Justifying & Mitigating the Semantic Indeterminacy in Charter Jurisprudence: An Exploration of Legal Validity, Moral Considerations & Hermeneutics

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Abstract

The meta-objective of this thesis is to *justify* and *mitigate* the semantic indeterminacy inherent to Charter jurisprudence, particularly, the indeterminacy of the language that comprises Charter rights. The author achieves this justification and mitigation by 1) Re-conceiving the Charter; 2) Explaining the intricate relationship between validity and moral considerations by a theory of Charter law called Inclusive Legal Positivism; 3) Conceptualizing Charter interpretation through the use of philosophical and critical hermeneutics; and 4) Introducing, defending and applying an adjudicative typology/ attitudinal model that manifests the critical reflective attitude a judge *should* bring to indeterminate Charter cases. This 'model' or 'attitude' gains its theoretical support from the fusion of philosophical and critical hermeneutics. Ultimately, the thesis shows that one can at the same time accept that Charter jurisprudence is indeterminate but also that such indeterminacy is *legally and principally guided and constrained.*

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Introduction

Research Problem

Nearly a quarter century ago, a monumental shift occurred in Canadian law and politics. A Charter of Rights and Freedoms was entrenched in Canada's Constitution, which purported to guarantee Canadian citizens a series of rights subject to reasonable limitations. Yet it was not long after this significant addition to the country's legal machinery that the Charter's contents, its democratic legitimacy and the very grounds on which it was promulgated, became the source of vehement critique. The criticisms, if slotted into categories, would fall under those that are political and those that are semantic. The political criticisms are often based on the arguments that the judiciary has gained far too much power from their review function and that the absence of judicial elections makes the process fundamentally undemocratic. On the other hand, the semantic criticisms challenge the indeterminacy of the language that appears in the Charter itself. Critics often claim that, due to the inherently vague and ambiguous language of Charter rights, decisions made in light of such rights are often based on extra-legal or "exogenous" norms that transcend that which is legitimate in the eyes of the law (Hutchinson, 1995). Yet, as a response to such political and semantic criticisms, the advantages of the Charter as a mechanism which protects minority groups and the inevitability and desirability of a constrained indeterminacy are often illuminated.

However, despite this ongoing debate and the exchange of theoretical justifications between both proponents and opponents of the Charter, one of the problems that continues to pervade the matter is the charge of semantic indeterminacy. According

to Waluchow (1994, 143), since its entrenchment into the Canadian Constitution in 1982, the Charter of Rights and Freedoms has incorporated a certain terminology into the law "which figures prominently in virtually all modern moral theories". One can extrapolate from this insight that the sections of the Charter, the language in which they are written, and the consequent methodologies that judges have adopted in determining the meaning of such language in light of a contested case of competing interpretations, have contributed to the problematic charges of indeterminacy. The semantic indeterminacy of Charter jurisprudence is therefore a significant point of inquiry. I believe it is significant because of the picture of our legal system that it tends to portray: I am concerned with the general truth that it is the very nature of adjudicative method which articulates the justification of Canadian citizens' rights and limitations to such rights. Judges' articulated reasons delineate and constitute the legality of citizen/government interactions, and the deployment of state coercion on civil society. What makes this potentially problematic is if one considers that our identity as legal subjects with constitutional rights is often interpretively defined through recourse to either pre-existing judge-made standards or new methods of interpretation and validation of individual rights. I feel that it is of the utmost significance to realize that the constitution and definitional expansion of our most cherished freedoms is justified by a few elite minds whose adjudicative method cannot, without uncertainty, be viewed as unitary, neutral or determinate.

On the other hand, there is reason to believe that not only are Charter-rights interpretation and re-articulation desirable as modern societal values, attitudes and beliefs change, but that the criticisms used to eschew the reasonability of Charter-adjudication

are misleading and flawed at best. Furthermore, the entire notion of semantic indeterminacy can best be analyzed by explicating what *actually occurs* in Charter jurisprudence as well as what *should occur*. This latter generalized argument is the core of my position as well as the general thrust of this thesis.

Purpose & Research Questions

The purpose of this thesis, at the most fundamental level, is to defend the Charter of Rights and Freedoms from the charges of semantic indeterminacy. However, my approach to accomplishing this task is primarily theoretical and philosophical, rather than political. In addition to identifying the nature of the Charter debate and the general arguments proposed therein, I take on three crucial tasks: The first is to support the claim that the indeterminacy of Charter jurisprudence, specifically in adjudication, is inevitable, desirable and constrained by the nature of legal language. The second task is to advance and defend a theory of Charter law called Inclusive Legal Positivism, which I argue best explicates our understanding of the way moral considerations operate in determinations of legal validity in the context of the Charter. This descriptive/explanatory task results in an advocacy of a legal theory that not only appropriately articulates the connection between law and morality in general within the context of the Charter, but also justifies the appeal to moral considerations as a necessary element of legal practice as opposed to an extra-legal process that tends to exacerbate semantic indeterminacy. Finally, as Inclusive Legal Positivism accurately explains that the appeal to moral considerations is a legitimate standard of legal decision, the third task is to go beyond this identification and examine the *interpretive process itself.* Thus, the final objective is to further undermine

and mitigate the negativity of the asserted undesirability of indeterminacy in rights cases by focusing on the nature of interpretation.

The main thrust of the thesis, as exemplified in the second and third tasks, is to theoretically 'conceptualize' the existentialities of Charter jurisprudence. Based on the general insights of what has been said heretofore, the main questions of inquiry in this thesis are as follows:

1) How can we *conceive* the Charter in order to justify its indeterminacy? 2) What are the existing legal theories (and the shortcomings thereof) which purport to depict the relationship between legal validity, interpretation and morality? 3) Can the appeal to moral considerations even be theoretically explained as an *essential* element of Charter jurisprudence? 4) Can there be an adjudicative typology, which, when adhered to, stabilizes the interpretive process in Charter adjudication and further mitigates the charge of indeterminacy?

Ultimately, the aim of this thesis is to engage with theory in order to best explicate the complex interrelations among law and morality, and how we should understand the nature of the interpretive process itself, all within the ambit of the Charter. Within this general aim, I argue that the justification and mitigation of semantic indeterminacy is possible.

Method of Organization/ Chapter Breakdown

The theoretical basis of this thesis is found in the diverse and contentious body of jurisprudential theory and philosophy which attempts to *explain and/or normalize* the complex relationship between the existence and validity of law, the role of morality in such a process and the overarching element of legal interpretation. As such, I am

indebted to a multitude of thinkers whose ideas serve as both grounds of support and points of critique for my submissions. The following is a succinct overview of each chapter of the thesis including recognition of the main theorists I draw upon to formulate my arguments.

Chapter 1

The purpose of the first chapter is to answer the first part of the research question: How can we conceive of the Charter to justify its indeterminacy? The chapter begins by elucidating the debate between the proponents and opponents of the Charter of Rights and Freedoms. The general aim is to provide justification for taking a 'pro-Charter' position. The criticisms of the Charter are categorized as either political or semantic and to each criticism a response is given which attempts to undermine the force of the arguments.

Although the political and semantic criticisms together give an exceptional account of the overall 'critique' of the Charter, the semantic criticisms and the rebuttals thereto are paramount in the context of this thesis. This is because the overall themes of the 'meaning' and 'interpretation' of rights and subordinate legislation predicates the entire thesis including the charges of indeterminacy as well as the need to expound both a theory of Charter law (Inclusive Legal Positivism) and a hermeneutical conceptualization of legal interpretation. In order to highlight the 'semantic' criticisms, I draw upon Allan Hutchinson's critical theoretical postulations in his seminal text: *Waiting for CORAF: A Critique of Law and Rights.* In general, Hutchinson (1995) portrays the decision-making process as deeply ideological and political, and reinforces the position that arguments are often formulated by appeal to exogenous norms rather than legal rules. The charge is that

the determination of who is a right-holder, what a fundamental right is, which rights outweigh others and what the language of certain rights mean, is all fundamentally indeterminate and such indeterminacy fatally undermines the legitimacy of Charter adjudication. In response to this negative caricature of the Charter's indeterminacy, I draw upon HLA Hart's doctrine of open texture (1994) and Waluchow's use of the living-tree metaphor (2005) in order to characterize the indeterminacy as both *inevitable and desirable*. Finally, I draw upon the thoughts of Aileen Kavanagh (2003) in order to support the argument that the language in which Charter rights are written, and the tests used to adjudicate rights disputes, both have an inherently 'constraining' capacity.

Chapter 2

The purpose of the second chapter is to provide an answer to the second part of the research question: What are the existing legal theories (and the shortcomings thereof) which purport to depict the relationship between legal validity, interpretation and morality? Given that the Charter's language itself is the source of indeterminacy, the second chapter begins to look at theories that may be able to account for the 'moral deliberations' that occur in Charter jurisprudence as a result of the indeterminate meaning of legal language. The chapter proceeds by way of critical theoretical analysis. The focus of such analysis is on the legal philosophy of Joseph Raz and Ronald Dworkin in order to expose their shortcomings and to provide the prefatory grounds for advancing and defending a theory of Charter Law called Inclusive Legal Positivism. As the entire chapter fits within the jurisprudential ambit of 'law and morality', the first section traces the development of the law and morality continuum in jurisprudence. This is done first by discussing the historical debate between HLA Hart and Lon Fuller on the relationship

between law and morality and then by explicating the complexities and theoretical integrations that have stemmed from the original 'cut and dry' legal positivist and natural law perspectives by introducing the legal theory of Joseph Raz and Ronald Dworkin. In the second and main section of the chapter, these two later theorists are juxtaposed and critiqued. The theoretical analysis examines two areas of discussion: 1) the operation and relevance of coherence in interpretation and 2) legal norms, gaps and judicial discretion. By juxtaposing Raz and Dworkin's positions, identifying some of their imperfections and highlighting their criticisms of each other's theoretical claims, the grounds are set for the third chapter.

