists between Law and Morality. Working on the assumption that the PGC does provide a Categorical Imperative which applies equally to all action, an assumption which has been robustly defended in Chapter Three,<sup>1</sup> the canonical positivist theories of Kelsen and Hart have both been shown to be incapable of rebutting a claim that law, in any meaningful sense of the word, need not incorporate the moral requirements of the PGC.<sup>2</sup> The argument then moved on to contemporary theory by analysing the writings of Joseph Raz.<sup>3</sup> It was concluded that the characterisation of his work as being in the Exclusive Positivist tradition, that it is conceptually impossible for any connection between law and morality to be possible, is grossly overstated; his claim that law necessarily possesses legitimate authority can only be possible should the rules being considered for legal validity be justified according to a moral stand-point, as opposed to the Legal Point of View he defends. Once this step has been taken, Raz's Exclusive Positivism becomes, at a sympathetic reading a variety of Inclusive Positivism. This is something Raz would reject, as a central tenet of this branch of positivism is that it is entirely plausible that law might rest on a moral foundation – but that this

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<sup>1</sup> *Supra*

<sup>2</sup> Chapter Four

<sup>3</sup> Chapter Five

relationship is entirely contingent, and not something which is axiomatic to our understanding of the abstract concept of law.

Inclusive Legal Positivism is itself a diverse field of scholarship. This chapter will examine the extent to which modifying the positivist claim to allow for a contingent relationship between law and morality can prove that no connection is, in fact, necessary. Three particular theorists will be considered in turn in order to demonstrate the breadth of the field, and the plurality of viewpoints contained within it. Firstly, the Formalism discussed extensively by David Lyons will be placed under the microscope. The commitment to procedural formalism is one which is often viewed as necessary in a legal system, and this claim will be examined for its normative justification before the section moves on to consider what Lyons calls his 'Minimal Separation Thesis'.

Secondly, this chapter will move on to examine the inclusive positivist theory of Jules Coleman. This will form the large bulk of the chapter given that Coleman himself, for reasons which will be explained during the course of the section devoted to his writings, rejects the label of 'Inclusive Positivism' in favour of what he calls 'Incorporationism.' The section will begin by exploring a famous distinction in Coleman's writing, which he believes justifies his Incorporationist approach, between Negative and Positive Positivism. Having established where Coleman believes the foundations of a theory of law are necessarily located, the section will move on to discuss his ideas around Law as an essentially economic theory and the location of concepts of wrongfulness contained within it. The section will close with a critique of Coleman's conceptions of legal authority built from these foundations, a discussion of the importance he places on the Practical Difference Theory and a critique of whether or not his theory is ultimately successful in explaining the concept of law.

The third and final section of this chapter will be dedicated to a critique of the writings of one of the most spirited defenders of contemporary positivism, Matthew Kramer. Kramer characterises himself as a Moderate Incorporationist,

and founds his theory on extensive writings on moral and political theory. These writings will therefore form the foundation of the first part of the analysis, where they will be assessed for their normative validity. The section will then move on to Kramer's writings on the nature of law. He famously holds that moral-political foundations of legal writing should be seen as inferior to his own theoretical-explanatory approach.<sup>4</sup> This is a puzzling claim for a writer who grounds himself firmly in the Natural Law tradition, and will be assessed for its validity when seen in the light of Kramer's writings on the nature of morality. The conclusions of this comparison will then form the foundation of a critique of Kramer's commitment to a contingent link between Law and Morality.

The critique of these three conceptions of inclusive positivism will, naturally, be grounded in the belief that the PGC is itself capable of providing a categorically binding restriction on the permissibility of all agents. Of the theories being considered, only Kramer explicitly references his reasons for rejecting Gewirthian theory; Lyons and Coleman do not expressly confront the logical necessity of the PGC in rejecting a necessary connection between it and the concept of law. As has been alluded to above, this thesis has attempted to demonstrate that none of the critics so far discussed have managed to give a satisfactory account of why the PGC should not provide this necessary foundation. The discussions taking place in this chapter will therefore rest on the same assumption of the PGC's validity, and will address any challenges to its necessary presence in the law as and when they arise.

## **2 David Lyons and Formalism**

Central to any understanding of the formalism which forms the large part of the writing of David Lyons is a central underpinning of his idea of law. Lyons does not reject any assertion that the law is morally infallible, and instead believes that law must earn the respect which it demands. This conclusion seems unusual to ascribe to somebody whose writings are usually placed in the positivist canon,

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<sup>4</sup> Matthew Kramer, *Where Law and Morality Meet* (OUP 2008) 156-157

yet it becomes more coherent when viewed alongside the key role which Lyons ascribes to adjudication; a thorough understanding of adjudication is something Lyons holds to be central to any understanding of the concept of law. This is because of the nature of the adjudicatory process itself, which Lyons believes necessarily requires an interpretation of the rules being adjudicated upon. It is the outcome of this deliberative process which he holds justifies the obligations which arise from it.

He therefore draws a distinction which may confuse lawyers who believe a necessary connection between law and morality exists in order to justify the normative force of legal obligations. Law can be unjust, and indeed the outcome of judicial deliberation can be unjust. This gives rise to the following claim:

An unjust law is like counterfeit currency, which causes trouble because it so closely resembles and may be taken for the real thing. But unjust law is not genuine law. And thus it deserves no respect.<sup>5</sup>

Yet at no point does this prevent the law whose injustice renders it deficient from making the claim to be law; it merely means that those to whom it is addressed need not give it respect. It remains law, it is just bad law. Lyons believes such normative judgments can be made of law, but are not necessary for a rule's status as law. Standards for validity proposed by Natural Lawyers therefore need not be rejected outright; they can be modified as a tool against which to assess the success of a legal rule in making its claim to legitimacy.<sup>6</sup> A parallel can therefore be drawn between Lyons' conception of law as possessing merit of a varying scale, and the claim made by Coleman in s.3 that law should be seen as a success term. This will be discussed later, but the conclusion reached by Lyons is that the lack of merit possessed by a given rule should not necessarily mean that no legal obligation exists to follow it. Such a claim is in direct opposition to the Natural Lawyer's belief that a morally unjust rule cannot possess binding legal force. This opposition will therefore be the starting point for our analysis of Lyons' writing. In order to understand the distinction as he

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<sup>5</sup> David Lyons, *Moral Aspects of Legal Theory: Essays on Law, Justice, and Political Responsibility* (CUP 1993) 1

<sup>6</sup> *ibid* 2



views it, we will begin by discussing the Formalist approach undertaken by Lyons. The second half of this section will place this formalism in the setting of what Lyons calls his ‘Minimal Separation Thesis’, before assessing the extent to which the thesis can survive intact when assessed for its moral validity by subjecting it to the test contained within the PGC.

## 2.1 Formalism Explored.

The central claim of formalism rests on the empirical starting point that a system of law is something that exists, and is often the source of disputes as to its content. In adjudicating these disputes, it is therefore pragmatically desirable that the rules be enforced in a consistent manner with one another, and that precedents set are followed when similar situations arise in the future. Lyons hold this formalism is necessary for any conception of law, as the outcome of adjudication is always to be characterised as either a restatement of the existing law in a given area, a declaration of new law to be applied in a given area or a combination of the two. As such, judicial or other official statements which arise as a result of the deliberative process should be viewed as law. From this, Lyons concludes that ‘[A]n injustice is done whenever an official fails to act within the law, regardless of the circumstances.’<sup>7</sup> This conclusion presumably arises from the axiomatic claim that law makes on its subjects to direct their behaviour in accordance with its specifications. We can also imply that for Lyons, the existence of a legal system is enough to make its authoritative claim to do so *prima facie* and *de facto* legitimate, meaning that any deviation from its standards is in breach of its own pre-existing rules. For a system to contradict its own rules would therefore be irrational and, therefore, unjust. For Lyons, this argument would follow regardless on the substantive content of the rules resulting from adjudication and being adjudicated upon; it is therefore content-neutral, in that value is placed on existing legal rules regardless of the moral status of those rules.<sup>8</sup> In this sense, the formalism described by Lyons is positivist in character; rules being applied may be morally good or bad – any potential injustice that

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<sup>7</sup> *ibid* 13

<sup>8</sup> *ibid* 13

may occur arises through their application, and is therefore independent of the character of the individual rules. Moral judgements are therefore levied at the conduct of officials independently of the rules being applied; formal justice therefore requires us to *prima facie* ensure that officials engaged in adjudication apply legal rules consistently.

Recognition of this commitment to formal justice is something which Lyons believes exists to varying extents in legal systems and is a necessary function of their operation. He points to the familiar example that law should be applied impartially by those engaged in adjudicative practices,<sup>9</sup> and concludes that this view is consistent with positivism's claim that the substance of law need not necessarily incorporate moral principles itself. Natural Lawyers are therefore mistaken in critiquing substance when the real moral nexus of law is in its application. Lyons holds that officials themselves may be in a position to disagree with the moral substance of the law and can exercise their discretion to depart from laws they see as unjust or morally deficient, but that this itself would be a departure from the starting point of legal consistency. Departure from the substantive requirements of a given rule may be morally or otherwise justifiable, but it remains itself a form of injustice by dint of it breaching the formalist principle of consistency.<sup>10</sup>

This claim is worth examining in further detail, as it appears to be where the Natural Lawyer would depart from the formalist approach thus outlined. We will begin by once more stating the categorically binding nature of the PGC as has been outlined in previously.<sup>11</sup> The principle has been shown to be capable of withstanding normative critiques as to its ability to provide a normative basis for action. It has also been shown to survive criticisms which hold that it does not, as it claims, proceed on a dialectically necessary basis in providing a categorical imperative not to act in a non-compliant manner. We should therefore presume, since no valid argument has been presented to the contrary, that the PGC itself does act as a Categorical Imperative which does apply to all forms of action, and therefore provides an absolute and exclusionary reason not to behave

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<sup>9</sup> *ibid* 16

<sup>10</sup> *ibid* 20

<sup>11</sup> Chapter Three

in a way which disregards its content. We should also note that, in shifting the moral nexus of the law away from substantive content and into the realm of adjudication, Lyons has attempted to circumvent rejection of the law's content on moral grounds. Yet adjudication is itself a form of action performed by officials within a system; such officials are necessarily agents for the purposes of the PGC in that they are performing an action that cannot be described as a reflex or natural impulse. They are therefore subject to the requirements of the PGC in their adjudication, and cannot act in a way that condones a law that, when itself assessed for its PGC compatibility, proves itself to be morally deficient. They would therefore be bound to depart from the deficient law. Lyons suggests a formalist would have no objection to this, and could '[A]cknowledge other moral factors which have a bearing upon official conduct maintain that those [reasons] favouring deviation may outweigh those favouring adherence...in specific cases.'<sup>12</sup> Such a departure may be warranted, in that '[F]ailure to follow an unjust law may also result in less injustice than adherence to it, and might therefore be justified.' But he adds that this departure would still in itself be properly classified as an injustice as opposed to a just departure.<sup>13</sup>

It is difficult to see how such a conclusion could be sound if the PGC is accepted as the moral determinant of the substantive content of the rule being departed from. It is in the nature of a Categorical Imperative that it excludes the permissibility of conduct contrary to its specifications in an absolute manner. The official hypothesised by Lyons who departs from a rule deemed substantively immoral by reference to the PGC would therefore, if he chose to depart from the rule, be committing a justified injustice. This statement is paradoxical, meaning that the conclusion to Lyons' argument must be unsound. The PGC necessarily produces an outcome which is morally permissible which rationally is prioritised over those judgments which are morally impermissible. Therefore, a judgment which disregards a non-PGC compliant law should be seen as *prima facie* just as opposed to unjust, as Lyons suggests. This is not to dismiss Lyons' statement that an element of injustice may be committed in the departure from the unjust rule in question; but the injustice is morally necessary.

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<sup>12</sup> Lyons (n 5) 20

<sup>13</sup> *ibid* 26

It is therefore improper to characterise it as injustice in the way which Lyons appears to endorse, as to do so introduces the paradox of an unjust justice which was outlined above.

We ought therefore to reject the formalism outlined by Lyons in this piece as being non-compliant with the PGC. Formalism as a doctrine is only morally coherent if the substantive rules being applied are themselves PGC compliant. Non-PGC compliant rules not only provide no normative basis on which officials can justify following them; they run contrary to an exclusionary normative reason to not follow them. Since it cannot be the case that  $(R_L x, \Phi \ \& \ R_M x, - \Phi)$ , it must be true that  $(R_M x, - \Phi) > (R_L x, \Phi)$  for all agents acting as legal officials who are presented with the problem laid out in the former formula. We are forced to conclude that formalism can only be accepted as a legal ideal if we abandon Lyons' transferral of the moral nexus away from substance to adjudication., thereby abandoning the contingent claim to moral content and replacing it with a necessary moral foundation. To do contrariwise would be irrational, and therefore any such promulgations are incapable of possessing the legitimate authority which Lyons suggests is ascribed to these norms through the inclusive-positivist formalism he describes.