Chapter 3

The purpose of this chapter is to answer the third part of the research question: Can the appeal to moral considerations be theoretically explained as an essential element of Charter jurisprudence? This question is answered through the defense of Inclusive Legal Positivism, which is argued to best explicate a descriptively accurate understanding of the intricate interconnectedness of legal validity, reason, authority, meaning and morality within the context of the Charter. Although there are multiple sections that all occur in a coherent and logical order in the chapter, the two central tasks accomplished are an explanation/description of the theoretical implications of Inclusive Legal Positivism and a defence of the theory through a continuation of critical theoretical analysis that focuses on the more central ideas of Joseph Raz and Ronald Dworkin as well as a significant argument put forth by Scott Shapiro.

In addition to the works of Joseph Raz (1970; 1979; 1986; 1994; 1996a; 1996b) and Ronald Dworkin (1977; 1985; 1986) (although they are primarily sources of critique)

that serve as theoretical sources for my arguments, the literature on Inclusive Legal Positivism and Incorporationism produced by Wil Waluchow (1994; 1998; 2000; 2002) and Jules Coleman (1996; 1998; 2001a; 2001b) have been significant sources for justifying my theoretical position. Citing their work as significant is, in fact, an understatement.

Chapter 4

The purpose of the final chapter is to answer the last part of the research question: Can there be an adjudicative typology, which, when adhered to, stabilizes the interpretive process in Charter adjudication and further mitigates the charge of indeterminacy? This question is answered on the basis of three crucially important points: 1) Although Inclusive Legal Positivism does identify and articulate the way law and morality are connected in the context of the Charter, it does not go far enough to conceptualize the wider context in which legal interpretation occurs, and, ultimately, what informs the judge's practical or evaluative reasoning in the deciding of indeterminate cases; 2) Given 1), the perceptual turn from the objectives of Inclusive Legal Positivism to an analysis of the interpretive process itself can best be done through a hermeneutical lens; 3) The fusion of philosophical and critical hermeneutics serves as grounds for advancing an attitudinal model/ adjudicative typology, which, when adhered to, cannot only produce ideal, rational, and justificatory decisions, but can also further mitigate the negativity of semantic indeterminacy.

The 'hermeneutical lens' to which I refer is comprised of the 'philosophical hermeneutics' of Hans-Georg Gadamer and the 'critical hermeneutics' of Jurgen Habermas. It is on the basis of this hermeneutical conceptualization that I expound an

attitudinal model of interpretation comprised of an epistemic base that posits three central criteria, which, when taken as a whole, manifests the 'critical reflective attitude' a judge must take to her adjudicatory task. I apply this 'model' to the controversial *Little Sisters* case in Canadian Charter jurisprudence in order to show the possibilities of adjudicating with a critical reflective attitude and exemplifying how such an approach can contribute to the mitigation of semantic indeterminacy.

In addition to the foundational theoretical and philosophical insights of Gadamer (1975; 1989) and Habermas (1970; 1973; 1979; 1987), I am also indebted to Paul Ricoeur (1981), whose work on the mediation of the Gadamer/ Habermas debate provides essential theoretical support for my adjudicative typology/ attitudinal model.

Concluding Introductory Comments: Scope and Limitations

As this thesis explores the delineated research question in the context of the Charter of Rights and Freedoms, its primary focus and concomitant limitation is but one segment of the legal enterprise: Charter/Constitutional Jurisprudence. The central components of the thesis indicative of this focus/limitation are the use of Inclusive Legal Positivism circumscriptively to explain/describe the intricacies of the law/morality relationship within the context of the Charter, as well as the conceptualization and application of my hermeneutical-inspired attitudinal model within that same context. As such, both my defence of Inclusive Legal Positivism and the attitudinal model are purposely meant to apply to Charter jurisprudence and not 'law' in general.

However, although I attempt to formulate and explain Inclusive Legal Positivism in a Charter context as well as use hermeneutics as a springboard for developing a model for adjudicating in penumbral Charter cases, this does not preclude such

theoretical/philosophical foundations from potentially applying in other areas of law. This task, however, is clearly beyond the scope of the thesis.

Given the foregoing general overview of the thesis project, the first objective to accomplish, namely, the elucidation of the political and semantic criticisms of the Charter, is in order.

Chapter 1: Political and Semantic Charter Issues: Identifying the Criticisms

"A decade of Charter adjudication offers ample and cogent evidence of rights-talk's failure to provide the determinate guidance and operational efficacy necessary to its legitimacy as the constitutional métier of liberal legalism" (Hutchinson 1995, 55).

"Judicial development of constitutional law informed by moral reasoning means moral reasoning according to the Constitution. It is not tantamount to unlimited moral adjudication by a free-wheeling judiciary" (Kavanagh 2003, 72).

These quotations from legal and political theorists reflect some of the diametrically opposing views with respect to the adjudicative processes in Charter cases. Their opposition to one another also implicitly questions the legitimacy of a Charter of Rights and Freedoms as a document that can function as a protective mechanism of rights in a constitutional democracy. The fact is that the Charter of Rights and Freedoms, heralded as the beginning of a new era of minority-rights protection, the advancement of democratic values of equality and liberty, and the balancing of power between Parliament and the Judiciary, has also been criticized as a document which is subject to selective interpretation, as the cause of a regression in democratic values, and resulting in the often quoted aphorism: "the judicialization of politics and the politicization of the judiciary" (Martin 2002, 97).

The following includes an analysis of some of the most forceful criticisms of Canada's Charter of Rights and Freedoms. The arguments will be enunciated categorically, beginning with what may be termed as political concerns and subsequently with semantic issues of meaning and interpretation. My purpose is to highlight the significant and thought provoking, and subsequently to argue in favor of a conception of the Charter as a document that must continue to be progressively developed within the

confines and limitations of the language in which it was written. It is to this task that I now turn.

Section 1: Political Concerns

The first argument that is commonly held by Charter opponents is that it was drafted and promulgated on politically unstable and controversial terms and conditions, exemplifying the dissentious atmosphere in which the then Trudeau government found themselves enveloped. Although, it is claimed, that the Charter is a testament to a guaranteed protection of citizen's rights from government intrusion, this is merely the ideological slogan used to gain political support and a device by which spontaneous consent may be obtained from rights-holding members of society. The underlying and pressing concerns of the time were to partake in a universal strategy of nation-building, to promote a nationalistic Canada, and, most significantly for Pierre Trudeau, to "overrule various provinces' restricted and unfriendly treatment of official language minority groups" (Morton 1995, 178). By giving the judiciary extensive jurisdiction over provincial statute invalidation, Trudeau restricted the policy autonomy of the provinces, shifted power to the federal government and obfuscated the federalist nature of Canadian politics. In a deliberate safe-havened approach to ensuring a bilingual and multicultural Canada, and to diffuse the threat of Quebec nationalists, the Trudeau government entrenched its initiatives by placing language rights in the Charter and preventing their subjection to provincial legislative override[1] (Morton 1995, 179-80). The increased power of the

[1] The overriding mechanism is Section 33, or the Notwithstanding Clause. This was instrumental in getting 7 of the 8 provinces to support the Charter. Of course, the lone dissenter was and continues to this day to be Quebec. Debate around this issue alone has contributed to a voluminous body of literature. For example, see Cameron, J. "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" Superior Court Law Review 23:2 (2004): 135-66.; Sharpe & Roach. *The Charter of Rights and Freedoms 3rd Edition.* Irwin Law Inc., 2005, 86-91; Whyte, J.D. "On Not Standing for Notwithstanding." Alberta Law Review 28 (1990): 347-57.

federal government over provincial issues, the institutionalization of the judiciary as a third arm of government, and the pursuance of the particularistic interests of a majoritarian government's Prime Minister, are all reasons to argue that the entrenchment of the Charter in Canada's Constitution was part of an overall political scheme masked in the rhetoric of rights-talk.

Second, is the contention that the appointment of judges, their representation of Canadian citizens, and their ability to overrule elected members of parliament, is fundamentally undemocratic in nature. Political Scientist Robert Martin (2002, 99) captures the underlying force of the argument:

> ...since the adoption of the Charter, judges can now overturn deliberate policy decisions made by the elected representatives of the people where those decisions do not accord with the way the judges interpret the Charter. This is undemocratic. Some of our commentators call this 'counter-majoritarian', but the phrase is pure obfuscation.

The idea of allowing unelected judges, through their interpretation of Charter rights, to take part in the 'governing' process is an affront to representative democracy. To allow the judiciary to make decisions based on fundamental questions of political morality, is, to the Charter critic, to eviscerate the ability of Canada's legislative assemblies to carry out the responsibility bestowed upon them by their electorates. The argument from democracy may go even further if we view the government-citizen relationship as an example of what I call 'licensed self-governance'. Theoretically speaking, the supporting community members of the particular government in power essentially authorize a body of citizens (the government) to lead them from the period of their inauguration until they are either reelected or defeated. This is essentially an ongoing process of self-governance, legitimized through the electoral process and the underlying concept of

representative democracy. If this process is augmented by substituting the judiciary as a governing body with powers of judicial review, statutory interpretation and invalidation or nullification, then we have a far deeper criticism to unveil: Not only has the Charter adversely affected democratic values, but it also questions Canadian citizens' ability to govern themselves. As Jeremy Waldron (1999, 239) argues, if an individual is disassociated with and precluded from the decision making process to which he or she is theoretically entitled, he or she will "feel slighted [and] feel as though his or her own sense of justice has been denigrated as inadequate." As the argument goes, undermining the elected assembly's power is to undermine the citizen's power. The argument is no doubt forceful and challenging.

The last political argument I shall identify may be considered an extension of the previous one. It questions the inherently elitist framework in which our rights as citizens are articulated and the competence of those who articulate them. It is not rocket science to understand the difference between the socio-economic elitism of the judiciary and the deprivation of mainstream rights claimants from such status. This essentially entails the judiciary developing their own biased interpretation of rights in light of their selective views of political morality. Consequently, the critic claims that it is "the suppression of those-women, minority racial groups, the poor and so on- whose interests are not adequately recognized or supported by the dominant mainstream ideologies to which judges have an affinity" (Waluchow 2005, 216). Hence, one can observe the plausibility in the conception that there exists a foundation of elitism on which Charter adjudication is premised.