## 2.2 The Minimal Separation Thesis

The second part of this section will move away from the formalism which Lyons himself recognises as being a controversial doctrine, and to one which he believes to be less contentious. This is connected with his endorsement of what he refers to as the 'Minimal Separation Thesis',<sup>14</sup> a thesis which he believes can be used to demonstrate the necessary connection between law and critical morality outlined above is, at most, merely a contingent relationship. This should be distinguished from the Separation Thesis as normally understood, which holds simply that there is no necessary connection between law and morality. Lyons rejects this as being vague and equally acceptable to both Natural Lawyers

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<sup>14</sup> *ibid* 64-65

and Positivists.<sup>15</sup> He therefore prefers a new, Minimal formulation, to which he ascribes the following content:

Law is subject to moral appraisal and does not automatically satisfy whatever standards may properly be used in its appraisal.<sup>16</sup>

We might contend that this statement is uncontentious, and it is indeed one which many Natural Lawyers would endorse. The problem is therefore not one of content, but the opposite. The statement begins with the word 'Law', and therefore presupposes that a definition has been made in favour of inclusive positivism. Thus, the statement can be shown to shed no light on the topic that is meant to address, namely, whether or not law necessarily possesses moral content. On a kind reading, we could perhaps suggest that Lyons here is referring to 'The Law' of a particular legal system, rather than the abstract concept of 'Law' that is usually the focus of jurisprudential enquiry. For the purposes of this section, this is a concession that will be made; yet this does not render the statement unproblematic. For even if the subject of the Minimal Separation Thesis is the law of a particular state, we still have no hint from Lyons as to what the outcome of a moral inquiry as to the permissibility of a law would be should the analysis demonstrate the law to be substantively immoral. The thesis implies that if a test for moral permissibility is failed then the rule in question is somehow deficient; yet it also suggests that it would be improper to say that the rule cannot be correctly classified as law. Can it still be described as valid law, but one which – after appraisal – is objectively deficient? If so, how does the deficiency affect its status as law? It seems odd to argue that something which is deficient in some respect should possess the same characteristics as a perfect example of the same commodity. If the deficiency is acknowledged, then how deficient does the rule need to be, and against what criteria, to cease being law? Or could a hypothetical morally deficient law still possess the same legal bindingness as a one which is perfect in its moral compliance? These are all questions which the Minimal Separation Thesis completely fails to address. It should therefore be seen to be

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<sup>15</sup> David Lyons, 'Moral Aspects of Legal Theory' (1982) 7 *Midwest Studies in Philosophy* 223, 223

<sup>16</sup> *ibid* 226; Lyons (n 7) 68

of minimum utility in any enterprise where the essence of law is the object of enquiry as it is incapable of answering fundamental questions as to the outcome of the moral appraisal it suggests.

Yet Lyons clearly believes it can shed light on the disagreement and, as such, we shall address his justifications in turn. Before we do this, it is worth noting that Lyons does attempt to shed light on the standard of assessment to be used in the Minimum Separation Thesis. He holds that no adjudicatory decision can be morally neutral in its outcome, and that the appropriate standard of assessment should be one which appraises the justice or injustice of the decision in light of the moral standard being applied.<sup>17</sup> In light of the conclusion reached in the previous section concerning his previous writing on Formal Justice, we can reject here any attempt to ground the conception of justice he describes on a purely procedural formalism. This standpoint has been shown to be inherently paradoxical when viewed in conjunction with the moral principle contained within the PGC. Any conception which Lyons refers to must therefore be seen as possessing that substantive element of PGC permissibility.

Lyons himself would object at this stage that justice may only be located at the level of the substantive content of the rules themselves. He concedes that this is one element, and rejects Raz's Sources Thesis for not addressing the connection between social facts and moral value which he believes is necessary for a successful appraisal of justice.<sup>18</sup> Instead, he identifies three loci which each could be subject to moral appraisal. Substantive quality is but one of these; the others are the procedural quality of the law, and the interaction between the legal subject to the legal system - namely, whether the undertaking of the subject to obey the law one which is freely determined.<sup>19</sup> It is this separation of places for moral appraisal which Lyons believes justifies the vagueness of the Minimal Separation Thesis, and he holds that there is no good reason which exists to

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<sup>17</sup> Lyons (n 7) 74

<sup>18</sup> *ibid* 79

<sup>19</sup> *ibid* 96

reject it.<sup>20</sup> This challenge is met here, in that Lyons' tripartite separation of moral focus does not circumvent the PGC-butressed conception of justice which has previously been shown to be necessary for any formal conception of justice. Substantive justice has been shown to be necessary for procedural justice to exist without regressing into a paradoxical system capable of producing judgments which are incommensurably both just and unjust in equal measure. Similarly, the third locus of moral assessment, the interaction between a legal subject and legal system, is firmly located within the realms of practical rationality. Interaction between a subject and the legal system which purports to govern them rests wholly on the subject perceiving the system as capable of possessing the authority over them which is necessary for it to successfully guide their action. A valid reason is therefore needed to justify why the subject should thus perceive the system. As was established in the discussion of Raz's deficient account of reasons in the previous chapter, the PGC is crucial to accepting any claim to authority from the subject's internal point of view. As the PGC provides an absolute exclusionary reason to behave in accordance with its content, any and all contradictory authority must be rejected as not possessing the legitimacy required to be a true reason for action. The substantive content of a rule has again been demonstrated to be of vital importance for the third moral nexus identified by Lyons.

Lyons' motivation for moving away from classical formulations of the Separation Thesis to his Minimal Separation was due to his belief that the former was ambiguous and rested on unclear foundations. As such, it was an unreliable test for the categorisation of theories of law as either Natural Law or Positivist in nature as it could be accepted equally by both.<sup>21</sup> The above analysis has demonstrated that his Minimal Separation Thesis does succeed in overcoming this ambiguity, but not in the way he might expect. Instead of supporting an Inclusive Positivist reading of the contingent relationship between law and moral standards, proper application of the PGC has shown that the thesis can only avoid non-contradiction by recognising a necessary moral link between the two.

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<sup>20</sup> *ibid* 100

<sup>21</sup> Lyons (n 15), 223

Its coherence therefore relies on us rejecting the separation element of the thesis. It should therefore be seen to be unable to provide a sound argument in favour of a positivist theory of law.

### 3 Incorporationism and Jules Coleman

Having established that formalism is doctrinally incoherent as a positivist theory, this chapter now moves on to discuss the influential work of Jules Coleman. Coleman only grudgingly refers to his work as being in the Inclusive Positivist canon, preferring to refer to the doctrine as ‘Incorporationism’. He believes this terminology more accurately captures the essence of his theory; that morality can only form part of a system of legal norms if purposefully incorporated into that system through the appropriate law-creating mechanisms. The default position is that law and morality are not connected by necessity; any laws which do correspond to moral norms do so only to the contingent extent that the moral principles in question have been deliberately incorporated as law. In this sense, the substance of Coleman’s writing is appropriately recognised as being a form of inclusive positivism; the difference here is one of terminology only.

Coleman is committed to the contingent nature of any connection from the outset:

However we disambiguate the expression, restricting law to norms that bind the conscience involves departing from the ordinary concept of law... [I]t is neither essential to the concept nor is it entailed by anything that is.<sup>22</sup>

Yet this claim is hardly true. If the ordinary concept of law were one which was settled, then this thesis – and indeed, Coleman’s own writing – would be redundant. The fact that the work exists at all suggests that the claim is not apodictic as he suggests. This lack of clarity is also one which appears to pervade

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<sup>22</sup> Jules Coleman, ‘The Architecture of Jurisprudence’ in Jordi Ferrer Beltrán et al (eds), *Neutrality and Theory of Law* (Springer 2013) 69



the usage of the term even outside the realms of jurisprudence. Many people ask themselves how they would behave were they confronted with an obligation stemming from a morally repugnant law such as the genocidal laws which existed in Nazi Germany, and the dilemma is also one which judges themselves have frequently grappled with.<sup>23</sup> Does the legal obligation imposed by such laws prevent an individual from refusing to follow the law on moral grounds?

The scepticism introduced here is one which Coleman acknowledges, albeit implicitly, some pages after this claim is made. He comments that law should be correctly be seen as a 'success-term' in that it can only succeed as a concept if it succeeds in binding the consciences of its subjects.<sup>24</sup> This is, he suggests, a result of its being a social construct. Law is made with the purpose of guiding action, so it must therefore be successful in doing this in order to be worthy of the label.<sup>25</sup> Yet he dismisses this as being an artificial usage of the term 'law', designed by natural lawyers in order to avoid the ordinary and settled meaning of the word. Immoral law has historically been followed, thus confirming Coleman's initial claim that, in ordinary usage, law and morality are not connected by necessity.<sup>26</sup> We should reject this identification of the ordinary concept of law as settled. If we accept Coleman's assertion, then his account is rendered purely descriptive; it cannot engage with the normative objections raised by natural law theorists without abandoning the preliminary objection. This is something that this thesis will assume to be necessary, given that the canon of Coleman's writing is consistent with a belief that there is a genuine normative dispute as to the distinctive content of 'governance by law' which exists between Incorporationism and theories grounded in the natural law tradition.<sup>27</sup> Given Coleman holds that legal statements are capable of being either true or false,<sup>28</sup> this is a dispute which he must believe can be settled with appropriate enquiry into the subject.

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<sup>23</sup> Sebastian Haffner, *Defying Hitler: A Memoir* (Phoenix 2003)

<sup>24</sup> Coleman (n 22) 70

<sup>25</sup> *ibid* 71, n14

<sup>26</sup> *ibid* 75

<sup>27</sup> *ibid* 82

<sup>28</sup> *ibid* 95

It is in this spirit that this section of the chapter will explore Coleman's arguments to see whether he is capable of rebutting the necessary link between law and morality that demonstrably exists if the PGC is considered valid. The discussion will begin by exploring Coleman's writings on the nature of positivism in his famous essay 'Negative and Positive Positivism', with particular emphasis on his Conventionality Thesis, before moving on to consider whether Coleman's characterisation of Law as an essentially economic doctrine has implications for the debate between Positivists and Natural Law theorists. The place of the concept of wrongfulness will then be examined in light of the conclusions which have been drawn to date, drawing to a close the analysis of the theoretical framework which Coleman employs in his writing. The conclusions drawn from this theoretical underpinning will be applied to Coleman's beliefs on the nature of law in the final part of the section, with particular emphasis on the focus placed by Coleman on the authority of law and any necessary commitment to the Practical Difference Thesis.

### **3.1 Positive Positivism and the Conventionality Thesis**

One of Coleman's most celebrated pieces of writing holds that a valuable distinction which should take place when categorising the varying doctrines of Legal Positivism is between what he labels Negative or Positive Legal Positivism. Negative Positivism is, for him, a theory in which commitment to the Separation Thesis - that there is no necessary connection between law and morality – constrains any potential Rule of Recognition which might exist.<sup>29</sup> Coleman claims that such conceptions are vulnerable to criticism, in that only one legal system in which conformity with moral standards is a necessary precondition of legality need be identified in order to completely undermine the validity of the doctrine.<sup>30</sup>

Coleman instead proposes a theory of Positive Positivism. Instead of being a negative theory highlighting elements a Rule of Recognition cannot contain,

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<sup>29</sup> Jules Coleman, *Markets, Morals and the Law* (CUP 1988) 4

<sup>30</sup> *ibid* 7

such theories are instead characterised as establishing what features are universally necessary within a system. The necessary feature upon which Coleman constructs his theory is that '[L]aw is ultimately conventional: that the authority of law is a matter of its acceptance by officials.'<sup>31</sup> Coleman calls this conception 'The Conventionality Thesis'. The merits of this assertion will be assessed later in this section, but it is worth emphasising that such a theory is one that is concretely inclusive-positivist in nature. This feature is something Coleman feels is preferable to Exclusive Positivism, as he believes there are several examples of legal systems that do incorporate moral standards within them; to deny this is, for him, fallacious. Yet this thesis is not seeking to defend the exclusive positivist canon, so we shall instead consider why he believes such an approach is preferable to one that claims a necessary link between law and morality. The reason given is that moral standards are incapable of being a necessary component of legal validity as a reliable and uncontroversial test cannot be identified by which they can be proven to be valid. Since law requires such a test for its validity, in that either it exists or it does not, Coleman concludes the two concepts are not *prima facie* compatible.<sup>32</sup>

Yet, as has previously been mentioned, Coleman believes that it is a truism that some laws fundamentally do possess a moral foundation. They enjoy their status as law however not because of their status as a moral truth, but because a Rule of Recognition within the legal system has recognised that they should possess legal status. In order to justify this, Coleman argues that we need to distinguish between the grounds and the content of the Rule of Recognition. There is nothing, Coleman argues, to preclude a Rule of Recognition from containing a moral content – yet the grounds upon which the Rule of Recognition itself must be constructed upon cannot be moral in nature. The grounding of the rule is the social fact of its acceptance by officials in the system, through the Conventionality Thesis.<sup>33</sup> The position can be summarised thus:

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<sup>31</sup> *ibid* 12

<sup>32</sup> *ibid* 9

<sup>33</sup> Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2001) 107

[T]he inclusive legal positivist holds that *whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely the Rule of Recognition.*<sup>34</sup>

This formulation is supposed to circumvent the necessity of any moral grounding for a Rule of Recognition, whilst recognising the social fact that such a rule may possess moral content. So to what extent has Coleman succeeded here in his attempt to forge a middle-way between Exclusive Positivism and Natural Law? In order to establish this, let us address one of the criticisms Coleman himself believes would necessarily be addressed to him from both schools concerning his characterisation of the nature of morality. We have already seen that Coleman believes that morality is too vague a concept to provide a valid foundation for legal obligation, as this is his reason for rejecting Natural Law theories outright. Yet by permitting a Rule of Recognition to possess moral content, albeit on a conventional grounding, Coleman opens his theory to the same problem. If the purpose of a Rule of Recognition is to resolve dissensus around the validity of a rule, then to permit necessarily vague content to these same rules circumvents the whole purpose of the Rule of Recognition itself.<sup>35</sup> Coleman rejects the criticism on two grounds. Firstly, he argues that the criticism is itself an incorrect formulation of his position, in that recognising a moral principle as having legal force through a Rule of Recognition allows the matter to be arbitrated upon by legal institutions, thus providing an avenue through which dissensus can be resolved.<sup>36</sup> This argument is supported by a secondary rebuttal of the criticism, namely scepticism as to the characterisation of purpose of the Rule of Recognition as being one of dispute resolution. Coleman suggests that it is conceivable that a society might exist in which there was no moral dissensus, but in which individuals may still wish for formalisation of these principles in a concretised legal structure. The Rule of Recognition could therefore still exist in the absence of dissensus around the content of the rules it establishes.<sup>37</sup>

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<sup>34</sup> *ibid* 108; emphasis original

<sup>35</sup> *ibid* 111

<sup>36</sup> *ibid* 112

<sup>37</sup> *ibid* 112-113

This second argument from Coleman is one which requires analysis. Let us imagine the society he paints, in which moral precepts were universally accepted by all citizens, with no dissensus as to their applicability or bindingness. It is difficult to see why citizens in this society would wish for a formal adjudicatory structure to be put in place. After all, if there is universal consensus as to the content, applicability and bindingness of all moral claims then it follows that the possibility that these claims would not be followed is zero. This would be inconceivable in the society thus outlined. If citizens wished for a formal adjudicatory structure to be put in place to resolve potential disputes, this would only be a reasonable step to take if the same citizens could conceive that, either now or at some point in the future, the moral principles might not be followed and that the legal institutions they desire would be put to use. In conceiving of this possibility, they are suggesting that dissensus is also something which would be rationally possible. And in recognising the rational possibility of dissensus, they necessarily claim that the moral principles upon which they supposedly agree are not as uncontroversial as Coleman would have us believe. In recognising the rationality of dissenting views, they are recognising the existence of dissent itself. Dissensus is therefore not absent, as Coleman suggests, meaning that the society he describes is not one which is conceivable in the manner that he suggests.

This leads us to a criticism of Coleman's primary objection to his own detractors. If we want to hypothesise the society that Coleman describes in which moral precepts are universally accepted, then we must also conceive of the fact that all competing conceptions of moral content have been rejected by that society in favour of the standards that were ultimately accepted. This uncontroversial statement suggests that a test as to the validity and content of moral standards is something that this society has located prior to their decision to concretise these standards as law. This logical inconsistency in Coleman's rebuttals has the unintended effect of removing the main justification he proposes for rejecting theories of Natural Law stated earlier in the section, namely the necessary vagueness and incommensurability of morality. This thesis has argued that such a test for the validity of moral content has been identified in the PGC, whose dialectically necessary argument all agents are rationally compelled to comply

with. In hypothesising the society he describes, Coleman appears to be conceding that his society has also identified such a principle. There is therefore no *prima facie* reason for Coleman to see moral principles as incommensurable and, by extension, to reject any necessary connection between law and morality on this basis.

This conclusion brings us to a secondary reason upon which Coleman bases his rejection of a necessary connection between law and morality, namely the exclusionary force of law. This objection is connected to the Practical Difference Thesis, the validity of which will be discussed in detail later in this section. For the time being, we will presume Coleman's understanding to be sound - that law must be capable of featuring in an individual's practical reasoning and therefore must be capable of acting as an exclusionary reason which obligates an individual to comply with its demands to the expense of all other reasons.<sup>38</sup> Such force again should, Coleman suggests, be seen to originate with the Rule of Recognition operating within the Conventionality Thesis – and need not be moral in content. For he holds quite plainly that '*[T]he evaluative considerations that go to the legality of a rule need not coincide with those that go to the merits of the rule.*'<sup>39</sup> Yet in order to fulfil this requirement, law must possess a form of normative authority which is identifiable without moral recourse.<sup>40</sup> Coleman must therefore adequately locate a source of normativity which derives from the conventional grounding of any Rule of Recognition in order to adequately explain why the content of primary rules deriving from it should be seen as possessing strong normative reasons for compliance.

Before we consider the source identified by Coleman, it is worth revisiting his reasons for locating normativity in conventionality as opposed to morality. We have already considered the commitment to the Practical Difference Thesis apparent in his claim that law purports to govern our conduct by dint of its status

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<sup>38</sup> *ibid* 123

<sup>39</sup> *ibid* 126-127; emphasis original.

<sup>40</sup> *ibid* 129

as law as opposed to an analogous moral claim.<sup>41</sup> This gives rise to the following formulation of the Conventionality Thesis which, Coleman suggests, recognises the normative character of law whilst maintain its necessary character as a social fact:

‘[T]he possibility of legal authority is to be explained in terms of a *conventional* social practice, namely, the adherence by officials to a rule of recognition that imposes a duty on them to apply all and only those rules valid under it.’<sup>42</sup>

Coleman arrives at this formulation by clarifying the conditions he believes pertain between any conventionally grounded Rule of Recognition and the officials who operate underneath it. His starting point is the truism that a Rule of Recognition can only exist if officials do practice it, making adherence an existence condition for such a rule. This serves as a differentiation feature between Rules of Recognition and Primary Rules, which are held to exist even if they are not practiced due to their authority being derived from the Secondary Rule which is.<sup>43</sup> Like Hart then, Coleman believes that the normative force of law is located at the level of Secondary Rules which require both a convergence of behaviour amongst officials and an acceptance of that convergence to exist.<sup>44</sup> The normativity of the law can therefore, for Coleman, be explained through the internal viewpoint adopted whereby a convergent practice is accepted by officials who have a reason to do so. This location of normativity within practical reason amongst officials is a point to which we will return in due course but, for the moment, Coleman’s argument will continue to be laid out so as to ensure any criticism is directed appropriately.

In contrast to both Hart and Raz, neither of whom believe that a Rule of Recognition can impose duties or obligations of officials to observe its requirements, Coleman has no difficulty in ascribing one particular duty to officials – to ‘[E]valuate conduct [for its legality] by appealing to all and only

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<sup>41</sup> *ibid* 74

<sup>42</sup> *ibid* 77; *emphasis original*

<sup>43</sup> *ibid* 78

<sup>44</sup> *ibid* 83

those norms that are valid under the rule.<sup>45</sup> If duties can arise from a social fact, Coleman must justify why he believes this independent of a moral foundation. Such a foundation in critical morality is, for Coleman, incompatible with the nature of a Rule of Recognition; this is because moral rules, like primary rules, exist regardless of their being practiced. Yet if Rules of Recognition are social facts whose existence depends on their being practiced, they cannot be founded on an authority which precedes their existence otherwise they would be a mere tautology.<sup>46</sup> The answer, for Coleman, is one of psychological origin. He believes that the Internal Point of View is capable of generating norms, as human beings possess a basic psychological capacity to adopt social practices as rules possessing normative force.<sup>47</sup> No further source or philosophical justification is required beyond the claim that a norm has been created because the officials have decided that a particular standard should be accepted as one.<sup>48</sup> This assumption is founded, for the most part, on the theory of Shared Intention proposed by Michael Bratman and defined thus:

[S]hared intention, as I understand it, is not an attitude in any mind. It is not an attitude in the mind of some fused agent, for there is no such mind; and it is not an attitude in the mind or minds of either or both participants. Rather, it is a state of affairs that consists primarily in attitudes (none of which are themselves shared intentions) of the participants and interrelations between those attitudes.<sup>49</sup>

Such a shared intention can form the foundation of Shared Cooperative Agency, which itself consists of three tenets:

1. Mutual Responsiveness: Agents must be aware of the intentions and actions of other agents with whom they cooperate;
2. Commitment to the joint activity; and
3. Commitment to mutual support through joint pursuance of shared activity.<sup>50</sup>

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<sup>45</sup> *ibid* 84-85

<sup>46</sup> *ibid* 86

<sup>47</sup> *ibid* 88

<sup>48</sup> *ibid* 90

<sup>49</sup> Michael E Bratman 'Shared Intentions' (1993) 104 *Ethics* 97, 107

<sup>50</sup> Michael E Bratman 'Shared Cooperative Activity' (1992) 101 (2) *Philosophical Review* 327, 328



Coleman suggests that commitment to a Shared Cooperative Activity is apparent in judicial action. Judges commit to adjudicating by certain rules as per Bratman's three principles. They do so from the Internal Point of View, but the normative obligation arises from the structure of the practice of cooperation. In condoning a Rule of Recognition within a system, they therefore acknowledge that the rule gives rise to a 'system of interdependent and reciprocal expectations.'<sup>51</sup> These expectations give rise to the duty Coleman believes exists to appeal to all and only norms which are valid under the rule, and it is this duty which creates the normative force of primary rules passed accordingly.

Having established Coleman's explanation of legal normativity, two objections can be made. The first is one raised by Coleman himself. He suggests that this argument is somewhat circular – the creation of the Rule of Recognition through Shared Cooperative Agency itself presupposes that officials exist who are in a position to cooperate in an official capacity. Law has therefore been explained on the understanding that legal recognition of official capacity already exists. Yet Coleman believes this is a straw man, and that at the nascence of a legal system creators of the Rule of Recognition ascribe the conditions necessary for officialdom through their Shared Cooperative Agency. These conditions are then passed down through the Rule of Recognition to all officials who follow, but at some point in history individuals must have decided to grant themselves the status of officials. Officialdom is therefore also explained by conventionality.<sup>52</sup>

This point will be granted for the consistency of Coleman's position. Yet the second objection to be raised at this point is a criticism from the PGC. This criticism itself can be separated into two distinct objections to the hypothesis Coleman has painstakingly constructed. Firstly, we should examine the claim that officialdom was created in some proto-legal system by a group of people decided to see themselves as officials who were in a position to establish both a Rule of Recognition and their own status as officials capable of determining the

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<sup>51</sup> Coleman (n 33) 94

<sup>52</sup> *ibid* 100-101

content of primary rules by reference to the secondary rule of their own creation. This account presented by Coleman possesses little in the way of justification as to why those members of society who were not granted the status of Official in the system should accept the Shared Intention of those who were. Let us imagine a situation where my colleagues and I declare ourselves to be officials in a new legal system which, by our Shared Intention, we seek to establish across the United Kingdom at the expense of the legal system currently in existence. Our endeavour would be unlikely to be successful on two grounds. Firstly, we would be unlikely to persuade the majority of those we claim to be subject to our new legal order that we are in a position of sufficient authority to do so. Secondly, we would likely face active resistance from those officials whose duty it is to enforce the current legal system. We would therefore only be able to bring our shared intention to fruition by one of two means; either imposition by force, or by convincing the majority of our claimed legal subjects that we are in a position which possesses a more legitimate claim to authority than that which is currently in place. Which of these two options would Coleman be more likely to endorse as an appropriate course of action for his hypothesised ur-officials? The former route, imposition of their will by power, does not fit neatly with the normative enterprise which Coleman is at pains to establish; for if legal authority could be explained in terms of the imposition of the sovereign's will through power then no normative force need be present in the law being applied.<sup>53</sup> It would be more likely, then, that Coleman would prefer his officials to possess a claim to legitimacy in establishing their Rule of Recognition and their own officialdom; a legitimacy superior to those which existed prior to the rule. Without this, the legal system would be likely to be rejected before it was in a position to be recognised as law by those to whom it is addressed.

A necessary claim to legitimacy raises our secondary objection to Coleman's project. If an ur-legal system founded on the basis of normative obligations must be seen as legitimate to be accepted as a de facto authority over whatever system for dispute resolution existed before, we are forced to ask which standards of legitimacy we are assessing the system against. Such standards must themselves

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<sup>53</sup> *ibid* 71

be normative in order to justify a normative system, and must be present within the system seeking to establish itself as law. Morality on Coleman's own terms has a role to play in providing this normative justification for legitimacy, in that legitimacy presupposes that the officials in question are bound by conscience to accept a certain system. For if Coleman's ur-officials are responsible for the creation of a Rule of Recognition which creates primary rules which are conceived as legitimate by those to whom they are addressed, this criterion of legitimacy which binds them in conscience must necessarily be present in the Rule of Recognition itself. The PGC is not only capable of, but necessarily must, provide this role in that, if it is seen to provide a supreme moral principle, it necessarily – in Coleman's words - binds all agents' consciences through its dialectical necessity. For if Coleman concedes that ur-officials are responsible for the creation of a Rule of Recognition, he acknowledges that such officials are employing their agency to do so. In thus locating the creation of legal normativity within practical reason, we can see that the agents responsible for this undertaking are bound by the PGC to create a Rule of Recognition which is incapable of breaching the PGC. To do otherwise would be to act contrary to the requirements of the categorical imperative contained within the principle itself, which acts as an absolute and exclusionary reason to bind said officials in conscience to its requirements. In locating this shared cooperative agency prior to the existence of a legal system, in that it is *prima facie* necessary to create the system, this statement is immune from the positivist charge that a legal reason is hypothetically capable of overriding it. Such a statement would itself be false, but it cannot even be levelled at this argument since Coleman concedes that it is taking place prior to the creation of any primary rules capable of doing so. By grounding the normative force of subsequent primary rules in the Shared Cooperative Agency of ur-officials responsible for the creation of a legal system, Coleman therefore commits them to acting in accordance with the moral requirements of the categorical imperative of the PGC; a necessary connection between law and morality has therefore been established, thus collapsing the Conventionality Thesis from a proposition of inclusive positivism to one of Natural Law.

### 3.2 Wrongfulness and Law as Economic Rights

Having demonstrated that Coleman's Conventionality Thesis would fail to create a legal system without convergence with the PGC at the creation of the legal system in question, thus necessitating a link between law and 'norms that bind the conscience' in a way Coleman seeks to avoid, this thesis moves on to discuss Coleman's other significant contribution to legal theory – the characterisation of Law as an economic undertaking – with the aim of analysing whether this reframing of the concept can provide any significant contribution to the debate surrounding the necessity of a moral foundation to law. It will then move on to do assess the role of wrongfulness in Coleman's theoretical framework. This task will be undertaken in the acceptance of the necessary link between the Conventionality Thesis and the PGC, as has been demonstrated in the previous pages.