Furthermore, apart from the association of judges with socio-economic elitism and the inherent distance they find themselves from ordinary rights claimants, there is reason to question the competence of the judiciary in formulating decisions. Is a small group of judges more capable of warranting decisions to conflicting rights cases through justificatory reason than, say, a group of legislative members that can be chosen to decide cases based on their knowledge of the field in which the case is situated? Similarly, is it not safe to say that a panel of Supreme Court judges may be inferior to a carefully selected, representative and diverse panel of expert government authorities? Surely, Dworkin's Herculian judge is a Platonic figure representing the metaphysical objectivity of decision making[2]. This idealized truth is far from realistic. However, if this is so, and judges cannot reasonably be said to reach proper or 'right' outcomes in the course of Charter-adjudication, would it not make more sense to at least have a body of individuals, who, even though they themselves may lack an idealized degree of competence, will nevertheless be accountable to the citizens? The opponents of the Charter in this respect would give an affirmative answer.[3]

Response

As the main focus of this thesis has much more to do with an analysis and justification of the legal reasoning process through different philosophical and theoretical perspectives

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[2] Dworkin's use of Hercules as an idealistic judge is found in his texts (1977), *Taking Rights Seriously*,, and further developed in his renowned work (1986) Law's Empire.

[3] There have been several attempts to reconcile this apparent problem by re-conceiving the relationship between the judiciary and the legislature. One example is the well known assertion that the legislature and judiciary are in a dialogical relationship and the Charter and its substantiation through Charter based decisions act as a medium through which such a dialogue can be articulated. See for example Hogg & Bushell, "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All?)." Osgoode Hall Law Journal, 35 (1997): 75-124. Also, for the proposition of a shared or relational approach to adjudication between the judiciary and the legislature, see Janet L. Hiebert. "A Relational Approach to Constitutional Interpretation: Shared Legislative and Judicial Responsibilities." Journal of Canadian Studies 35 (2001): 161-81.

on meaning, interpretation, reason and validity, and not with the *political justification* of the judiciary's role in Charter interpretation, I will be brief in responding to the aforementioned criticisms as I have identified them.

First, although I accept and treat as factual the claim that the Charter was entrenched in the Constitution for particularistic, partisan purposes, I do not believe that the political atmosphere 24 years ago overshadows the tremendous benefits that the Charter of Rights has given to us as Canadian citizens since then. Although there have been Supreme Court decisions that are controversial, the progression into a legal era that recognizes and protects the rights of minorities, sets the boundaries for our democratic freedoms, and promotes equality among individuals, can hardly be considered an 'affront to democracy'. Examples of such cases involving controversial decisions include *Hunter v. Southam Inc,* where the concept of purposive interpretation was first articulated by the then Chief Justice Dickson, *R.W.D.S.U., Local580 v. Dolphin Delivery Ltd,* where the scope of the Charter was first defined and restricted to government/citizen relations, and *R v Butler,* a case exemplifying the courts willingness to redefine the law on obscenity.

Other cases that are premised on far more morally contentious issues include *R v Morgentaler* (abortion and rights of women), *R v Latimer* (compassionate homicide) and *Rodriguez v R* (assisted suicide and physical disability).

On the other hand, there are cases that truly justify the enactment of the Charter, nearly obviating the concerns raised by those who question the political partisanship associated with the Charter's entrenchment in the Constitution. Three examples of cases that exemplify the judiciary's recognition of freedom of expression as a right guaranteed

under reasonable conditions and the indelible value of equality are *R v Keegstra, Andrews v Law Society of B.C. and Reference Re Same Sex Marriage.*

Keegstra challenged the definition of hate speech and whether or not it is a form of expression. Although because it nonetheless 'conveys a meaning', it is not a justifiable form of expression under section 1 and is therefore unconstitutional. The message is clear: Canadian citizens can exercise their right to free expression in so far as it does not abrogate the rights of other individuals. Anti-hate laws, with the intentions of "avoiding tangible harm in the form of feelings of humiliation and degradation" and enhancing "a social climate of mutual respect and tolerance" (Sharpe & Roach 2005, 153), promote the dualistic values of multiculturalism and equality, integral to Canada's democratic society.

Being the first case involving a section 15 equality challenge, *Andrews* was a landmark decision. In a 4 to 2 majority decision, the Supreme Court held that the citizenship requirement to practice law in British Columbia was an unjustifiable infringement of section 15. Significantly, the court provided a rationale for interpreting a statute that differentially treated certain individuals on the basis of undue disadvantage and whether or not an infringement could be justified. Through this decision, the Supreme Court told Canadians that distinctions based on group characteristics apart from those based on an individual's "own merits and capacities" (*Andrews*, 175) shall not be condoned, and all laws that reflect such discrimination shall be subject to justification under section 1 of the Charter. Justice Wilson stressed the importance of a strict stance toward discriminatory legislation: "...given that section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden

resting on government to justify the type of discrimination against such groups is appropriately an onerous one" (*Andrews*, 154). *Andrews* marked the beginning of the substantiation of section 15 and was the first case of many which protected adversely affected individuals from discriminatory government policy.

Finally, perhaps the most controversial issue of all was addressed in the recent same sex marriage reference case. In this case, it is not so much what the Supreme Court did, but it is what they refrained from doing. One of the four questions asked by the government was whether or not restricting marriages to heterosexual unions was 'consistent' with the Charter. The court refused to address this question because "a ruling might undermine the government's stated goal of legislating to recognize same-sex marriages and achieving uniformity in the law" (Sharpe & Roach 2005, 110).

This declaration reinforced the equality rights that gay couples had already attained through the provincial court system. However, it did much more than simply solidify a relatively new substantive addition to the criteria of equality under section 15. The Court's decision was the epitome of equality rights attainment. It was long fought-for decision for Canadian citizens, and it brought the Charter's language in line with a modern, liberal conception of equality, without discrimination on the basis of sexual orientation. The Charter was written on the assumption that societal values, beliefs and attitudes toward social phenomenon are subject to change. The same sex marriage reference case exemplifies the judiciary's role of interpreting the Charter in light of contextual considerations and the progression of historical change. The long line of equality cases, and the attainment of certain rights and opportunities for minority groups,

cannot be ignored in favor of a Charter-skeptical attitude. It is simply a far too pressing and substantial matter to overshadow with overstressed political accusations.

The preceding brief comment suffices to address the argument that highlights the questionable terms and conditions on which the Charter was entrenched in the Constitution. Prior to a more in depth analysis and response to the *semantic arguments*, I will address the remaining political arguments with respect to democracy and judicial elitism.

Essentially, the democratic and judicial elitism/competence arguments, as I have identified them, make three points: 1) The fact that judges are both unelected and undermine the process of self-governance is fundamentally undemocratic; 2) The difference in socio-economic status between judges and rights claimants suggests an unacceptable degree of selectivity and bias in adjudication; 3) Judges may not be in the best position to give justificatory reasons in competing rights cases in comparison to plausible alternative adjudicatory bodies.

In response to 1), let it first be said that one of the underlying tenets of a free and democratic society is to have an external body which can ameliorate conflicting interests among rights bearing citizens. By having such mechanisms in place, the idea is to escape the specter of pure majoritarianism[4], which conceives of democratic rule and decision making as the sole and innocuous function of *political* bodies. Without a doubt, the core of the problem with this type of rule is that expunging or even limiting judicial review makes possible the oppression of certain individuals and minorities. Therefore, the critic's argument concerning the negative effect of the judiciary on the concept of self-

[4] Pure majoritarianism and the concept of self-governance in general is put forth by Jeremy Waldron in his book *Law and Disagreement*. Oxford: Clarendon Press, 1999.

governance is based on a flawed assumption. The assumption is that citizens, by electing their representatives, are having their interests represented vicariously through them. The concept of self-governance therefore involves the *idealistic* premise that political bodies will, for the sake of integrity and respect for their electorates, be 'apolitical'. Somehow, leaving these political bodies to adjudicate citizens' conflicting interests does not get conflated with their own interests in maintaining office, pleasing certain supporting interest groups and pursuing other partisan objectives. On these grounds, it cannot be said that giving political bodies the responsibility for adjudicating rights claims promotes the idea of self-governance and furthers democratic values. A flawed assumption vitiates the concept of self-governance, while the overwhelmingly possible intertwining of political partisanship and formal procedure in accountable, political adjudicatory bodies, prohibits, rather than promotes, democratic values.

With respect to 2), the critic appears to problematize the different socio-economic backgrounds of both citizens and judges. If this is the stance the critic wishes to take, then one may infer from such a position that in order to mitigate bias, sustain impartiality and create an ideal epistemic condition in which a judge can adjudicate a particular case, the socio-economic gap between judges and citizens must be removed. I believe that this criticism depends on a rather ill-conceived depiction of judicial reasoning. As former Justice Brian Dickson asserted in the *R v Big M Drug Mart* ruling, the determination of the meaning of a right or freedom and the justification of individuals' claims, is to be done so through "an analysis of the purpose of such a guarantee, and it is crucial that at the same time the "courts to do not overshoot the actual purpose of the right or freedom in question but respect the fact that the Charter was not enacted in a vacuum... and must

therefore... be placed in its proper linguistic, philosophic and historical contexts" (*R v Big M Drug Mart*, 344). Thus, the judiciary, in applying the Charter, has recognized the necessity in promoting the interests that the Charter was meant to protect. Given the progress of democratic and equality rights since the Charter's debut, it is absurd not to note how the judiciary has, despite their socio-economic differences, both weighed the interests of Charter rights claimants in light of textual considerations, underlying principles of justice, and the direction in which society as a whole has gone with respect to the issues that underlie such cases. Just because a judge is in a different class bracket than an individual concerned about his or her rights, does not inevitably impede them from fulfilling their purposive objective approach to substantiating Charter rights. To argue in this way is neither logical nor persuasive.