In a way that connects him more to the Gewirthian project than he might expect, Coleman characterises law as being a means of resolving disputes that might broadly characterised as economic in nature. Any such underpinning of legal duties therefore depends on an understanding of economic claims being made in the form of perceived rights-possession, an idea that Coleman believes requires two rules in order to meaningfully exist:

1. Rights are allocated 'under conditions of rational cooperation, full information and zero transaction costs.' Create conditions under which mutually advantageous bargaining can take place.
2. Procedures must be in place for remedying when these conditions are not satisfied.<sup>54</sup>

Coleman thus characterises all social interaction as being similar in nature to bargaining in the market place, in that it is essentially reciprocal in nature. Rules governing the oversight of such reciprocal exchanges can therefore look to the example of the market for their inspiration. Of course, for a market to operate

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<sup>54</sup> Coleman (n 29) 28

efficiently, conditions under which the bargaining can take place must be established in advance. If a perfect set of conditions for bargaining to take place cannot exist, then it is up to the courts to imagine what would have been achieved in a hypothetical perfect market and work from there.<sup>55</sup> The analogy here can be drawn with the PGC in that, for any form of action to occur, agents must agree that their Generic Conditions of Agency are respected by all other agents. Coleman would therefore agree that, for bargaining to take place on the model he has presented, all participants in the market he describes must necessarily possess the same level of freedom and wellbeing as one another for optimum market efficiency. He concedes that an explanation of the foundation of these rights is essential for any system of institutional rights to exist,<sup>56</sup> and this thesis will argue that the PGC is capable of providing this theoretical justification.

Where this thesis and Coleman would *prima facie* disagree is in the distinction that he believes necessary between the logical form and content of these rights. For whereas Coleman argues that the content of these facts is a matter of contingent fact dependent on the provisions which exist in each legal system,<sup>57</sup> this thesis is committed to the viewpoint that the content of these rights is, to some extent, constrained by the dialectically necessary constraints imposed on all agents by the PGC. Coleman should recognise this constraint as being necessary for two reasons. This claim is supported firstly by Coleman's own characterisation of rights as 'conceptual markers' or 'place holders' which demonstrate that an interest is something that should be protected by law.<sup>58</sup> Concepts of property, liability and inalienability should form any subsequent content of these right – yet Coleman offers no justification as to why these conceptions should be accepted as fulfilling this role. Examples of societies exist which possess very different conceptions of property and ownership to our own, so for these devices to be acceptable we must demonstrate why they should be accepted. The PGC is capable of fulfilling this theoretical gap within Coleman's framework,

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<sup>55</sup> *ibid* 29

<sup>56</sup> *ibid* 33-35

<sup>57</sup> *ibid* 34

<sup>58</sup> *ibid* 35

but since it is a framework which must necessarily be accepted by all agents, Coleman is required to abandon his claim to the absolute contingency of the content of the rights which could exist. The second reason that the PGC should be accepted as the underpinning of Coleman's economic rights is that it has already been demonstrated that his Conventionality Thesis also requires acceptance as the PGC as necessary for the creation of any legal system. Since Coleman believes an arbitration system is necessary in any framework of rights, and he holds the Conventionality Thesis as central for the creation of such a system, the PGC is again necessary for the existence of the rights framework he proposes in any meaningful sense. The specific content of the rights within each legal system can diverge to some extent depending on the contingent facts which exist within legal systems, provided that these rights do not stray beyond the requirements necessitated by the PGC. Should they do so, then the legal system, by Coleman's own theory, could not establish itself amongst a given population.

This is concession which Coleman inadvertently condones in his closing analysis, where he makes two connected claims about the purpose of such a system. Firstly, he argues: "For ease of exposition, let us assume that the purpose of a system of institutional rights is to maximize net welfare."<sup>59</sup> This is a statement which requires some development, as the focus of the claim is one which is not immediately clear. Is the purpose of such a system of economic rights the maximisation of net welfare of individuals within the system, or of the society in which it operates as a whole? Given the analysis of the previous paragraph demonstrates that Coleman is committed to recognising that the PGC must form the theoretical justification for the rights which he seeks to establish, we can presume that the individual must be of some concern to him in making this claim. For the maximisation of net-welfare, we must see that each interaction within the hypothetical market framework as being between individuals, each of whom must feel that they get some benefit from the agreements which they make within it; without such an assumption, the individuals would possess no reason to undertake the bargaining exercise. Coleman makes a similar claim when he suggests that there would be no rational reason for an agent to participate in bargaining if the outcome of the transaction would leave them

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<sup>59</sup> *ibid* 36

worse off.<sup>60</sup> Since practical reasons are within the realm of the PGC, we must therefore assume that any maximisation of net-welfare must operate of the consent of the individuals who are participating with in the system – who are themselves rationally bound to act in accordance with the PGC itself. Maximisation of net-welfare could therefore not occur without a necessary level of PGC compliance within the sphere of bargaining.

This conclusion feeds into Coleman’s second inadvertent acceptance of the PGC, contained in his recognition that the freedom to bargain is essential for any hypothetical bargain and therefore ought to be protected by the officials overseeing the transactions in question. He concludes: “The rule of liberty of transfer is thus a *normative, not an analytic*, one supportable, if at all, by substantive argument, not linguistic convention.”<sup>61</sup> In granting that the area is one grounded in normativity, Coleman is tasked with finding a suitable explanation for how such normativity arises – this is something which he does not go on to address directly, requiring us to fill the lacuna on his behalf. He gives us an insight into what may prove acceptable to him when he suggests that, as the market paradigm is necessarily founded in rationality, no concepts of justice or fairness can provide normative grounding unless they are themselves grounded in a theory of rational choice.<sup>62</sup> It is suggested that the PGC is once again not only capable of, but by its categorical scope necessarily must provide this role. As was discussed in previous areas of this thesis,<sup>63</sup> no reason presented to date has explained why we should not view the PGC as categorically binding. Its necessity should therefore be accepted until an argument against it can be shown to succeed. Coleman should accept this conclusion given his commitment to the claim that political morality can only be productive if it provides systemic pareto optimality and is individually rational.<sup>64</sup> The PGC necessarily provides both, and legitimises the coercive authority of the state which Coleman holds necessary for the correction of such wrongs.<sup>65</sup> Such coercive authority is only legitimate for Coleman if a sound argument exists which legitimises such authority, or it can

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<sup>60</sup> Jules Coleman, *Risks and Wrongs* (CUP 1992) 19

<sup>61</sup> Coleman (n 29) 38

<sup>62</sup> Coleman (n 60) 17, 28

<sup>63</sup> Chapter Three

<sup>64</sup> Coleman (n 60) 21

<sup>65</sup> *ibid* 29

be proven that it is in an agent's best interests to otherwise submit to it.<sup>66</sup> The PGC, as previously defended, can fulfil both of these criteria.

Having established that Coleman's characterisation of Law along an economic model requires integration of the PGC in order to be accepted as legitimate, we can spend time addressing how Coleman conceives the concept of wrongfulness within such a normative system. He holds that wrongfulness is grounded in the idea of wrongdoing, which itself can be described as consisting '[in] the unjustifiable or otherwise impermissible injuring of others' legitimate interests.<sup>67</sup> Such legitimate interests are themselves characterised as those in conformity with protected rights. A wrong is therefore conduct 'which is invasive of a right', and the same conditions of agency which justify wrongs as being in opposition to rights necessarily comply to the same normative framework.<sup>68</sup> Wrongs which are remediable for Coleman are therefore those which breach the rights which have already been shown to be necessary in a successful characterisation of law along the economic model he prefers. Coleman again attempts to distinguish between the form and content of rights, developing his argument more than in his previous work. We will therefore examine whether this expanded theory can overrule the necessary connection between such rights and the PGC that has been previously demonstrated.

Coleman believes that the syntax, or form, of rights should be seen as describing their nature and meaning and can be demonstrated to be true analytically. This should be distinguished from their semantics, or content, which can never be *a priori* necessary in character; such content is necessarily derivative from the analytical norms that prescribe their form, and must therefore be contingent on the particular domain to which they are addressed.<sup>69</sup> In an economic model of law, such content is governed by the normative conditions of liability and property rules and it is these conditions that must be satisfied in order to avoid the commission of a remediable wrong.<sup>70</sup> Coleman therefore argues that if somebody possesses a property right, then they have a valid claim that those

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<sup>66</sup> *ibid* 29-30

<sup>67</sup> *ibid* 331

<sup>68</sup> *ibid* 332, 335

<sup>69</sup> *ibid* 338

<sup>70</sup> *ibid* 339



who seek their resources must seek their consent. They have a corresponding liability-right, which holds a valid claim to compensation arises if another secures their resources without having secured their consent. He concludes that the content of rights must therefore be secure by the interrelation between the rules governing the ownership of property and liability issues which arise from this ownership.<sup>71</sup> It is contended that this justification for rights, and therefore the identifiability and correction of wrongs, merely begs the question in that it presupposes the legitimacy of property rights within a legal system. Coleman would undoubtedly return to the Conventionality Thesis here and claim that such property rights are valid if recognised as such by primary rules stemming from a Rule of Recognition legitimised through the Shared Cooperative Agency of a proto-system's ur-officals. This argument has therefore already been demonstrated to be incapable of generating normative rules unless the original shared intention rests on an acceptance of the PGC, and the Rule of Recognition which arises also generates primary rules which themselves by necessity comply with the PGC in turn. If this argument is accepted, then it follows that the independence of form and content which Coleman requires for his theory to be seen as positivist in nature is rationally impossible. It must therefore be rejected, and the PGC must instead must necessarily justify any property and subsequent liability rights within a system for it to be accepted by its subjects. Contingency of content is therefore only possible beyond the necessary constraints imposed by the PGC.

### **3.3 Legal Authority and the Practical Difference Thesis**

Having demonstrated that Coleman's Economic portrait of law must also necessarily make reference to the PGC in order to provide a valid foundation for rights and coercive authority, we turn to a third aspect of his writing. This final part of our analysis of Coleman will consider his conception of legal authority, and the commitment to the Practical Difference Thesis which such authority must necessarily contain. This conception will be assessed for its

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<sup>71</sup> *ibid* 339-340

compatibility with the PGC-compliant reformulation of the Conventionality Thesis that has been developed in the preceding sections. As has been noted, Coleman attempts to outline an explanation of legal authority founded in legal positivism. But he acknowledges several extant instances of a law expressly referencing moral principles; he therefore establishes a doctrine known as Incorporationism, in which substantive moral principles are capable of acting as law, but only if deliberately incorporated according to proper law-making procedure in accordance with a Rule of Recognition:

Incorporationism allows that substantive moral principles can count as part of a community's binding law in virtue of their status as moral principles provided the relevant rule of recognition includes a provision to that effect.<sup>72</sup>

Many of Coleman's defences of his theory are, curiously, aimed not at theories grounded in Natural Law but at Exclusive Positivism. Yet given that this thesis aims to defend the former, Exclusive Positivist critiques of incorporationist conceptions of authority will not be considered here. We will instead examine the idea of authority that Coleman argues that Incorporationist theories must account for, and examine whether such claims are truly positivist in nature.

Coleman correctly acknowledges that authority possesses components which can be described as both analytic and normative; the former discusses the different types of authority which may make claims on an individual, and the latter addresses the legitimacy of the claims to authority being made.<sup>73</sup> The validity of this claim has, however, been cast into doubt in s.3.1 of this chapter. For if Coleman maintains that convergent behaviour is the key to the normative claim of law,<sup>74</sup> then we have demonstrated that this behaviour must be PGC compliant. This blurs the normative and analytic distinction thus raised by Coleman, in that it suggests that any analytic definition of a valid legal authority must necessarily comply with specified normative content. Without the distinction however, positivist conceptions of legal authority are impossible –

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<sup>72</sup> Jules Coleman, 'Authority and Reason' in Robert P George (ed), *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press 1996) 287-288

<sup>73</sup> *ibid* 296

<sup>74</sup> *ibid*; Coleman (n 33) 70 - 71

Coleman is therefore committed to an attempt to refute the PGC-compliant Conventionality Thesis which this thesis holds is necessary.

He may attempt to do so by doubling-down on his previous attempts to categorise legal reasoning as somehow distinct from moral reasoning. Although we have already refuted this claim in establishing that the establishing of a legal system requires PGC-compliant pre-legal reasoning in order to succeed, and that this reasoning necessarily must result in a PGC compliant system, we will explore Coleman's objection *arguendo*. He suggests that it is incorrect to state that legal authority can only be explained with reference to reasons and rationality. A natural law position which claims that law must be justified with reference to reason, such as the one defended by this thesis, would argue that 'If law leads agents away from reason, and, therefore, away from what they ought to do, agents moved by reason cannot accept law as an authority over them.' This is something that Coleman suggests provides an implausible conclusion, in that law is rendered either irrational or otiose.<sup>75</sup> It either possesses no authority, or makes no difference to the likelihood that its subjects will comply with its requirements in that it merely reflects the reasons that its subjects would already act upon. In putting forward this objection, Coleman shows himself to be committed to the Practical Difference Thesis – that law's authority necessarily claims to override all other reasons for action, and it therefore belongs to a separate normative regime. Put more simply, law must be capable of changing the behaviour of those to whom it is addressed.

This is a conclusion which any successful theory grounded in natural law must reject. A good place to begin would be with an objection proposed by Coleman himself. The purpose of a legal system is to provide a series of rules under which individuals can act. These rules therefore benefit those individuals to whom they are addressed in allowing them to exercise their right reason in situations not prohibited by law. If law therefore allows us to follow right reason and right reason entails moral claims, then the law too must require moral compatibility in order to provide a reason for compliance.<sup>76</sup> Unsurprisingly, Coleman rejects

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<sup>75</sup> Coleman (n 72) 304

<sup>76</sup> *ibid* 309

this conclusion. He argues that right reason is applicable to human agents, and since legal authority stems from beyond human reasoning it need not be in compliance with it.<sup>77</sup> In doing this he adopts a Raz's Normal Justification Thesis, contending that Law's authority should be seen as efficacious in its nature as opposed to one of utility with reference to right reason.<sup>78</sup> Yet this conclusion is itself unsound on Coleman's own previous reasoning. His commitment to the Conventionality Thesis requires recognition of the moral content of the Rule of Recognition, thereby returning us to the unavoidable conclusion that law may definitionally be either irrational or otiose. Yet this dichotomy is not necessarily accurate for two reasons. Firstly, it ignores the moral claim made by the PGC, which is one of permissibility. Rather than specifying a correct set of universal legal rules, it specifies that law must not contradict its requirements; it therefore allows for legal pluralism and for legal systems to each require different conduct, provided that the conduct itself does not breach the PGC. Secondly, to hold that law that reflects the moral content of the PGC is otiose presumes that all legal subjects would act in PGC compliant ways. We know that they do not. The law can therefore circumvent the objections raised by the Practical Difference Thesis by claiming to act according to Raz's Normal Justification Thesis; it provides a means by which individuals can better attain those ends that they already have a reason to do.