Finally, the last objection, which questions the competence of the judiciary in comparison to other alternative methods of adjudication, may be persuasive if it can be proven that such alternative methods do give better justifying reasons for warranting particular outcomes in particular cases. However, this can only be achieved if the legal and moral reasoning abilities of such alternatives produced virtually deterministic and uniquely correct decisions[5]. Granted that Dworkin's ideal judge is perhaps inimitable in reality, it is no more plausible that politicians, many who are untrained in legal reasoning, argumentation, fact finding, and critical thinking, can formulate better decisions than judges. Furthermore, the line of reasoning I used in response to 1) can be invoked here as well. That is, it would be more of an affront to democratic values and the legitimacy of the law in general, if politically affiliated adjudicatory bodies were *directly* involved in

[5] Unique answers to legally indeterminate questions are dealt with first by Dworkin in (1977) *Taking Rights Seriously*, Duckworth & Co. This concept and other salient aspects of Dworkin's hermeneutic legal theory will be discussed and critiqued in chapter 2.

the case by case decision making process than judges who are constrained by and confined to the textual and principle objectives of the Constitution. One of the main factors distinguishing judicial and legislative law-making functions is the former's adherence to principled considerations as opposed to the latter's policy-oriented considerations. Although I do recognize the arguments that assert that the Charter "provides the occasion for judicial policy making" (Morton & Knopff 2000, 57), if one is to construe such decisions in competing rights cases as part of the policy agenda of the judiciary, there is still the undeniable difference that any decisions of the judiciary must be based on justificatory reason, within the ambit of the language of the contested right in question, and in accordance with the fundamental and principled importance of substantiating rights in light of new and changing contexts.

Therefore, although the third point, as I have identified it, raises a fairly strong objection based on judicial competence, it remains to be proven that alternative adjudicatory bodies are able to produce determinate or 'correct' answers to legal questions. Further, there is reason to believe that leaving such decisions to a policy-oriented as opposed to a textually and principally constrained body is likely to entirely remove the barrier between law and policy, allowing for their conflation, and resulting in a society wherein a judicial check on majoritarian political regimes becomes non-existent.

As I have stressed, this thesis is not primarily concerned with political justification, and thus, the foregoing treatment of political criticisms and my subsequent responding arguments are based on some of the more prominent concerns raised by critics. They are by no means exhaustive. The remainder of this chapter deals with the

semantic concerns of meaning and interpretation of Charter rights as well as the judicial reasoning methods employed in Charter cases. In addition to legal validity, these are the themes that will reoccur throughout this thesis, particularly in the explication of Inclusive Legal Positivism, its relation to other competing legal theories and the critical analysis that will follow.

Section 2: *Semantic Concerns*

In the past 25 years of Charter jurisprudence, perhaps the most commonly held objections are based around semantic concerns of Charter language, the proper definition and substantiation of rights and, arguably the most forceful of all, the charge that the judiciary possesses a largely unfettered ability to interpret constitutional and statute law at its own discretion. Drawing primarily on the works of Allan Hutchinson, I will expound these criticisms. Borrowing from philosopher Wil Waluchow, I will respond by advancing a different conception of the Charter as a reflection of human struggle and imperfection, and one that accepts the inevitable interpretive proclivities of legal language.

First, in his critical text, *Waiting for CORAF:*[6] *A Critique of Law and Rights*, Allan Hutchinson challenges the legitimacy of rights-talk, questioning the ability of the Charter of Rights and Freedoms to "resolve liberalism's perennial conundrum of how to balance the need for public scrutiny with the desire for personal liberty" (Hutchinson 1995, 28). Although Hutchinson's book may be characterized as an attempt to undermine the theoretical foundations of liberal legalism, I will deal with three of the more specific criticisms that he puts forth. I have interpreted these three related criticisms as semantic rights propositions, which are rhetorical rights questions that seek

[6] This is simply an acronym for the Charter of Rights and Freedoms. However, Hutchinson's use of such a title is meant to signify the pointlessness in waiting for the Charter adjudication to bring about desired social change, similar to the imagery captured in Samuel Beckett's play, "Waiting for Godot".

to determine the meaning of delineated Charter rights, the proper recipients of such rights, and the proper balance between existing individual rights and the communal good or general welfare. Hutchinson's three rights-based interrogatory questions are as follows: 1) Who are rights holders and how far do their rights extend? 2) In a case of competing rights, how is the recognition of one to prevail over the other? 3) How are rights to be balanced with communal interests?

Substance & Scope of Rights

Since the Charter's debut in 1982, the prominence of rights discourse and judicial review, and their dominance in jurisprudential literature has created a very large and illuminating body of thought.[7] Hutchinson's criticism of 'rights-talk' is undoubtedly a significant contribution to this work. The significance of 'rights-talk' as a discursive formation in Charter scholarship is that it "fails to ensure the operational efficacy that it promises and requires in order to become a safe methodological haven for advocates and judges in a dangerously ideological world" (Hutchinson 1995, 29). The attempt to substantiate this critical charge is provided by Hutchinson through his discussion of the problems the focus on rights has caused individuals and society in general.

The first question Hutchinson tackles has to do with the substantive meaning of rights, who can legitimately hold rights, and how far they can extend. Hence, I have termed this his semantic concerns about *substance and scope*. Two of the 'substance' issues Hutchinson addresses are what constitutes a fundamental right and who is able to claim such rights. First, he is eager to highlight the relatively divisive and inconclusive

[7] One of the ways scholars have analyzed the emergence of rights discourse is by creating distinct positions or perspectives on rights and their ability to effectuate social change. For example, see D. Herman (1994) "The Good the Bad and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms." Oxford Journal of Legal Studies 14:4 (1994): 589-604.

debate surrounding just what it is that counts as a 'fundamental' right. Hutchinson (1995, 35) notes that the cause of much of this semantic problem is due to the tension between those who believe that fundamental rights are based on individual claims and those who believe that they primarily consist of social entitlements. The determination of fundamental rights is therefore predicated on predominant ideological belief systems, such as liberal individualism and social or welfare individualism. Although this may seem like a virtue rather than a vice for the potential of an inter-ideological substantiation of fundamental rights, in practice, there has been a "general orientation toward a civil libertarian rather than socio-economic vision of rights", and this is evidenced by the emphasis on the former in the Charter of Rights and Freedoms (Hutchinson 1995, 37)

Furthermore, Hutchinson raises the concern that because of the evolving substantiation of such individualist rights as equality under section 15, the question of "what rights are fundamental and essential... is more open and less determinate than it ever has been" (Hutchinson 1995, 38). The argument is essentially that rights talk is becoming limitless, rights as they are formally delineated cannot determine their own substantive context, and the only way to substantiate such rights is to look beyond the language in which they are written towards normative, evaluative and ideological considerations. Hence, as he vehemently argues, the determination of fundamental rights and their substantiation is not just divisive and contested, but it is the Charter of Rights and Freedoms that exacerbates these issues and creates a realm in which "contingency permeates the whole debate in and around rights-talk" (Hutchinson 1995, 37).

Beyond the issue of what fundamental rights actually are, and how they are substantiated, there is also the issue of to whom or to what they apply. The 'identity of

rights holders' has largely been based on the way that the law has defined and treated the legal person[8] (Hutchinson 1995, 29). Hutchinson's argument is simply that what constitutes a legal person under the law has been abstract, indeterminate and inconsistent. For example, up and until 1929, women were not eligible for membership in the Senate because they were not persons under the law. This exemplifies the semantic problem of identifying the proper criteria or principles of meaning which constitute a legitimate rights-holder in the eyes of the law. Beyond the history of human legal personality, its development and its limitations, is the recognition of non-human entities' entitlement to legal rights. In comparing the recognition of economic organizations and corporations as legal persons under the law and the denial of such recognition to labour unions, Hutchinson (1995, 34) claims that this exemplifies the courts' "inconsistency and partiality" in attributing personal characteristics to non-human entities. Given Hutchinson's insights concerning the abstractive, indeterminate and inconsistent nature of rights holders, the important connection to be made here is that although these concerns are not novel, *it is the Charter that has created an avenue by which these semantic problems can be exacerbated.*

Finally, Hutchinson draws the reader's attention to the inability of rights as they are enumerated in the Charter to determine the scope of their own application. It is said that although there is some consensus on which rights are fundamental in Canadian society, these rights are 'malleable', 'plastic' and 'indeterminate' (Hutchinson 1995, 39).

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[8] The literature on the topic of legal personhood and personhood in general is voluminous. Although he more than likely had no intentions of it being thorough or exhaustive, Hutchinson's treatment of this topic is cursory. For exceptional introductions to legal, sociological and philosophical treatments of individuals, human beings and persons, see Margaret Radin. "Property and Personhood." Stanford Law Review 34 (1982): 957-1015.; Spencer Cahill. "Towards a Sociology of the Person." Sociological Theory 16:2 (1998): 131-48.; S.F. Sapontzis. "A Critique of Personhood." Ethics 91: (1981): 607-618.

He (1995, 39-40) identifies the competing ideological dichotomies of formal and substantive equality as a testament to the interpretive proclivities of rights language. It is in this respect that the application of certain rights *can* lead to contradictory conclusions[9]. Thus, the application of rights such as equality may only provide a context in which conflicting ideological variants of equality can continue to impede securing a clear and determinate understanding of its meaning.

Competing Rights

The competition for the recognition of two or more rights in a Charter case, and the judiciary's obligation to 'choose' which right shall prevail, has also been the source of criticism. How is the court to weigh the competing rights of equality and liberty, or individual and collectivist interpretations of democratic rights such as freedom of religion? As Hutchinson (1995, 48) laments, the methodology of the courts seems to be based primarily on "ideological predisposition rather than legal argumentation." Balancing rights, then, appears to reflect a deep and underlying truth of indeterminacy in Charter adjudication. Furthermore, although the main goal of balancing rights is to

> identify different interests, attribute respective values to them, and weigh them on a constitutional scale...rather than amount to a solution to the judicial dilemma of constitutional legitimacy, balancing seems to concede the fundamental incommensurability of constitutional argument (Hutchinson 1995, 48).

Again, as Hutchinson continues to stress throughout his text, these semantic problems of identifying the meaning of certain rights and how they shall be balanced in respect to each other, is devoid of any precise and determinate methodology, resulting in the inevitable invocation of ideological and political considerations.

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[9] A case that is often used to illustrate the possibility of contradictory decisions in equality cases is *Andrews v Law Society of B.C.* wherein Justice McIntyre created a three step approach to determining and justifying equality claims on the basis of discrimination.

Between Rights and Social Interests: Beyond the Confines of Rights Talk

The last of Hutchinson's semantic issues that I wish to raise, is his concern with the competition between existing Charter rights and communal or social interests. The main thrust of his argument is based on what he considers the "malleability" of the Oakes test[10] to determine whether or not a Charter right has been justifiably infringed (Hutchinson 1995, 49-55). The question, then, is *when* enumerated rights should yield to competing social values. Further, Hutchinson claims that the appeal to the "greater public interest" when assessing the nature of the infringement through the Oakes test is an illusion. He goes on to say that "such disputes speak to the *fractures in community values, not their availability as a source of normative construction"* (Hutchinson 1995, 49, emphasis added). As is reiterated time and again in the damning language through which he articulates his criticisms, Hutchinson (1995, 50-53) complains that the mechanism through which the judiciary determines the justifiability of rights infringements cannot "apply itself" and will inevitably result in the consultation of "exogenous norms" to reach an often politically charged or policy driven outcome.

The aforementioned arguments on the substance and scope of rights, the identification of rights holders, and competition between enumerated rights and societal interests, all raise concerns of *semantic indeterminacy.* It seems that Hutchinson has predicated his arguments on two grounds: 1) rights talk is illusory and fundamentally indeterminate; and 2) lack of determinacy and fixed meaning is an *undesirable*

[10] Created by the Supreme Court in *R v Oakes* as a rationale for assessing whether or not Charter rights could be justifiably infringed, the Oakes test guides a section 1 reasonable limits analysis, including the following key criteria: The objective of the government in limiting a Charter right must be pressing and substantial and the means adopted to reach such an objective must be proportional to the objective. Furthermore, the means adopted must have a rational connection to the objective, which impairs the right as little as possible and whose benefits outweigh its detriments.

consequence of the Charter. I will now attempt to respond to these criticisms.

Response: Re-Conceiving the Charter

There is no doubt that the Charter of Rights has proven to be a document that is neither wholly determinate of its application nor a mechanism that has unequivocally resulted in the total separation of the political realm from the legal realm. These are concessions that I am willing to make. However, I do not think that conceding such points precludes the opportunity to respond. As Waluchow (2005, 220) asserts, critics of the Charter often conceive of it as "aspiring to embody fixed points of agreement on and pre-commitment to moral limits on government power." If what I have identified as Hutchinson's semantic arguments is accurate, one can see the plausibility in attributing to him such a view. He does characterize the Charter as a document wrought with indeterminacy and inconsistency, contributing to the failure of 'rights-talk' to efficiently deal with the protection of individual interests from the power-wielding government. As Hutchinson constantly refers to the malleability of rights, their indeterminacy of meaning and application, and the invariable pervasion of ideologically grounded reasons in rights-based decisions, *there is no doubt that he is claiming that the Charter has hitherto failed to provide reliability, stability and determinacy through the judicial application of its contents.* Yet, as I will argue, a commitment to the Charter as a fixed document resembling a static view of moral commitment to the protection of interests is not an ideal alternative, is flawed, and is antithetical to the nature of law itself.

First, what we have to understand about legal propositions, whether they be contained in legal statues or constitute Charter rights, is their necessarily penumbral capacities. H.L.A. Hart, perhaps the most influential legal philosopher of contemporary

history, explained the importance of avoiding the specter of formalism, while understanding the need for some degree of specificity in legal standards, in order to compensate for our inability as humans to contemplate the many possible future situations in which rules can apply. (Hart 1994).

In a complex world consumed with contrasting and multifarious human intuitions, perceptions and intentions, there exists rules that normatively guide, direct and constrain human conduct in order to sustain societal order. As such, general rules, which comprise the body of law under which all humans are subjected, are enforced through legal systems as vehicles of social control. However, in light of the intrinsic ambiguity in human language, in which societies' rules are structured, there exists what Hart termed an *open texture* in law; a state of relative indeterminacy in the meaning of rules in certain fact situations unanticipated by the framers of the law. Hence, there will inevitably be instances where a specific legal rule will fall into the realm of judicial interpretation. This is the very *essence* of Hart's concept of the law.

Hart claims that there is an indubitable core meaning of a rule, yet, as a result of inconceivable fact situation, there are instances where the rule enters the penumbra of doubt. This is what Hart means by the 'open texture' of rules[11]. His anti-formalist justification for the indeterminacy of rules in certain instances is assertive and emphatic: "Particular fact situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is in question, nor can the rule itself step forward to claim its own instances" (Hart 1994, 126). Thus, this

[11] To illustrate open texture, Hart (128-9) introduces the hypothetical rule that there shall be 'no vehicles in the park'. 'Vehicle' has a core meaning of auto vehicles such as cars or other motorized vehicles. Where the term vehicle has open texture and moves the rule into the 'penumbra of uncertainty', is when we consider, for the purposes of the rule, whether or not a bicycle, skateboard, etc... can appropriately be deemed a 'vehicle' in the context of the rule.

combination of 'ignorance of fact' and 'indeterminacy of aim' characterizes the open texture of rules.

To connect Hart with this discussion, the Charter of Rights and Freedoms is a document that should be conceived as embodying our concession as human beings that *lack a legal language that can account for each and every instance to which each Charter right applies.* Thus, there must be opportunity for change in a legal system in order to avoid the 'static' character of legal norms, a characteristic that would prohibit the possibility of change in the law, which is informed by changes in societal values, interests and attitudes. This last point needs further justification. In conjunction with Hart's perspective on the inherent and desirable indeterminacy of legal language, *further justification* for embracing the Charter is offered by Waluchow:

> Far from being based on the unwarranted assumption that we can, in advance, have all the right answers to the controversial issues of political morality which might arise under Charter challenges to government action, and that we are warranted in imposing these answers on those by whom we are succeeded, the *living tree* conception stems from the exact opposite sentiment: from a recognition that we do not have all of the answers and that we are best off designing our political and legal institutions in ways which are sensitive to this feature of our predicament (Waluchow 2005, 228, emphasis added).

Embracing the living tree conception of the Charter not only complements the inevitable and desirable flexibility of rules, but it also distances us from a rigid, mechanical and autonomous view of the law as that which can apply itself and formulate decisions without recourse to the "proper linguistic, philosophic and historical contexts" (*R v Big M Drug Mart*, 344) in which the right should be placed. Therefore, in addition to Hart's indeterminacy thesis, the conception of the Charter as a living tree, if accepted, may suffice to justifiably circumvent the criticisms propounded by Hutchinson by discrediting his proposition that the *indeterminacy of rights is undesirable.* If my argument is

accepted, indeterminacy in 'rights-talk' should be conceived of as an inherent and characteristically *desirable* element of the Charter.

Furthermore, accepting the intrinsic desirability of flexible Charter language and the possibility for change through the inclusion of moral reasoning in the adjudicative process does not thereby expunge the *fixity* and *circumscriptive* qualities of rights. Rights are not just "empty vessels waiting to be filled with some political content" (Hutchinson 1995, 56), substantiated according to the preferences of individual judges.

Without getting into the justificatory adjudicative defence which occupies the final chapter of this thesis, fixity and general circumscription is achieved in rights language by the doctrinal development of principled rationales for judicial reasoning and the limitations on extending the meaning of moral terminology past its core or central purpose.

With respect to the development of principled rationales, the most emphatic example of one is the *Oakes* test, which was deliberately constructed to help circumscribe the meaning of the naturally ambiguous phrase 'reasonable limits' in the reasonable limits clause of section 1 of the Charter. While the court views the application of the Oakes test in constitutional cases as highly dependant on contextual circumstances, and therefore is unable to state a single, unequivocally 'proper' way to apply the test (Sharpe & Roach 84), the Oakes test has still functioned in the courts as a mechanism for eliminating radical indeterminacy[12] in rights cases. There is now an institutionalized doctrinal test, capable of generating justificatory reasons for either allowing or

[12] Radical Indeterminacy is generally a linguistically-based concept, which asserts that there is no proper meaning to be given to a particular term, and, as such, there is no way of determining whether a certain term or expression applies in a certain case. For work on this definition see Timothy Endicott. "Linguistic Indeterminacy." Oxford Journal of Legal Studies 16:4 (1996): 667-97.

disallowing the infringement to remain within constitutionally recognized reasonable limits. It is on this basis that it can be said that *radical* subjectivity or indeterminacy in section 1 justifications has been eliminated. It would be unpersuasive if one were to argue that the substantiation of rights by judges is without any degree of fixity or circumscription. Thus, although the Oakes test does not 'apply itself' as it would in an ideal world of linguistic objective determinacy, it does not logically dictate that rights are therefore "empty vessels waiting to be filled with some political content" (Hutchinson 1995, 56).

Moreover, fixity and circumscription is also achieved in Charter rights discourse through the limits placed on *extending the meaning* of moral-based concepts in Charter rights propositions. As Aileen Kavanagh (2003, 62) argues, "even though constitutional clauses may be indeterminate with respect to a particular issue, they have a certain range of meaning, the boundary of which is marked out in the constitutional text." For example, the range of considerations, recourse to which the judiciary has in order to arrive at a reasoned conclusion, that apply to a section 12 'cruel and unusual punishment' case, are circumscribed by the language of the terms 'cruel' and 'unusual'. The clause therefore limits the range of government action to punishments, and further, to punishments that are qualitatively serious (Kavanagh 2003, 62). Hence, the right to be free from cruel and unusual punishment by government officials is interpretatively fettered by the very language in which it is written thereby preventing the extension of the meaning of the terms in which it was written beyond their intended core and reasonable purpose.