Yet even were these rejections of the irrational/otiose dichotomy themselves rejected, this does not itself provide a reason for rejecting the claim of a necessary link between law and morality. This thesis has yet to locate an objection to the validity of the PGC which survives proper scrutiny, and therefore holds that the principle is valid and should be accepted. If the purpose of jurisprudence is to locate a factual and rationally coherent explanation of the concept of law, then it is nonsensical to reject a sound argument in favour of an unproven prior commitment which holds the contrary. Such a claim has several implications for the survival of the Practical Difference Thesis. This confrontational claim is one which Coleman himself makes, directing it at

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<sup>77</sup> *ibid* 309

<sup>78</sup> *ibid* 310

Exclusive positivists such as Raz. Such theorists claim that Inclusive Positivism should be rejected for its non-compliance with the Practical Difference Thesis; Coleman argues the opposite, that the Practical Difference Thesis should be rejected given the logical necessity of his incorporationist argument.<sup>79</sup> Such logic is axiomatic, he claims, in that, because of incorporationism:

Positivism can allow [for moral adjudication within the law] without abandoning anything of importance just as long as the criteria of validity are criteria of membership in virtue of the practice among officials.<sup>80</sup>

Thus, Coleman abandons the strong claim of the Practical Difference Thesis that law necessarily must make a practical difference to our behaviour in favour of a weaker claim; that it must be capable of doing so.<sup>81</sup> It is this concession that ultimately undermines Coleman's Incorporationism. For in doing so, PGC compliant law as described in the previous paragraph is perfectly compatible with the thesis thus presented – it is capable of making a practical difference to our behaviour. Coleman can therefore no longer use the Practical Difference Thesis as a grounds upon which to reject our previous modification of his Conventionality Thesis to demonstrate that any possibility of incorporating the PGC into law becomes an obligation to do so by necessity.

Two final recourses are open to Coleman in an attempt to circumvent the requirements of the PGC; the first being to find an alternative means of demonstrating that the reasoning implicit within the PGC is different to that employed by law. He attempts to do this in claiming that a valuable difference exists between something being a reason for a subject to act and actually being a reason on which a subject acts.<sup>82</sup> He hypothesises an situation where A promises to meet B at noon. A forgets that this promise has been made, but nonetheless meets B at noon as a new reason emerged to do so. The promise was therefore not the reason to act, whilst remaining a reason for action. Reasons for action therefore need not be causal, but can warrant or justify action in that

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<sup>79</sup> Jules Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis' (1998) 4 (4) *Legal Theory* 381, 387

<sup>80</sup> *ibid* 396

<sup>81</sup> *ibid* 424-425

<sup>82</sup> *ibid* 71

they create grounds to act.<sup>83</sup> In this sense Law is correctly characterisable as a reason for action, rather than being the reason on which an agent actually acts.<sup>84</sup> Its authority therefore stems in its ability to increase the likelihood that an agent will act upon reasons they already possess, as with Raz's Normal Justification Thesis. Yet it is not immediately obvious how this characterisation aids Coleman in dismissing the normative obligations imposed by the PGC, in that the same characterisation could be made of moral requirements. In locating law and morality at the same nexus of reasoning, Coleman again opens us up to the paradox which has become central in this thesis, that it is impossible for  $(R_L x, \Phi)$  &  $(R_M x, -\Phi)$ . Given the dialectical necessity that all agents act according to the PGC, the statement  $(R_M x, -\Phi) > (R_L x, \Phi)$  must be true. The distinction between reasons for action and reasons to act therefore does nothing to support Coleman's rejection of the PGC as necessary for the success of the Conventionality Thesis.

The second is to challenge the methodology of the argument for the PGC as being incompatible with legal theory. Coleman introduces this critique to some extent in his recognition that Hart held his writing to be primarily descriptive in character, in opposition to the normative methodology employed by his critics from the Natural Law tradition. Coleman suggests the latter is problematic for law, in that it cannot account for a plurality of theories; a moral-political understanding of law necessitates the invalidity of all positivist reasoning.<sup>85</sup> Such a statement is true, but it is not obvious why a theory should allow for the existence of directly contradictory theories within it. It is axiomatic in their nature that they make a claim to their own truth at the expense of contradictory claims. This is the very nature of the debate in which this thesis is engaged. Yet Coleman suggests a plurality of theories is valuable, meaning that this claim must be examined for its validity. Since all theories accept that law must be internally accepted by its officials, Coleman uses this as a starting point to justify theoretical pluralism.<sup>86</sup> This acceptance entails a further claim:

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<sup>83</sup> *ibid* 71-72

<sup>84</sup> *ibid* 72

<sup>85</sup> Coleman (n 33) 186

<sup>86</sup> *ibid* 186-187

[W]herever we have law, it must be the case that the law of that community must be at least *prima facie* legitimate – because its practitioners necessarily see it that way. And thus we must engage in moral argument to determine whether a community has law in the relevant sense. Jurisprudence must be normative.<sup>87</sup>

Coleman suggests that this description oversimplifies how law operates, as the circumstance may arise where the belief of the practitioners in the legitimacy of the system is false? This argument can be dismissed with reference to the argument presented on the status of false beliefs in a previous chapter.<sup>88</sup> All beliefs, including false beliefs, necessarily contain a truth claim – they are therefore normative in character, and their falsehood does not affect their location on the normative level. A practitioner’s mistaken belief as to the legitimacy of their system is therefore as normative in content as a correct claim to legitimacy. The argument is therefore one which must necessarily be located in political morality rather than in descriptive analysis, as the latter cannot adequately explore the normative claim which is necessarily being made.

Coleman attempts to circumvent this problem by searching for a moral property which is simultaneously strong enough to create a normative justification for legal claims, but which is weak enough to not necessitate the connection between legality and legitimacy. Such a step is essential if we are to refute the natural claim that law must necessarily be connected to morality to be viewed as legitimate, and therefore to exist as law.<sup>89</sup> He believes such a property does exist, and is linked to law’s being a ‘predicate of commendation’. Law possesses a status which makes it morally preferable to rule by military occupation or alternative forms of government.

Any plausible account of law must not only make plain the differences among these forms of governance, it must do so in a way that explains

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<sup>87</sup> *ibid* 188

<sup>88</sup> Bruno Celano ‘Are Reasons for Action Beliefs’ in Lukas H. Meyer et al. (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (OUP 2003) 31

<sup>89</sup> Coleman (n 33) 190

– or enables us to explain – why we believe legal governance is morally attractive.<sup>90</sup>

Such a commendation must allow for the plausibility of morally illegitimate law in order to allow for the theoretical pluralism which Coleman is attempting to defend as valuable.<sup>91</sup> This is, for Coleman, founded in pragmatism. Agents can better attain their goals in the stability afforded by a legal system. He thus attempts to demonstrate that law need not be grounded on a purely moral basis; that norms are capable of being ‘pragmatic, theoretical, epistemic, and most importantly, discursive.’<sup>92</sup> An Ethical Rationalist committed to the PGC could dismiss this fairly quickly as simply begging the question. As all of these foundations of normativity are grounded in action, they themselves can only possess normativity if they are in compliance with the PGC. The necessary connection cannot therefore be avoided, and Incorporationism has been demonstrated to be incapable of explaining away its own reliance on the PGC for a satisfactory explanation of legal normativity. It, too, necessarily becomes a theory of natural law based on the dialectical necessity of accepting the PGC.

#### **4 The Moderate Incorporationism of Matthew Kramer**

Of all contemporary defenders of inclusive positivism, few can be said to be as ferocious in their defence of the doctrine as Matthew Kramer. It is therefore with some trepidation that this section of the thesis commences. Kramer usually characterises himself as being an inclusive positivist, although he sometimes describes himself as a moderate Incorporationist to encapsulate his approval of the basic tenets of Coleman’s take on the doctrine. Nevertheless, his starting point is the same – he holds that the strict separability of law and morality is an essential feature of any theory of law.<sup>93</sup> This standpoint differs from Lyons’ Minimal Separation Thesis as discussed above,<sup>94</sup> in that it holds any criticism of law based on a moral assessment cannot affect the validity of the rule under any

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<sup>90</sup> *ibid* 190

<sup>91</sup> *ibid* 190

<sup>92</sup> *ibid* 196

<sup>93</sup> Matthew Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (OUP 1999) 1

<sup>94</sup> Ch6, Section 2.2



circumstance. Law and morality can converge, but any such convergence is purely contingent and does not affect the status of the unjust rule as law. In being stricter, Kramer hopes that the thesis will be better able to resist any claims of a necessary connection between morality and law that ultimately undermined Lyons' formalism.

The validity of Kramer's commitment to the Separation Thesis will be examined in the latter half of this section. The first half will be devoted to a brief discussion of Kramer's views on the nature of morality itself. This is essential as, as has already been stated, Kramer is the only one of the three authors being examined in this chapter who directly addresses the Gewirthian project. It is one which he does not believe provides an adequate explanation of moral normativity; any subsequent assessment of his theory of law based on the PGC must therefore first overcome the objections which he raises to the moral content of the principle.

#### **4.1 Kramer's rejection of Ethical Rationalism**

Ethics, for Kramer, is a vast scope of enquiry. Even a narrow enquiry of the substantive merits of a particular action necessarily must comprise of conclusions on various other abstract propositions and problems. Any such substantive ethical enquiry must '[Embrace] all the standards and normative implications articulable in statements that apply ethical predicates to objects of ethical assessment.'<sup>95</sup>

The first such normative implication can be found in what Kramer terms the mind-independence of morality. He holds that '[T]heir continued existence as correct principles of morality does not depend on the continuation of the mental functioning of any people individually or collectively.'<sup>96</sup> Put differently, moral

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<sup>95</sup> Matthew Kramer, *Moral Realism as a Moral Doctrine* (Wiley-Blackwell 2009) 3

<sup>96</sup> *ibid* 26-27

standards are things that exist. They do not depend on either their recognition or acceptance by their subjects for their existence.<sup>97</sup> In this sense, they can be distinguished from other normative systems such as law, which is held by some theorists to require a degree of systemic efficacy in order to be said to exist.<sup>98</sup> Moral principles are stable, objective and do not need to be accepted by a subject in order to exert legitimate authority over him. This is a widely accepted statement as to the status of moral norms, and is one which does not impugn the validity of the PGC. Still some clarification as to why this is the case is worth establishing, as for some, the fit between Kramer's insistence that morality need not be internalised and Gewirth's argument that the PGC should be accepted by all agents could appear uncomfortable at best. This is not something that should be of concern once the true nature of the Gewirthian argument is restated. The PGC operates on a dialectically necessary argument which holds that all agents are rationally committed to recognising its validity as a matter of necessity. Kramer, by contrast, makes a claim that moral principles' acceptance is not necessary for their validity. He does not assert that the internalisation of the moral principle can never be achieved; merely that it need not be to be valid. The acceptance of a moral standard therefore does not serve to negate its validity, provided it can be proved to be a valid rather than a mistaken moral standard. This claim is one which adequately describes the operation of the PGC; should an agent choose to act in a way which is not PGC compliant, then they are in breach of the moral principle which it contains. Their failure to internalise the principle does not damage its legitimacy; it serves as the basis for the moral judgment which follows, thus demonstrating the PGC need not be internalised by a particular agent in order to be valid. It merely requires the existence of an agent in order to proceed on a dialectically necessary basis to its moral conclusion. There is therefore no dissonance here between Gewirth and Kramer in their differing views on the necessity of the internalisation of a moral principle; the disagreement rests in the content or validity of the PGC, Kramer's arguments against which will be considered below.

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<sup>97</sup> *ibid* 27

<sup>98</sup> Chapter Four

The second predicate which needs to be established before we address Kramer's concerns about the validity of the PGC is the determinate-correctness of moral standards. He holds that '[t]he extent to which there are determinately correct answers to moral questions is inversely proportional to the extent of the leeway enjoyed by anybody who confronts those questions.'<sup>99</sup> On this understanding, Kramer is holding that moral standards are obligatory by degree. Weak moral propositions could be validly overridden. Strong moral reasons, such as an absolute exclusionary reason provided by a categorical imperative, are obligatory and should be followed. Moral subjects possess no discretion in their ability to circumvent the requirements of such a principle. Disagreements as to the level of moral-bindingness possessed by a principle should be seen not as evidence that the problem is incommensurable; the mind-separateness of moral standards suggests that the principle's status can be identified with an increased understanding of both the principle itself and the circumstances against which it is being applied.<sup>100</sup> In making these claims, Kramer therefore accepts the logical possibility that a categorical imperative might exist, and that it would fully bind its subjects to act in compliance with its requirements. Moreover, his commitment to the predicate of determinate-correctness suggests he would also accept that any disagreement to the bindingness of a moral principle is something that has the potential to be resolved.

It is against this backdrop that we turn our attention to Kramer's objections to Gewirthian Ethical Rationalism. The objections are not as rigorous as one might expect given Kramer's usual fastidiousness in his writing. His rejection has been stated at length,<sup>101</sup> but can be summarised thus:

What is so objectionable about the efforts to assimilate moral obligatoriness to logical requisiteness...is that they evince a dearth of trust in the solidity for moral principles and moral requirements.<sup>102</sup>

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<sup>99</sup> Kramer (n 95) 86

<sup>100</sup> *ibid* 92

<sup>101</sup> Matthew Kramer, *In the Realm of Legal and Moral Philosophy* (Macmillan 1999), 174-199

<sup>102</sup> Kramer (n 95) 290

This statement is equivalent to a claim which follows soon after, that moral principles need not rest on foundations of rationality and logic. They should instead be able to be seen as valid without need for further justification on the grounds of rationality and consistency.<sup>103</sup> This claim is one which does not fit well with Kramer's earlier insistence on the determinate-correctness of moral standards. He has previously committed himself to the view that disagreements as to the moral status of a rule can be resolved with greater empirical knowledge of the rule itself and the circumstances against which it is being applied. In creating a dialectically necessary argument for the PGC, Gewirth is merely acting to evidence the validity of the moral content of the principle as Kramer suggests is not only desirable, but necessary to properly discern moral content. Kramer has therefore unwittingly caught himself in a logical contradiction – stating that ethical rationalism should be rejected on the one hand given that moral facts do not need evidence to demonstrate their existence, whilst simultaneously claiming disagreement as to the validity or scope of moral truths can be identifiable once an adequate amount of information is made available to an agent. It seems that two courses of action are available to Kramer here; he can either abandon his objection to ethical rationalism, or he can abandon his claim to the determinate-correctness of moral standards. These are the only options available for the resolution of the contradiction he has established.