Beyond the interpretive limitation of the terms themselves, it is arguable to assert that interpretations of moral terminology in 'borderline' (Hart 1994) or 'hard cases' (Dworkin 1977; 1985; 1986) is not limitless or unbounded[13]. Surely there are instances in which the moral terms in a law have been applied in previous cases thereby effectuating a determinate or proper reading of the term in question. If there is a moral stipulation of 'fairness' with respect to the validity of a bargaining contract, and that fairness has been identified or articulated in precedent cases or previous statutory interpretations, then surely a judge is not exercising an *unbounded* discretion when addressing such an evaluative criterion in a subsequent case. Furthermore, if we look at the morally laden term 'discrimination' as it appears in section 15, there are enumerated and analogous grounds on which no Canadian citizen shall be prejudiced or unjustifiably burdened. The term discrimination, therefore, cannot be manipulated to apply to or justify any conceivable fact situation. Given the overall context in which it is written, *the term itself is definitive enough to constrain the limits of judicial interpretation.* Additionally, since *Andrews,* the court has further circumscribed the nature of the term 'discrimination' by focusing on substantive rather than formal discrimination. As Sharpe and Roach (2005, 319) explain, "The [Supreme] Court has insisted that the equality guarantee mandates *substantive review*, avoiding a formalistic approach that would fail to take into account social reality." Again, these common law arguments give credence to the proposition that there exists a degree of fixity and circumscription in the meaning of Charter rights.

To be clear, I have not attributed Hutchinson as one of the 'formalists' towards

[13] These are cases where, conflicting theoretical and philosophical accounts set aside, there appears to be a gap in the law such that the legal rules themselves can not dictate a determinate outcome in the given fact situation.

which Hart was directing his argument on open texture. Although Hutchinson (1995, 60) maintains that the law "cannot offer determinate and objective guidance in the resolution of most legal cases" and that the law is "irredeemably indeterminate" leading to the view that legal interpretation is "thoroughly political because its performance and product can never be detached from the identities and interests of the interpreters", he does not take the formalist stance that we should therefore have no rules. Instead, Hutchinson claims that this lack of determinacy and objectivity in Charter rights "is fatal to the *legitimacy* of the adjudicative enterprise". What I have attempted to do in this chapter, is mitigate the force of Hutchinson's criticisms with respect to the indeterminacy of rights talk. In his discussion of the meaning of rights, competing rights, etc, he makes the general argument that rights are indeterminate and that ideological or exogenous considerations play a significant part in the substantiation/definition of rights. I have used Hart to show the inherent indeterminacy of legal language, and the living tree conception as justification for such indeterminacy. I then discussed how rights still have a degree of fixity and circumscription. I did this because Hutchinson suggests that rights talk has failed and it has not been reliable or predictable. What I have done is tried to downplay the negative side of semantic indeterminacy and put it in a better light. I do not think Hutchinson believes that *all Charter rights* should be capable of rendering determinate outcomes in the contexts to which they are applied, but I certainly believe that he sees the indeterminacy of 'rights talk' as an undesirable characteristic of the Charter; a point that I fundamentally disagree with.

The foregoing response challenges the assertion that the Charter should be a fixed and purportedly deterministic document resembling a static view of moral commitment to

the protection of interests. It shows the Charter as a living tree whose indeterminacy should be embraced and considered desirable. Finally, it vitiates the notion that links indeterminacy to freewheeling or radically subjective interpretation by showing how there is a degree of fixity and circumscription in Charter rights.

Conclusion

The arguments advanced in this section indicate the existence of considerable contestation with respect to several different aspects of the Charter of Rights. However, in no way are they meant to constitute an exhaustive representation of current and past viewpoints. The *political* and *semantic* arguments that I have explicated are what I regard as some of the more prominent and important in Charter rights discourse. Although an understanding of the Charter of Rights and Freedoms would be significantly inhibited without knowledge of political context, the more pressing concerns in this thesis are those that are based on the semantic issues of meaning, interpretation and the nature of judicial reasoning in Charter cases. In addition to the foundational concept of legal validity and the elements thereof, these three considerations will re-occur throughout the thesis, acting as underlying themes and bases on which related issues may be explored.

The significance of semantic-related arguments with respect to Charter adjudication raise clear and compelling questions for legal theory: What are the existing legal theories which purport to depict the relationship between the law, authority, reason, interpretation and morality? What are the shortcomings of these theories? Can the appeal to moral considerations or morally charged arguments even be theoretically explained as an essential element of Charter jurisprudence? Can there be an adjudicative typology,

which, when adhered to, stabilizes the interpretive process in Charter adjudication and mitigates the charge of indeterminacy?

It is my intention to answer these questions. In the next two chapters, a critical analysis of competing theories of law and adjudication will serve both to illuminate the several theoretical inadequacies, obscurities and practical deficiencies of existing jurisprudential theories, and act as grounds for advancing a theory of law known as Inclusive Legal Positivism. This theory, I contend, not only accurately describes the operation of a legal system which contains a Charter of Rights, but it is also the basis for propounding an adjudicatory defense involving the creation of what I characterize as a justificatory adjudicative typology or attitudinal model grounded in and supported by a legal hermeneutics. It is to the task of theoretical criticism that I will now turn.

Chapter 2: Theoretical Criticism: En Route to Justifying Inclusive Legal Positivism

As I have clarified in the concluding remarks of the preceding chapter, this chapter will be devoted to a critical analysis of competing jurisprudential theories of law and adjudication in order to illuminate their own deficiencies as plausible explicatory devices for analyzing the nature of law.[14] This analysis will set the grounds for the claim that they are inferior compared to the explanatory and justificatory capability of Inclusive Legal Positivism. The introduction, explication and descriptive justification of Inclusive Legal Positivism shall be covered in the third chapter.

When one embarks on an analysis of the concept 'law', it is difficult to ignore or subvert the issue of morality to which such a conceptualization is so often connected and on which so much of the jurisprudential literature has been based. This chapter can appropriately be placed within the ambit of a legal-philosophical analysis of the relationship between law and morality. This is so, because, as will become clear, the plausibility of Inclusive Legal Positivism in the context of this thesis will *depend on the way in which the appeal to moral considerations is connected to the underlying criteria of legal validity.*

The following discussion will be broken down into two main sections. First, I will make some preliminary comments on the progression of the debate among legal theorists with respect to the intricacies of the law/morality relationship. In this section I hope to illuminate the theoretical paradigms of legal positivism and moralism through a

[14] The nature of law includes, in general, the way it is both conceptually and empirically connected to morality. The more specific topics that I have already mentioned in the discussion of political and semantic Charter criticisms include legal validity and the appropriate constitution thereof, the meaning of legal rights, and Charter adjudicative interpretation/reasoning.

discussion of two of its original leading proponents: H.L.A. Hart and Lon Fuller. I then introduce the theories of Ronald Dworkin and Joseph Raz, which have taken their place in the realm of jurisprudence as two of the three distinct paradigmatic positions with respect to the concept of law and its relationship with morality.

Second, in light of the first section, I focus on the Exclusive Legal Positivism of Joseph Raz and the interpretive theory of Ronald Dworkin as the basis for my theoretical criticism. The reason for such focus is their undeniable prominence in a conceptualization of law and adjudication, and their commonality as both opponents and adamant criticics of Inclusive Legal Positivism. It is my hope in this section to explicate the problems with these theories *on their own merits.* This will be done by analyzing their treatment of topics including the relevance of coherence in interpretation, easy and hard cases and judicial discretion.

Section 1: Explicating the Law and Morality Continuum in Jurisprudence

The relationship between law and morality has its origins as a legal-philosophical topic of discussion for proponents of legal positivism and natural law theory. Briefly, natural law theory has existed for approximately 2500 years (Boyd 1998, 9). While elements thereof can be found in the works of classical philosophers as early as Plato's *Republic,* others such as Augustine directly defined the natural law tradition with the phrase 'an unjust law is no law at all'. Contemporary philosophers of law have narrowed their focus to the fundamental tenets of law in legal systems and propounded theories based on law being commensurate with and reflecting 'principles of natural justice' and including as a necessary validating element an 'internal morality' (Fuller 1958; 1969).

In its early formulations, legal positivism was associated with a strict and parsimonious view of law which emphasizes the importance of and basing its validity on legitimate procedure, excluding the need for such law to reflect a particular moral fiber of society or include as an element of its valid existence a particular acknowledgment of morality or justice. Defining the early tradition was philosopher John Austin ([1832] 1994, 157) whose famous phrase encapsulated the early positivistic paradigm:

> The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.

In sum, the aphoristic assertions that continue to identify the main source of divergence between the legal positivists and natural legal thinkers are briefly as follows: The former concern themselves with the 'law as it is' by identifying legitimate methods of legal promulgation while the latter emphasize what the law 'ought to be' by identifying necessary moral elements that the law must reflect.

The foregoing brief overview of natural law and legal positivism is as simplistic as it is insubstantial. If one were to attempt to explain or understand such an ineluctable body of thought in jurisprudence on the basis of the aforementioned, one's basis for knowledge would be fundamentally incomplete. Therefore, it must be clarified that this notion of incompleteness is due to the fact that the concept of law and its relationship with morality has produced variant theoretical perspectives that go beyond the confines of the early formulations of positivist and moralist theories, and attempt to combine certain elements of both perspectives into an integrated whole. The progression of the debate between positivist and moralist legal thinking has therefore reached a point of

theoretical intersection: No longer are such paradigms mutually exclusive, nor can they be said to form a distinct dichotomous epistemology with respect to the concept of 'law'.

Hart, Fuller & the Impetus for Debate

The beginning of this new era of theoretical expansion and integration in contemporary jurisprudence has been associated with the famous debate between natural legal scholar Lon Fuller and analytic legal philosopher H.L.A Hart in 1958. The exchange between Hart and Fuller has been regarded as the impetus for the contemporary continuity of the law/morality dispute. The debate was centered on the topic of "what role, if any, legal positivism...could play in the resistance to evil laws and evil regimes" (Bix 2005, 31)[15]. The manifestation of each philosopher's theories came in the form of Hart's publication of *The Concept of Law* in 1961 and Fuller's *The Morality of Law* in 1964, in which the issue of morality and what role it plays in a legal system was among the central and underlying elements. It is these indelible works from which subsequent legal philosophers and scholars from other disciplines have extrapolated their theoretical ideas and perspectives, both sympathetic with and antithetical to Hart and Fuller's ideas on the foundation of a legal system, legal and moral obligation, and, of course, the nature of the connection between the law and moral considerations. A brief look at these theorists' work is warranted.

In the *Concept of Law*, Hart argued for a conceptual and descriptively accurate general or global concept of law on the basis of three points: 1) Law can be authoritative

[15] The political context in which this famous debate took place was after the fall of the Nazi Regime. The legitimacy of the Nazi's legal system was questioned: Did the inherent unjustness and morally iniquitous nature of their norms or standards of conduct vitiate their qualification as 'law'? Or does this question exceed the concern of the positivist tradition? Furthermore, what theory of law can better resist evil laws and regimes? It is in these respects that the 'moral question' is said to have recanted the jurisprudential discussion around the nature of the relationship between law and morality.

without it being morally legitimate; 2) Legal obligations are manifested by social acceptance and are different from the command or imperative theories of law propounded by Austin; 3) Legal Positivism holds as its central thesis that there is no *necessary* connection between law and morality (Ketchen 1999, 40).

On the basis of these three points, Hart introduced a dynamic legal theory, which purported to describe the nature of law and legal systems, based on a complex account of *rules and how such rules entail obligations.* Rejecting the Austinian imperative theory of law on grounds that it failed to consider the difference between having an *obligation* and merely being *obliged*, Hart sought to reveal the nature of obligation-conferring rules beginning with a definitional discussion of what can be identified as his 'practice theory'. According to Hart, the key to understanding the force of rules in this practical respect is based on the manner by which they are *accepted* by those who fall within their applicatory ambit. Thus, for rules to exist, at least some members of the entity to which the rules apply must look upon the behavior governed by the rules as a "general standard to be followed by the group as a whole" (Hart 1994, 56). This 'internal aspect' of the rules is emphasized by those who administer a critical reflective attitude towards them. This attitude is manifest in the behavioral and expressive proclivities of those who have such an attitude. As Hart stresses:

> What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong' (Hart 1994, 57).

The integral feature of the rule is then that it is in and of itself a reason for following it. This feature distinguishes a rule from a mere habit; a feature that Hart claimed vitiated Austin's imperative theory.

However, according to Hart, an understanding of what produces a *legal obligation* can only occur once the relationship between primary and secondary rules is identified. Hart differentiates the two types of rules as follows:

> Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from doing certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. *Rules of the first type impose duties; rules of the second type confer powers, public or private* (Hart 1994, 81, emphasis added)

Hart claims that in order to ameliorate the *uncertainty* of the authoritative force of primary rules of obligation, the *static* character of rules and the *inefficiency* of their application, secondary rules of recognition, change and adjudication exist in a legal system. Hart considers that by identifying the union of primary and secondary rules, "it is plain that we have here not only the heart of a legal system, but a most powerful tool for the analysis of much that has puzzled both the jurist and political theorist" (Hart 1994, 98). Hence, by elucidating and explaining what a rule consists of, the internal point of view, the union of primary rules of obligation and secondary power conferring rules and, most importantly, the rule of recognition that provides the criteria by which the validity of rules is assessed[16], Hart lays a theoretical foundation for what may constitute a legal system.

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[16] The Rule of Recognition will receive a thorough analysis in the third chapter, since an understanding of it is critical to the arguments in, and overall coherence of, this thesis.

Finally, his discussion of the importance of rules and obligations and the internal point of view is fundamentally connected to his view on the unnecessary inclusion of a moral commitment in the acceptance of the authority of law. Hart maintained that, although the law's normative authority may be accepted, that those who accept it "are not thereby committed to a moral judgment that it is morally right to do what the law requires". Hart (1994, 207) further stipulated that although "morally iniquitous laws may nonetheless still be laws", any connection between the law and morality is contingent only and depends on whether or not the ultimate criteria of legal validity (identified by the rule of recognition) include the appeal to moral considerations in the form of legally recognizable normative standards.

Moreover, Lon Fuller's work can be primarily understood as a series of arguments to undermine Hart's theses. In *The Morality of Law,* Fuller's elucidation of legal normativity essentially entailing 'fidelity to the law' was based on a rejection of the conceptual and descriptive accuracy of Hart's positivism, and the claim that a proper 'procedural natural' theory of law includes the recognition of a series of principles of legality that manifest the law's 'inner morality'.

In his famous Reply to Critics, added to the end of his 2nd edition of *The Morality of Law,* Fuller (1969,192) challenged Hart's positivism by exposing its "one way projection of authority" from author to citizen rather than focusing on the law as an essentially cooperative enterprise. Furthermore, positivist thinking was accused of being rooted in the philosophical question of not what law is or does, but from where it comes. The focus is therefore a question of source and not substance. In addition, Fuller (1969,193) focused on what he considered to be the most significant and debilitating

claim made by the positivists: "[Positivists] believe that clear thinking is impossible unless we effect a neat separation between the purposive effort that goes into the making of law and the law that in fact emerges from that effort." What Fuller appears to be lamenting is that in a positivist's account of law, the law essentially becomes a fixed datum whose meaning is no longer informed by the processes of interaction or the background conditions from which it was given meaning in the first place. He sees this disjunction between meaning and purpose as a fundamental flaw and fatal to the positivistic perspective.

Finally, as will suffice for this brief account, Fuller identifies eight principles which he maintains are immanent in law and are integral to fulfilling a legal system's role of coordinating relations between and amongst officials and citizens. In order for the law to achieve its purposive function, it must necessarily include each of the following constitutive principles: Law must be general in its application, it must be promulgated openly and in a public manner, it must not be retroactive, it must be clear, it must not be contradictory with respect to the extant law, it must be capable of being obeyed, it must have constancy through time, and must be administered so the action of an official represents the action allowable by the declared rule (Fuller 1969, 46-91). These eight principles constitute the inner morality of the law, and each to some extent functions as the criteria of legality in any legal system forming its basic claim to legitimacy. A 'fidelity to the law' is therefore possible in such a system where adherence to the aforementioned principles of legality reflect the substantive aims of justice and rationality. Hence, as is apparent in Fuller's explications, the role of morality in the law's legitimacy is not only fundamental, but it is necessary in securing the law's function to

coordinate the actions of citizens as well substantiating the minimal constraints necessary for a continuity of reciprocal interaction between citizens and their authoritative figures.

The insightful claims made by both Hart and Fuller projected the law/morality relationship to the forefront of jurisprudential topics of discussion. It is no surprise that for the past several decades the emergence of such a large body of legal- philosophical literature on the subject includes either direct responses to the authors' work, or theoretical construction the basis of which is either a critical or sympathetic analysis of some aspect or element in positivistic and moral theory. In what follows, I highlight two of the three main theoretical variants of the positivistic and natural legal perspectives that have developed during the progression in jurisprudential thought, and how they have manifested themselves in the context of a divide *within the legal positivist camp itself.* Evidently, it is the latter point that sets the context for the forthcoming theoretical analysis.

Ronald Dworkin

Beginning with his groundbreaking anti-positivist claims in "Model of Rules 1" (Dworkin 1967) and culminating in his masterful, yet challenging text *Law's Empire* (Dworkin 1986), Ronald Dworkin set out to undermine essentially his own conception of Hart's positivism[17], and the result of such powerful and unique arguments can be found in the past five decades of jurisprudential literature. Ronald Dworkin's legal theory has been termed moral/evaluative (Waluchow 1994, 9-30) because it is grounded on the assumption that identifying the law always involves, at some level or within some threshold, *normative* considerations and that the best way to understand the concept of

[17] His conception, which he names conventionalism, is essentially a construal of positivism to fit his interpretive framework. It has also been rejected by Hart (1994) and others (Coleman 1998; Waluchow 1994).

law is to understand adjudication. The latter assumption maintains that conceptuality and practicality must intertwine in order to present a sound conception of law. Dworkin's legal theory is given full account in his renowned text *Law's Empire*. Without explicating all of its intricacies, I will briefly discuss Dworkin's unique and challenging perspectives on the relationship between law, interpretation and morality.

Challenging the purported legitimacy of past legal theory, Dworkin implicitly categorizes Hart's legal positivism as 'the plain fact view of law' since it treats propositions of law as being true on the basis of their empirical or factual existence. Generally, Dworkin terms this view a 'semantic theory', which assumes that grounds of law are identifiable by reference to their 'legal language', and criticizes its validity by asserting that legal disputes often involve "theoretical disagreement" over the grounds of law; not disagreements with respect to the source of law (Dworkin 1986, 5). Dworkin characterizes those who erroneously believe that disagreement in law is exclusively empirical as suffering from the "semantic sting" (Dworkin 1986, 46). It is on these grounds that Dworkin believes past legal theory failed to address the theoretical issues and so he introduces the concept of *interpretation* as the framework for his underlying claim that legal justification is dependant, in part, on considerations or existential principles of political morality.

Dworkin (1986, 47) claims that in order for any social practice to be identified 'in its best light' members of a community must employ an interpretive attitude towards the rules of such practice. Using courtesy as an example, Dworkin illuminates the nature of *acceptance and disagreement* among people about the social practices that manifest their community. By doing so, he distinguishes the pre-interpretive and interpretive stages,

which explain how rules of any social practice are both *accepted and given meaning.* Engaging in the pre-interpretive stage involves asserting a rule's existence without reference to its point. This fits well with the positivist view of law as being valid on the basis that it is an empirical fact. However, Dworkin (1986, 47) identifies the interpretive stage as including the

> assumption that the practice [of courtesy or any practice] does not simply exist but has value, that it serves some interest or purpose or enforces some principle-in short, that it has some point that can be stated independently of just describing the rules that make up the practice.

So when people adopt this interpretive attitude, they "impose meaning on the institution- to see it in its best light- and then to restructure it in the light of that meaning" (Dworkin 1986, 47). The point of describing the interpretive attitude towards the social practice of courtesy is to show the bases for viewing law itself as an interpretive concept. The law, itself a social practice, is then to be interpreted to establish the meaning or point it is supposed to reflect. The two essential ingredients to legal legitimacy are moral (substance) and formal (fit) justifications. I have now reached the heart of Dworkin's theoretical principles of adjudication and interpretation. This is that the appropriate interpretive conception of law involves a process by which legal arguments are justified on the basis that they are both *coherent* and *morally appealing.* Dworkin labels this 'law as integrity'.