Kramer's writing on the whole suggests that his inclination would be towards the latter, his denial of ethical rationalism forms a large part of his analysis of moral truth. For example, in refuting rationality as a source of ethical principles, he argues that:

Moral principles are of course in conformity with the laws of logic, but their distinctively moral force is not a species of logical necessity, and that force is in no way tarnished or diminished by not being such a species.<sup>104</sup>

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<sup>103</sup> *ibid* 290

<sup>104</sup> *ibid*

Yet even this rebuttal concedes that moral principles must be in conformity with the laws of logic. Kramer would likely argue that this is not the point he is making here; he would have no problem with the moral truths being subject to the laws of logic, but instead has difficulty in accepting that rationality is the normative source of these moral truths. He claims that moral truths need not be thus created:

In being morally necessary rather than logically necessary – that is, in obtaining by dint of the logical form of any proposition that rightly affirms their existence – they do not fall short in any way as moral requirements.<sup>105</sup>

Yet it is difficult to accept why this distinction should be accepted. If a moral concept should be in conformity with the laws of logic as Kramer contends *supra*, this suggests that a moral principle which is not in conformity with the laws of logic is not a true moral principle; it cannot simultaneously possess normative moral force and be *prima facie* irrational. A link has therefore been established between the ability of a norm to possess moral normativity and the rationality with which it is applied. To see moral normativity and rationality is interlinked is therefore not as heinous a statement as Kramer originally suggests; indeed, his own writing on dismissing a necessary connection actually suggests that one does exist. Kramer does not suggest why this jump is incorrect, instead choosing to rely on the apparent self-evidence of moral principles.

Even should we concede the point that moral norms cannot be identified by recourse to rational argument to Kramer, a further problem raises its head. This is the problem of moral incommensurability. It has been noted *supra* that Kramer believes in the mind-independence of moral principles; they exist regardless of whether or not they are actually followed. Yet we know that disagreements exist as to which moral truths are actually valid and which are founded on mistaken assumptions and falsehoods. In denying that such moral truths only can be identified rationally, Kramer is holding that mind-independent truths cannot be rationally discerned. The self-evident truths he alludes to therefore collapse into

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<sup>105</sup> *ibid*

nothing more than a contingent theory of pragmatism. Yet this is not the picture of morality which Kramer paints for us. He believes that certain moral truths not only exist, but are identifiable to the point where moral judgements based on critical as opposed to popular or collective morality are something which is conceptually possible. How does he explain the validity of the truths being applied in these situations without being able to justify them on a rational basis? In claiming that logical inconsistencies are capable of existing within moral norms,<sup>106</sup> Kramer appears mistaken. For if logical inconsistencies can exist within moral norms, agents would be unsure as to how and when they should be applied. It does not seem like a falsehood to suggest that irrational mind-independent moral standards would lack the clear determinate-correctness in order to properly guide the conduct of those against whom they are addressed. This would lead to the widespread incommensurability of moral claims, and preclude any rational justification for favouring one as being morally true and rejecting others as making false claims to their legitimacy. The moral project would inevitably stall.

A neater solution to resolve the contradiction apparent in Kramer's rebuttal of Ethical Rationalism would be for the objection to be reversed. Rejecting the claim that rationality can play a role in the identification of moral truths would mean abandoning any serious claim to the determinate-correctness of moral standards, leading to the widespread incommensurability of claims of mind-independent moral truths whose legitimacy can be neither proven nor disproven. This is an undesirable, and indeed irrational position for Kramer to commit himself to. A better route to take would be to reconsider his objections to ethical rationalism. This thesis has already defended the ability of the PGC to generate binding moral norms.<sup>107</sup> For Kramer to object in a serious manner to the conclusions thus reached, he would need to argue against the conclusions entailed by the argument of the PGC rather than merely claim that to claim moral norms need not be supported by rationality.

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<sup>106</sup> *ibid*

<sup>107</sup> Chapter Three

This section has so far attempted to demonstrate that Kramer's hostility to the PGC is not founded on a serious engagement with the dialectically necessary argument for its existence, but instead with an unproven objection to the role of rationality in moral discourse. This stance has been shown to be problematic for Kramer's own theory in ways that he does not address. The following section of analysis will therefore assume that the coherence of Kramer's understanding of morality is better served by dropping this objection. In the absence of evidence to the contrary, it will therefore continue to view the PGC as a source of valid and categorically binding moral norms which Kramer has failed to adequately refute. It is suggested that this is something which ought to be welcomed by Kramer. A recent monograph of his contains in its opening pages the grandiose claim that '[O]ne of the chief messages of this book is that nearly all non-tautological and non-self-contradictory claims about ethics or morality are ethical or moral in content...' <sup>108</sup> Ethical Rationalism is neither tautological nor self-contradictory in its foundations, and should therefore be accepted by Kramer as creating a valuable and necessary foundation to any theory which addresses the Separation Thesis.

## 4.2 Implications for Kramer's Theory of Law

The second half of this section is dedicated to incorporating the PGC to the Separation Thesis advanced by Kramer. The previous section has demonstrated that Kramer's attempts to reject Gewirth would have the effect of collapsing his writings on morality into one of inescapable indeterminacy. This analysis will therefore assume that the PGC is a valid source of categorically binding moral norms given the absence of any engagement with the theory on Kramer's part which gives us a reason to believe otherwise. We will begin however by addressing Kramer's response to previous attempts to address the necessary connection that ethical rationalists have previously claimed exists between law and morality.

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<sup>108</sup> Kramer (n 95) 13

His opposition to such a connection seems to stem from the centrality of pragmatism as a motivational factor which influences officials when they are charged to employ their discretion during the adjudicatory process. It is for this reason that he rejects Beyleveld and Brownsword's contention that a sound moral underpinning is an essential part of the adjudicatory process.<sup>109</sup> Giving the example of a morally iniquitous legal system, he suggests that officials within it might be motivated to act in accordance with seemingly moral precepts such as the Rule of Law out of a prudential desire to maintain their own privileged position;<sup>110</sup> such prudence is in effect a reason for action, whereas morality may be simply a reason to act. He characterises their position thus:

‘Beyleveld and Brownsword’s case thus hinges on the claim that the general capacity of legal obligations to override each person’s self-interest ... is sufficient to warrant an inference that anyone who upholds these obligations as such is perforce embracing them on moral grounds.’<sup>111</sup>

In viewing their argument in these times, Kramer appears to be misunderstanding the precise claim being made by Beyleveld and Brownsword. He discusses their claim for several pages in his *In Defense of Legal Positivism*,<sup>112</sup> although it might be more appropriate to characterise this as him engaging what he believes their claim to be rather than a sound engagement with what it actually is. For notable by its absence in the discussion is any mention of the theoretical underpinning of the claim made by Beyleveld and Brownsword, namely the PGC. As has been discussed in the previous half of this section, Kramer does not believe that Ethical Rationalism is capable of providing a sound foundation for moral principles to begin with. Yet he appears to be giving the benefit of the doubt to the theory here, as his argument that prudence can be substituted for moral concerns does not make sense if the theory he is using as an example of a moral standard is something which believes is nothing of the sort. The analysis here can then proceed on the conclusions reached with regards to Kramer's views on ethical rationalism; that he should accept the PGC as capable of

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<sup>109</sup> Kramer (n 93) 216

<sup>110</sup> *ibid* 229

<sup>111</sup> *ibid* 228

<sup>112</sup> *ibid* 225-233



providing a test for the determinate-correctness of the moral permissibility of action.

Kramer believes that this is something which is not necessary. Yet, as has been pointed out in the previous paragraph, his repeated claim that the counter-inclinal role of legal obligations may be grounded in prudence as opposed to morality does not engage with the claim being made by Beyleveld and Brownsword. Their claim is based on the dialectically necessary argument that the PGC applies to all agents in all circumstances which utilise practical reasoning. In any form of action, the PGC provides a categorical imperative which creates an obligation on all agents to act in conformity with its requirements. Its status as a categorical imperative necessitates the claim that all statements which attempt to provide a reason for agents to behave contrary to the imperative fail in providing a reason to do so, and the behaviour is therefore irrational. Once this argument is applied to the situation which Kramer suggests, that prudence and not morality can be the primary motivating factor for officials in an adjudicatory capacity,<sup>113</sup> we can see that the statement is actually neutral as to the claim regarding the necessity of the PGC rather than being dismissive of it. To demonstrate this neutrality, we will expand Kramer's hypothesis to account for two outcomes to the adjudicatory process in question. Such an expansion is necessary as it is the substantive outcome of a decision that is the focus of Beyleveld and Brownsword's theoretical underpinning, whereas Kramer's analysis appears focussed on the procedure of its application and therefore misses the point. Firstly, let us conceptualise a situation where judges act pragmatically, but the result of this is a judgment which is compliant with the requirements of the PGC. Here we in effect have an outcome in which the PGC was a reason to act in this way, but as it was not internalised by the judges it could not be said to be a reason for action. This situation is perfectly compatible with the mind-independence of moral principles, which Kramer accepts must be seen to be valid regardless of their acceptance by those to whom they are addressed. The judges *ought* to be motivated by the PGC, but were not. Regardless of this, the judges still acted in a way that was PGC compliant. The

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<sup>113</sup> *ibid* 228

PGC has therefore not been breached, and Beyleveld and Brownsword would accept that the substantive outcome of the case is in compliance with the necessary connection they demand, albeit accidentally so. Kramer's attack here does not actually hit its intended target.

We could, however, conceptualise a secondary outcome to the deliberative process; in being motivated by pragmatic rather than moral concerns, the judges lay down a judgment whose substantive effects are not PGC compliant. Kramer would presumably argue that as the judgment is passed according to valid procedure, it should be seen as law and therefore demonstrates that morality is not necessarily connected to the law as Beyleveld and Brownsword contend. Yet Kramer's failure to engage substantively with the actual argument being made here again means that he misses the point of contention. Ethical Rationalists would argue that such a judgment is incapable of possessing force in any sense of the word. Kramer accepts that law necessarily imposes an obligation on its subjects, and is therefore normative in nature. Yet if the PGC behaves as a categorical imperative and holds that all non-compliant action is irrational and therefore incapable of possessing a normative reason to thus behave, we are forced to conclude that non-PGC compliant law also lacks any normative force to oblige obedience amongst those to whom it is addressed. Such rulings, in being devoid of normative content, cannot be categorised as law in any meaningful sense of the word. His commitment to positivism prevents Kramer from characterising his claims in this manner, yet in the absence of any sound arguments as to why the PGC should not be seen as necessitating this claim we are forced to reject his commitment as unjustified. We have therefore demonstrated that, if Kramer's objection centred on pragmatism is applied to the actual nexus of disagreement rather than where he believes it is located, the argument in favour of judicial pragmatism overriding moral concerns can be seen to either PGC compliant or missing its intended target. It is straw man and should be rejected as unsound.

Having rejected Kramer's dismissal of the PGC, we can now move on to critique his own writings on the nature of law using Gewirthian theory as a point of

reference. It has already been established that Kramer sets out to defend the inclusive-positivist claim that law and morality should be seen as concepts that are entirely separable.<sup>114</sup> Moral and legal principles can be connected and are capable of entirely overlapping, but any such connections are entirely contingent and the moral failings of a given rule are entirely irrelevant considerations when assessing its legal validity.<sup>115</sup> We will first examine the success of Kramer's attacks on authors who could be characterised as coming from the Natural Law tradition, before going on to examine the soundness of his arguments for a positivist commitment to the Rule of Law.

As has been common throughout this thesis, the arguments presented against Kramer will proceed from the PGC; since no argument which rejects its validity has been seen to be successful, it should be seen as sound until it can be proved otherwise. As has been shown already, Kramer's own engagement with substantive theories of natural law such as that defended by this thesis has failed to land any problematic blows. The connection is again missed in his more recent writing, where such theories are relegated to a mere footnote.<sup>116</sup> He appears to characterise them later as being based on the mere observation that the shared 'deontic terminological structure' of law and morality,<sup>117</sup> which – as has been demonstrated already – is not the foundation of the arguments which they present. The shallow analogy thus presented would not be endorsed by any serious substantive theory as a standalone comment, and – as such – Kramer is correct to reject it. Yet central to his overall hostility to such theories is the methodological approach that he believes is necessary for the success of any theory of law. He believes that the most appropriate approach is one which accurately describes legal systems as they exist, and therefore prioritises a theoretical-explanatory analysis.<sup>118</sup> Sadly, most Natural Law theories are more similar to a moral-political approach in their analysis. Such an approach appears to be precluded by his own commitment to positivism:

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<sup>114</sup> *ibid* 1

<sup>115</sup> *ibid*

<sup>116</sup> Kramer (n 4) 228, n7

<sup>117</sup> *ibid* 235

<sup>118</sup> *ibid* 156-157

Inclusivism and Incorporationism are fully compatible with the existence of a regime whose judges do not regard statements of law as authoritative unless those statements are ‘supported by a moral theory which justifies them’.<sup>119</sup>

Yet this statement demonstrates that Kramer, rather than truly exploring whether a moral component is necessary for law to exist, instead simply begs the question by beginning from a positivist conception of law. He gives no reason to truly prioritise his approach over that taken by the Natural Lawyers whose theories he attempts to disprove other than a belief that they are misguided, and the blithe claim that the benefits of inclusive or incorporationist positivism outweigh the existence of any ‘regrettable moral-political effects’.<sup>120</sup> This statement proves the fallacy being presented by Kramer, in that instead of actively seeking to disprove the claims of substantive natural law theories he is merely talking over them. By failing to engage them in a meaningful way, his arguments cannot succeed in the task ascribed to them. The two do not connect in the way in which Kramer holds that they do; his disinterest in the moral arguments raised suggests that he is unwilling to tackle them head on. This reticence is to some extent explained by his return to well worn line of positivist argument with regards to the possibility of judges employing prudential rather than moral reasoning in presenting the outcome of their adjudication:

Whenever I refer to reasons-for-action in this section, I am focussing not only on the considerations to which officials *do* give weight in deciding how they should be have, but also (and even more importantly) on the considerations to which they *would* give weight if they grasped the serviceability of those considerations for the furtherance of their general aims.<sup>121</sup>

Put another way, Kramer appears to be arguing that to reduce all adjudication to issues of moral concern is to portray a blatant falsehood of how judges actively reason. For a Natural Lawyer to insist otherwise would be to fall into the trap of describing how law ought to be, whereas the issue which is under

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<sup>119</sup> *ibid* 151

<sup>120</sup> *ibid* 157

<sup>121</sup> *ibid* 157, n16

debate is to analyse what the law is. If this claim could be ascribed to the discussion at hand, then the discussion would indeed be over. Yet it is contended that the statement cannot be said to hold true. The theoretical-explanatory approach adopted by Kramer means that he does not truly account for the fact that substantive natural law theories which posit the existence of a categorical imperative on action as being both identifiable, by dint of its existence, providing an absolute and exclusionary reason for compliance with its requirements in all examples of practical reasoning. Law, being an example of such practical reasoning when adjudicated upon by officials, is therefore subject to the requirements of a Categorical Imperative; failure to ensure compliance would mean that the non-complaint rule is incapable of claiming normative grounding, and therefore incapable of acting as a reason to act. Since it is axiomatic that the purpose of law is to provide a reason to behave according to its requirements, then to deny this claim is to hypothesise that a rule can claim the status of law whilst simultaneously being incapable of acting as a reason to conform to it. Thus is laid out the paradox implicit in Kramer's argument.

Kramer attempts to salvage his argument by responding to a similar line of reasoning put to him by Dyzenhaus, who holds that the internal perspective to which positivism commits itself necessitates recognition of moral consideration undertaken by judges; since adjudication is an action which is subject to the constraints imposed by a categorical imperative, adjudication cannot take place independent of moral concerns. Kramer responds that this may be an adequate description of how 'the law' of a particular community may behave, but that it does not follow that such a conclusion is universalisable to the abstract concept of 'law' itself.<sup>122</sup> We again are forced to conclude that Kramer is missing the point of Dyzenhaus' statement. It is in the nature of a categorical imperative that it makes a universal claim applicable to all its subjects. If we accept that the PGC can act as such, then the only way in which Kramer's refutation of Dyzenhaus could succeed would be if we could hypothesise a legal system in which neither the officials charged with its application nor the subjects who were covered by its authority were agents. Such a hypothetical system is paradoxical, given that practical rationality is at the heart of all adjudication and that the very purpose

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<sup>122</sup> *ibid* 158-159

of law is to compel its subjects to act in accordance to its requirements. Both axiomatic features presuppose the agency of those to whom they apply. Kramer's argument is therefore incapable of presenting a legal system which is capable of meeting the demands he places upon it in order for it to refute Dyzenhaus' claim.

Given his zealous commitment to positivism, Kramer is unlikely to agree with this conclusion. His objection may therefore shift to one which characterises the nature of legal obligations as being substantively different to moral concerns. Such a claim is the foundation of his rejection of Lon Fuller's eight desiderata: he dismisses outright any suggestion that the purposiveness of a legal system is alone sufficient enough to render a system intrinsically moral, contending that systems can exist whose primary purposes could be either amoral or immoral.<sup>123</sup> The moral purposiveness as a system is not necessary for its existence as:

Legal rules do not normally trade on each citizen's agency or autonomy in the cognitive sense; they normally present requirements and prescriptions that are to be heeded by persons who are capable of choosing to heed them.<sup>124</sup>

In thus characterising legal obligations as somehow different to those required by morality and practical rationality, Kramer attempts to justify his theoretical-explanatory approach. In showing the fallacy of such a contention, we will direct the same criticism against the PGC given that this is the substantive theory that this thesis is seeking to defend. It has already been demonstrated that the PGC is capable of providing a categorical imperative that applies to all agents who engage in practical rationality resulting in purposive action. Since law aims to direct the behaviour of the agents against whom it is addressed, it is necessarily within the realm of practical rationality and therefore is designed to influence the purposive action that is covered by the individual rule being applied. There is no reason to suggest that this statement does not hold. Since non-compliant behaviour would breach the requirements of the principle, any judgment or rule that breached the requirements of the principle would be incapable of possessing

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<sup>123</sup> Kramer (n 93) 42-42

<sup>124</sup> *ibid* 60

normative force to guide the actions of those to whom it is addressed. The legal procedures that are the focus of official conduct, as examples of purposive action themselves, are therefore required to be in compliance with the PGC in order to be a valid reason to act – a status which is axiomatic to the idea of law. As the necessary moral connection to practical rationality is present and applies to the deliberation of officials, Kramer’s insistence that legal rules do not address the autonomy of its addressees can be rejected as failing to appreciate the agency of the officials responsible for their creation.

Yet again, Kramer would attempt to reject this link between the law recognising the agency of its subjects and the necessity that this recognition creates a normative obligation. He gives an example of a bank robber, who allows his victim to engage their agency to choose whether or not they wish to comply with his demands or be shot. Kramer suggests that this does not mean that the command possesses normative character in the moral sense, thus proving that recognition of the agency of subjects need not necessarily create a normative ‘ought’.<sup>125</sup> Kramer is correct in suggesting that the commands of the robber in this situation do not generate a normative obligation, but is incorrect as to why this is the case. The reason why the command fails to possess normative character is that it does not, as Kramer believes it does, truly recognise the agency of its addressee. True recognition of the agency of an addressee would require the substantive content of the command to also be morally permissible, as commands are incapable of possessing normative content independently of their own moral permissibility. As the situation described would contravene the requirements of the PGC, it is therefore not analogous to the claims being made by Natural Lawyers and any attempt to characterise it as such should be rejected. Kramer’s hostility to Ethical Rationalism remains unsubstantiated.

Once a necessary conceptual link between law and morality has been identified in the domain of practical reason, then Kramer’s similar objections to other Natural Law theories similarly fail. Take his discussion of Detmold’s

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<sup>125</sup> *ibid* 59

characterisation of law as a system of behaviour rather than a static system of norms.<sup>126</sup> Kramer describes the project as holding law to be an activity where decisions are reached, thereby rendering law normative in its application<sup>127</sup> – an uncontroversial claim. The theory continues to claim that when a judge opts for one option or another, they necessarily hold – either implicitly or explicitly – that the decision arrived at is morally legitimate. Law is therefore characterisable as an array of moral judgments arrived at by its officials.<sup>128</sup> Such a claim can be supported by ethical rationalists so long as the claim of moral legitimacy made in reference to the judgment is grounded in PGC compliance. It therefore disappointing for Kramer to simply dismiss the theory once again as ignoring that judgments can be prudential as opposed to moral in character.<sup>129</sup> For this argument has already been demonstrated to be insufficient to defeat Detmold’s PGC-buttressed assertions. Natural Lawyers could accept that judgments could be pragmatic and still PGC compliant; if a pragmatic judgment is not PGC compliant then they would argue that the resultant decision is incapable of guiding action due to a lack of normative content, and is therefore unworthy of the label ‘law’. Similarly, when Kramer believes he has outflanked Detmold in ascribing to him what he believes to be the unsupportable commitment to belief that no actions and decisions of legal officials ‘can be devoid of moral concern’<sup>130</sup> he singularly fails to engage with the normative element of the natural law theory involved. All practical reasoning is necessarily a moral concern, and there is no reason to suggest legal deliberation should not be seen as a form of practical reasoning. The argument from the PGC stands. Kramer’s previous commitment to the mind-independence of moral principles precludes the claim that a judge need to be aware that they are acting in a moral way in order for a moral assessment of that decision to be valid, and the location of the source of moral normativity in practical reason precludes the exclusion of official action from the moral realm. Kramer’s argument does not address this concern, and should therefore be rejected.

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<sup>126</sup> Michael Detmold, *The Unity of Law and Morality: A refutation of Legal Positivism* (Routledge 1984)

<sup>127</sup> Kramer (n 93) 116

<sup>128</sup> *ibid* 116-117

<sup>129</sup> *ibid* 120

<sup>130</sup> *ibid* 120-121



This section will conclude with a surprising statement: that Kramer is, in fact, aware of this necessary connection, and it is therefore one that he should be willing to accept at the expense of his commitment to the separation thesis. For he states in *Where Law and Morality Meet*:

[The] moral status of any particular procedural deviation [from the requirements of the rule of law] is often a complicated matter which we can ascertain only by keeping an eye out for the possible existence of several interacting substantive considerations.<sup>131</sup>

This claim has vast ramifications for Kramer's entire project. For in recognising that deviation from a fundamental tenet of the rule of law can only be justified by reference to substantive considerations, Kramer is conceding that the deliberative project must be located in practical reasoning. In introducing a hierarchy of norms which must be considered in order to justify deviation, we can imply that he would only accept a deviation should it be seen as preferable to compliance. In locating the moral status of such a deviation in an assessment of the substantive merits of the decision, Kramer may not appear to making a controversial claim. Yet in confirming his belief that morality is located at the execution of action, he confirms his belief that such judgments are either valid or invalid by their link to the reasonableness of their justification. He therefore concedes the necessity of a test for their reasonableness. Since he has been unable to give a sound reason for his rejection of the PGC, we ought to see this as something which can be integrated into the above claim in order to give the assessment any objectively identifiable meaning. The PGC's status as a categorical imperative necessitates that it applies necessarily to all such judgments, and that reference to it cannot be purely contingent on its acceptance by the legal order. This is something Kramer ought to accept given his acceptance of the mind-independence of moral standards. In thus conceding that it is conceptually possible for deviations from the procedural standards of the rule of law to be morally justifiable, Kramer opens the door for this contingent link to become one which is necessary by dint of the PGC. Should he insist on the contingency of the principle, or claim that a deviation can fail but still be seen to be legally valid, he should be seen to be mistaken as to the

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<sup>131</sup> Kramer (n 4) 199

scope of a categorical claim. His inclusive positivism therefore necessarily collapses, as it is forced to recognise that the realm of practical reason is governed by the PGC in its entirety. As law is a form of deliberative reason, it too is necessarily governed by the principle.

## **5 Conclusion.**

This chapter has demonstrated that inclusive positivism, in allowing for the permissibility of a moral foundation of law, concedes a point which is fatal to its own coherence. It is in the very nature of a categorical imperative that it applies equally to all action and, as has been demonstrated in turn, the theories of Lyons, Coleman and Kramer have each been shown to be incapable of avoiding the necessary claims of the PGC.

Formalism, it has been shown, is only a coherent explanation of the content of law if it rests on legitimate grounds. To hold otherwise would be to introduce the paradox of unjust justice into legal discourse, which would be an irrational concession to allow. Lyons' attempt to fortify formalism with his Minimal Separation Thesis has similarly been demonstrated to be flawed, in that it can only avoid an internal contradiction if the contingent relationship between law and morality which it allows for is instead characterised as necessary. A similar conclusion must also be reached with Coleman's Incorporationism resting on the Conventionality Thesis; the creation of a legal system necessarily takes place in a pre-legal sphere, and therefore cannot rely on exclusionary reasons to reject moral compliance. Coleman's rejection of force as a justification for legal authority therefore means that any resultant legal system must be accepted as legitimate by its subjects, and, as its creators are bound by the PGC in order to act within its constraints, this is only possible if the resulting system is itself comprised of PGC compliant primary rules. The Practical Difference Thesis has similarly been shown to be deficient, in that the exclusionary authority it ascribes to law is predicated on a misunderstanding of reasons, actions and the nature of a categorical imperative to act.

Lastly, Kramer's 'Moderate Incorporationism', despite the spiritedness of its authorship, similarly fails. Kramer's own understanding of moral requirements precludes him from avoiding a claim if it can be proven to be morally required, and his rebuttals of the PGC have been repeatedly shown to be founded on a misunderstanding of Ethical Rationalism. The contingent acceptance of moral norms within a legal system has therefore been demonstrated to be the Trojan Horse which leads to the downfall of inclusive positivism, which must accept the absolute and exclusionary reasons provided by any categorical imperative in order to avoid contradicting its own foundational tenets.

## Conclusion.

This thesis, it is hoped, has defended a simple claim – that the PGC properly understood provides an inescapable reason to view that a necessary connection between law and morality exists in the proposition that  $(R_M x, -\Phi) > (R_L x, \Phi)$ . In making this claim, the thesis builds on the previous work of Beyleveld and Brownsword in *Law as a Moral Judgment*<sup>1</sup> by addressing developments within inclusive legal positivism which have emerged since its publication. It has done so in two parts; the first half of the thesis sought to defend the dialectically necessary proposition contained within the PGC from philosophical attacks against its validity by demonstrating that they either fail to fully engage with the substance of the normative debate in question, or operate on a misunderstanding of the claim put forward by the PGC. In light of the rebuttal of these attacks, we should accept that the PGC does succeed in the argument it proposes. The second half of this thesis has applied the defended PGC against several theories that are categorised as belonging to the Inclusive Positivist School, in that they recognise that moral principles may be a necessary component of a legal system – but only to the extent that the source of the particular system permits them to be. Such arguments have been shown to be self-defeating in that a universally binding restriction on the permissibility of action cannot exist contingently, and must, therefore, necessarily form part of a system's Rule of Recognition if it can be shown to exist. This is concise summary of the steps taken during the course of the thesis, and will therefore be expanded on to demonstrate the necessity of this conclusion.

The first part of the thesis is comprised of four chapters. Chapter one is included as a summary of the ongoing debate between Legal Positivists on the one hand and theories of legal validity which may be categorised as founded in a

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<sup>1</sup> Deyck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sheffield Academic Press 1986)

conception of Natural Law on the other. Its purpose was primarily to introduce the reader to the central aspects of these two positions in order that the argument that followed in subsequent chapters was clearly defined and delineated, with reference to both classical and contemporary positions. The chapter demonstrated that the key distinction between these theories is the method in which they present the normative dimension of legal authority, and introduced the claim that the debate should not be one which is reducible to a mere linguistic disagreement around the word 'law'; the concept, it was argued, itself contains a normative essence which any successful theory needs to engage with in order to provide a satisfactory account of legal authority comes about. This claim was explored further in Chapter Two, which sought to justify the reasons for which this thesis has limited its application of the PGC to Inclusive, rather than Exclusive Positivism. It argued that the normative essence of the word 'law' is overlooked by the latter for dogmatic rather than philosophically valid reasons, and demonstrated that this commitment casts doubt on the validity of the reasoning contained within such theories. This conclusion as to the necessary normative content of the concept was reached by an engagement with the linguistic philosophy of Wittgenstein and Kripke, which was used in order to show that exclusive positivism cannot adequately explain the normativity of legal obligations without accepting the normative content of the words used in its creation. Such a unified theory is, by its nature, rejected by these theories – rendering them devoid of meaning and incapable of providing a satisfactory explanation for the existence of legal authority. They therefore fail on their own terms, requiring this thesis to engage with theories that do accept the normative content of law whilst denying that legal normativity has a moral source.

Having justified the scope of the argument in which it will engage, the thesis moved on in Chapter Three to outline the Principle of Generic Consistency which it seeks to defend. The chapter presented the three steps of the Gewirthian argument as expanded by Beyleveld as providing an instrumental reason to act in accordance with its requirements. By the dialectically necessary progression of the argument from an incontrovertible starting point of noumenal agency, the PGC necessarily applies universally to all agents capable of acting on their will rather than natural impulse or reflex. A sound

understanding of the normativity of reasons was here introduced grounded on an essentially Kantian conception of practical reason, which demonstrated that a hierarchy of norms exists as a unified concept. The point of disagreement between positivists and non-positivists has therefore been located here; in order to avoid the claim that the dialectically necessary requirements of the PGC that apply to all agents override legal obligations that are not compliant with the principle, positivists must commit themselves to the claim that legal norms exist separately to moral norms. Yet such a claim has been shown, with reference to Kant's own writing and by expansions to his theories provided by Korsgaard, to be incompatible with the deliberative reasoning required for practical action. It should therefore be seen to be false, necessitating the view that the PGC, if it is itself valid, should be seen to operate to all agents in the same way as a Categorical Imperative – an absolute and exclusionary reason which necessarily precludes all conflicting action, including those which seek justification in conflicting rules which claim the status of law.

This claim assumes the validity of the PGC, a validity that was defended against philosophical attacks in Chapter Four. The chapter primarily engaged with moral philosophers who could broadly be characterised as sceptics, in that they do not deny the existence of morality but hold that its principles cannot be rationally identifiable or universalisable. As any successful theory proposing a link between law and morality must not only demonstrate moral realism but in the rational validity of the moral principle on which it relies, sceptical arguments must be overcome in order to demonstrate that the PGC is capable of serving as a rational moral foundation for legal normativity. The chapter began by examining the work of Bernard Williams, whose primary objection is that the level of abstraction required for the identification of morality through principles such as the PGC means that they ignore the lived experiences of their subjects and the necessary importance of interpersonal relationships that they formulate; such principles are therefore inapplicable to real-world moral dilemmas. It was argued that this attack does nothing to damage the claim to universal applicability made by the PGC, and is rendered empty by Williams' own reliance on a noumenal conception of agency in his other moral writings; it should therefore be rejected for its contradictory nature. Secondly, it was demonstrated that the subjective

morality often attributed to Nietzsche is nothing of the sort, and that his writings are in fact compatible limitations on action that are grounded on factors essential for universal human flourishing, such as the Generic Conditions of Agency which the PGC seeks to defend. Thirdly, the scepticism of Friedman, Foot and Leiter were dealt with in turn. Friedman's argument that the PGC mischaracterises the scope of the PGC, and should be rejected accordingly. Equally, Foot's argument that we should reject the PGC moral requirements can only exist at the level of a Hypothetical Imperative should be rejected, in that the PGC operates as a universally applicable instrumental reason; it is therefore compatible with her conception of moral requirements. Lastly, we confronted Leiter's argument that all enquiry into the nature of law is doomed to failure due to the fact that law is essentially a human creation, and - as human purposes vary over time - human artefacts are incapable of a single definition. This argument can be rejected in that it overlooks the central purpose of a legal system – to direct the action of its subjects. Having identified a constant purpose of the concept of law, the objection that its nature varies is shown to be false.

Our discussion of philosophical objections to the PGC concluded with an overview of Enoch's objections that the PGC does not provide an adequate reason to follow its requirements; an agent could simply say that they do not care about their agential status and thus justify non-compliance. He continued his attack, arguing that even if we did accept that the PGC provided adequate reasons for compliance, it would be improper to characterise their requirements as moral. Like those presented by previous sceptics, these arguments have also been shown to be deficient; the first on a misrepresentation of the claims being made by the PGC and the second in that the PGC complies with Enoch's characterisation of the rational justification for moral content in his later writing. Having successfully rebutted claims against the validity of the PGC, chapter four moved on to demonstrate how the principle should function as a normative source in a legal system. It did this with reference to the classical positivist theories of Kelsen and Hart, demonstrating that the Basic Norm and Rule of Recognition in each theory respectively could only generate normative authority if the primary rules they generated were themselves in compliance with the PGC. Such secondary rules must therefore contain a requirement that primary rules

flowing from them are PGC compliant. The necessary link between law and morality has therefore been established; as the PGC exists in a system of normativity where legal and moral norms are unified by the common factor of practical reason, it follows that  $(R_M x, - \Phi) > (R_L x, \Phi)$ . In order to function as law and direct agential behaviour, a rule cannot contradict the requirements of the PGC.

Having demonstrated the validity of this conclusion through the analysis contained in chapters one to four, the thesis moved on to apply the statement to contemporary theories that appear to rest on a foundation of Inclusive Positivism. Chapter Five first took the necessary connection to Joseph Raz. It is worth once more justifying that, although Raz's Sources Thesis is most commonly ascribed the label of Exclusive Positivism, Raz himself is silent on the point. An analysis of Raz's conception of practical reasoning in the first half of the chapter has therefore attempted to demonstrate that his own views on rationality mean that he would be more appropriately classified as an Inclusive Positivist and therefore deserving of the attention of this work. Raz's own writing on the nature of agency and moral reasoning has been demonstrated to be deficient in that they do not accurately describe the nature of exclusionary reasons for action, such as that contained within the PGC not to act contrary to its requirements. Once this discrepancy has been removed, Raz's account of deliberative rationality shows that he must be committed to a unified conception of legal and moral normativity on pain of contradicting his own conception of practical reason. He ought therefore to accept that the irreducible starting premises of the PGC commit an agent to recognising it as an absolute and exclusionary reason not to act in contravention of its requirements. Having removed such contradictions from Raz's conception of deliberative rationality, the chapter then applied Raz's own moral reasoning his writings on the nature of a legal system in order assess their compatibility. Of primary interest is his 'Sources Thesis', which holds that law is a social fact and can therefore must stem from social sources; morality can influence the creation of law, but must do so at the pre-legal stage and should therefore be seen as a separate normative hierarchy to legal obligations. Such a claim fails necessarily; if Raz accepts that a law-creating body is capable of creating law in compliance with moral



requirements, it follows that if a moral principle can be shown to be categorically binding for all agents, then the law-creators – in their capacity as agents - are obliged to act in compliance with that principle. The law they create must therefore also be in compliance with the universally binding moral principle – in this case, the PGC. As the first half of chapter five demonstrated that the requirements of the PGC are ones that Raz ought to accept, it follows that his positivist stance is untenable. This claim is supported by Raz’s further insistence that law necessarily claims legitimate authority; as non-PGC compliant rules are irrational and therefore *prima facie* incapable of making claims to legitimacy, law must necessarily be PGC compliant. Raz’s further objection that his Sources Thesis should be seen to operate on a systemic basis rather than at the level of individual norms should be dismissed as incoherent and contradictory for the same reason. The only way the Sources Thesis can remain an adequate description of the creation of legal norms is for it to be modified to exclude the possibility of creating non-PGC compliant rules; Raz’s positivism is therefore incapable of surviving the necessary requirements imposed upon it by the PGC. Since it cannot be the case that  $(R_L \times, \Phi \ \& \ R_M \times, - \Phi)$ , the unified conception of authority presented in this thesis necessitates that  $(R_M \times, - \Phi) > (R_L \times, \Phi)$ .

The final chapter of this thesis continued its critique of Inclusive Positivism, further developing point first made in connection to Raz; if a conception of law concedes that a law-creating body is capable of integrating moral requirements into that system at its discretion, then should a moral principle be identified which behaves as a Categorical Imperative on all action, such law-creating bodies become obliged to incorporate its requirements into the system they create. This statement is apodictic in that law-creating bodies are themselves comprised of agents, who are in turn bound by the categorical imperative alluded to. Since the PGC operates as an absolute and exclusionary reason in this way, it obliges all agents to act in conformity with its requirements. It therefore follows that in conceding the possibility of incorporating moral principles into the law, inclusive positivism obliges itself to do so when confronted with the PGC which has been argued to be valid in this thesis. It is this claim that the theories of Lyons, Coleman and Kramer must attempt to circumvent, and chapter six demonstrated that they are incapable of doing so. Firstly, Lyons’ formalism – like Raz’s Sources

Thesis – requires that law must make a claim to legitimate authority in order to survive; the chapter demonstrated that to claim otherwise would introduce a paradox into Lyons’ work by which an objectively just act could also be substantively unjust in its content. Such a claim is irrational, and therefore should be rejected. The Minimal Separation Thesis which Lyons suggests can be used to escape this conclusion is itself unsound, and can only survive as a source of law which claims authority over our actions if the contingent moral requirements to which he alludes are replaced with a necessary compliance with the requirements of a supreme moral principle – the PGC.

Coleman’s Conventionality Thesis has also been demonstrated to be incapable of creating legal norms that are not PGC compliant. In attempting to locate legal normativity in the Shared Cooperative Action of system-creators in a pre-legal system of rules, and further recognising that these agents might be influenced by moral concerns in concretising their behaviour into law, Coleman depicts a scene remarkably similar to that present in Raz’s Sources Thesis. The exercise therefore fails for the same reason; as the creators of a legal system are necessarily agents, they must necessarily act in accordance with reasons they already possess. Since their agency requires them to recognise the PGC as imposing valid limits on the scope of their actions, any actions they undertake must be PGC compliant. As the creation of a legal system is an action, the system they create must also be capable of creating obligations only insofar as these obligations are PGC compliant; any contradictory system of norms would be incapable of possessing authority over the subjects of the legal system, or capable of possessing a reason to be established by the system-creators. The PGC must therefore be present in both the secondary rule of recognition in Coleman’s system and within the primary rules that system creates; it is therefore the source of legal normativity. That this may potentially be in conflict with the Practical Difference Thesis is of minimal concern, in that Coleman himself argues that the thesis is not central to any conception of positivism; even if it were, the objection would rest on a misunderstanding of the nature of exclusionary reasons within deliberative reasoning, and still fail.

The last theories to be subjected to scrutiny from the PGC are the writings of Matthew Kramer. Forcefully presented, they are nonetheless shown to be

lacking when presented alongside Kramer's own understanding of morality. He commits himself to the position that if a moral action is required then it serves as an absolute and exclusionary reason against behaviour to the contrary, and – as such – concedes the possibility that a principle could act as a Categorical Imperative in this way. His dismissal of the PGC does not, however, directly engage in the argument, instead skirting around the requirements by claiming that rationalism is incapable of serving as a foundation for moral principles as moral principles do not need rational justification. The circularity of this argument is obvious, and merely begs the normative question. Indeed, Kramer's own characterisation of the mind-independence of moral principles presupposes a test should be necessary for their identification; this in turn presupposes that a reason must exist for choosing the acceptability of one test over another, and it would be paradoxical to suggest that a test for the validity of a moral principle could be *prima facie* irrational. There is therefore no valid reason for Kramer to deny the rational foundation of moral principles; it therefore follows that he ought to accept the PGC in the absence of any reason not to. If this argument is successful, then, by dint of its Inclusive character, Kramer's positivism also collapses into necessitating the recognition of the PGC within a rule of recognition.

It is not anticipated that this thesis will conclusively end the debate as to the source of legal normativity. It does, however, go some way to clarifying some misconceptions which are present in much of contemporary positivism. It has demonstrated that disagreement between positivism and non-positive theories is normative through the necessary normative content of the language we use. It has further demonstrated that the dialectically necessary argument of the PGC is capable of withstanding assaults against it, and should therefore be accepted as sound in the absence of an acceptable rebuttal to the contrary. It has also been demonstrated that the universally applicable instrumental reason produced by the argument is capable of acting as a categorical imperative, and necessarily must do so as part of a unified theory of norms within deliberative reasoning. As such, any theory of law which recognises that moral principles are able to be incorporated into a legal system is forced, by the categorical nature of the argument, to abandon claims to contingent incorporation in favour of a

necessary connection; to claim otherwise would strip non-compliant rules of their ability to serve so as to direct action, and thus could not serve as law in any meaningful sense of the word.

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