Joseph Raz

Primarily as a response to Dworkin's argumentative attempts to vitiate the positivist tradition (Kramer 2003, 54), legal philosopher Joseph Raz rearticulated a version of positivism that sought to further separate the relationship between law and morality to the

point of the near evisceration of the latter from the context of the *identification and validation criteria of the laws in a legal system.*

Joseph Raz, defender of exclusive or hard positivism, is a proponent of a legal-philosophical theory which includes conceptual considerations of authority, morality, reason and their interrelated significance in understanding the nature of the law, the operation of a legal system, and, at a more abstract level, overarching questions concerning the law's legitimacy and validity. Following the methodology of the late H.L.A. Hart, Raz adopts an analytical or descriptive/explanatory theoretical framework and proceeds to reveal the concept of 'the law' and 'the legal system' by propounding powerful and insightful arguments. Given the complexity and breadth of Raz's theoretical ideas, the following is an attempt to highlight some of the salient elements of his approach to understanding the law as a "medium between practical reason and action" (Raz 1994, 194-221).

Essential to fathoming the gist of Razian theory, one must understand his claims about the sources of law. Avoiding the normative claims of natural law theory, Raz asserts that accepting the parsimonious thesis that all law is source-based is justified because it "reflects and explicates our conception of the law" (Raz 1979, 48). According to Raz, a law is source-based "if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument" (Raz 1994, 194). We have here the simple yet powerful argument that moral or value considerations are unnecessary to determine the validity of any law, since its validity is de facto given if the law was promulgated in a legislature or developed in a legal decision. Thus, the Razian sources thesis parallels the hard-positivistic conception of law as one which, as a matter

of observable fact and conceptual necessity, "excludes morality from the considerations which can determine whether a standard exists as valid law and what it says and requires of us" (Waluchow 1998, 387). Hence, the *exclusion of morality* characterizes Raz's theory as Exclusive Legal Positivism. This thesis is at the core of Raz's legal theory and serves as a basis from which much of his further arguments are extrapolated. Yet it is his account of the authoritative nature of law's normativity and its ability to affect human practical reasoning that is most significant in attempting to understand the underlying premises of his often perplexing theoretical perspectives. Hence, the remaining brief account of Raz will focus on his claims about the functional importance of authority and reason in law.

Raz's doctrine of authority, albeit complex, can be simplified by focusing on its central points. To commence, Raz contends that the normativity of law is efficacious due to its (the law or the legal system) ability to claim to possess legitimate authority. According to Raz (1994, 202), the capacity for a norm to claim legal authority contains two underlying tenets:

> First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate.

The second feature of authoritative directives touches on the core of Raz's theory. This is the function of pre-emptive or exclusionary reasons as grounds for or indicating components of a claim to legitimate and justificatory legal authority. Raz contends that law's authoritative efficacy is dictated by its role in excluding citizen's reasons for action

and adopting or following the given legal directive as a basis for action.[18] It is in this sense that the law is said to be a medium between unlimited practical reason and action. In his three central theses, namely, the dependence, normal justification and pre-emptive theses, the full implications of Raz's doctrine of authority are summarized and elucidated:

> The Dependence Thesis: All authoritative directives should be based, among other factors, on reasons which apply to the subjects of those directives and which bear on the circumstances covered by the directives. Such reasons I shall call dependant reasons.
>
> The Normal Justification Thesis: The normal and primary way to establish that a person should be acknowledged to have authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding, and tries to follow them, than if he tries to follow the reasons which apply to him directly.
>
> The Pre-emption Thesis: The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should replace some of them (Raz 1994, 198).

Clearly, Raz believes that a proper interpretation of legal practice would necessarily involve importing the central assumption that the law presents reasons which legitimately replace or displace other considerations (moral, political, etc...) in determining what action one should take. Hence, one can observe the inextricable connection between authority and reason in Raz's theoretical explanation of the nature of law. This brief account of Raz's exclusive legal positivism and the salient elements of sources (excluding morality), authority and reason contained therein, is the theoretical foundation for considering his exigent views on the way in which moral reasoning factors in adjudication. As will be clear, it is the role of moral reasoning and the characterization of

[18] In his discussion of normative power, Raz (1979, 17) identifies negative second order reasons or exclusionary reasons as "reasons to refrain from acting for a reason". He then maintains that the law operates on the basis of such excluding reasons for action.

law that it constitutes that fundamentally separates Exclusive Legal Positivism from its counterpart: Inclusive Legal Positivism[19].

As translated by Peter Koller, European legal philosopher Hans Kelsen once remarked, "Legal Positivism is not finished and never will be, as little as natural law is finished, and never will be. This conflict is eternal. The history of ideas shows that sometimes one, sometimes the other position comes to the fore" (Koller 2006, 180).

This is clearly reflected in above considerations of Hart, Fuller, Dworkin and Raz. All have at the basis of their theories a conception of either the descriptively accurate or normatively correct relationship between law and morality. It is their differences and the responses that they have engendered that has perpetuated this pervasive topic in jurisprudence. Although the debate between theoretical perspectives continues, there appears to be one point of convergence: There certainly is not any foreseeable point in time where legal theorists concerned with the nature of law and its relationship with morality will become obsequiously reserved; the vehemence in theoretical retort is likely to continue in the realm of analytic and normative legal philosophy.

Prior to introducing the inclusive position as the other half of the positivist divide, which responds to Dworkin's criticisms of Hart's positivism and attempts to rebut the exclusive legal positivism of Joseph Raz, the next section is a critical analysis of Dworkin and Raz's arguments on their own merits.

Section 2: Exposing the Deficiencies: Dworkin & Raz Juxtaposed

In order to maintain an exceptional degree of coherence, the points of critique that will follow will be on themes that are dealt with by *both* Dworkin and Raz in their voluminous work. Exclusive legal positivist Joseph Raz, and proponent of interpretive or

[19] This issue will be analyzed in Chapter 3 as the main point of contestation between ILP and ELP.

evaluative legal theory Ronald Dworkin, have both utilized conceptions of interpretation[20]. Thus, the following discussion can be contextualized by the universal theme of interpretation. Although the result of their perspicacity has amounted to often antithetical points of view, examining Raz and Dworkin illuminates the significance of interpretation, at least in the context of what some theorists have claimed to be the 'model of rules' theory of law, as an inescapable, ubiquitous element of one's theoretical explications.

Specifically, under the guise of interpretation, the topics of discussion will be as follows: 1) the value and relevance of coherence in interpretation and 2) legal gaps, easy and hard cases and judicial discretion. In brief, I argue that by juxtaposing Dworkin and Raz, and critically examining the intricacies of the aforementioned issues, it is clear that their theories suffer from unwarranted assumptions, theoretical obscurity and applicative inadequacies. The conclusions drawn from this analysis, I argue, are ample grounds for beginning to justify the plausibility of Inclusive Legal Positivism.

The Value and Relevance of Coherence in Legal Theory and Judicial Practice

To begin, at the grand functional level, or the overall level of *theoretical coherence*, it is interesting to note a fundamental difference between Dworkin and Raz with respect to their position on the plausibility of a *theory of interpretation.* Raz (1996a) justifiably

[20] Although a discussion of the concept of interpretation itself is beyond the scope of this section and will be a prominent topic in Chapter 4, its importance cannot be overstressed. The concept of interpretation itself has been challenged by focusing on such considerations as the purpose of interpreting an object or text, to what extent one may distinguish between a genuine interpretation and an innovation or creation, how significant the identification of intent is in interpretive validity and, on a metaphysical level, what stipulations or criteria are to be met in order for some social phenomenon to be interpretable in the first place. The position of interpretation in legal theory, far from being uncontested, is fundamental to identifying the existence and content of laws in a legal system, to understanding the role of norms including both legal rules and principles in adjudication, and providing a theoretical base from which legal theorists can (and have) extrapolated their own theories of law. For a stimulating discussion on the concept of interpretation, see Michael Moore's "Interpreting Interpretation" in Andrei Marmour *Law and Interpretation: Essay's in Legal Philosophy.* Oxford: Clarendon Press, 1995. 1-29.

opposes the possibility of creating general theories of interpretation that can either coherently guide judges towards adopting the 'right' interpretation, or, furthermore, generally allow for the differentiation between an interpretation that is inherently good and fits with the extant law, and one that is clearly wrong, inappropriately incommensurate with the extant law. Raz rejects the possibility of positing a coherent theory of interpretation in the first respect because, as legal interpretation (and hence at some level the operation of innovation) inevitably involves recourse to morality, it cannot be governed by "theories which would enable a person whose moral understanding and judgment are suspect to come to the *right moral conclusions* regarding situations he may face by consulting the theory" (Raz 1996a, 21, emphasis added). Raz contends that these theories just cannot explain the differentiation between discovering the meaning of a legal text and formulating a new one. Raz's second point about the failure to posit a general theory that coherently encapsulates the methodological steps taken towards the evaluative criteria to which recourse must be made in identifying good and bad interpretations can be substantiated by asking the question: Cannot there be incommensurate but equally 'good' interpretations? (Marmour 1992, 53) If one answers this question in the affirmative, one must reject any unified theory of interpretation on grounds that interpretations can be equally 'right' yet incommensurable because they are formulated by recourse to different *evaluative assumptions* (Marmour 1992, 55). Therefore, the Razian position on the plausibility of a general coherent theory of interpretation is critical and, in my view, quite persuasive.

It is no surprise that Dworkin, the primary target of Raz's critical remarks, fundamentally disagrees with the implausibility of a general theory of interpretation.

First, Dworkin maintains that a holistic or unified theory of interpretation is necessary since the only way to understand 'the law' is to combine general legal theory with a theory of adjudication. Second, coherence in the law is achieved through the process of constructive interpretation, a process employed in all adjudicatory cases. Thus, his approach is antithetical to that of Joseph Raz.

Furthermore, Dworkin does believe that his law as integrity model can adequately guide judicial practice to reach proper decisions in all cases, without acting arbitrarily, and never need go beyond the legal norms available. Dworkin takes this position because he views both source-based laws and non-sourced based principles, such as 'no one shall benefit from his or her wrongdoing', as constituting 'legal norms'. As such, Dworkin's view is that such non-sourced based principles are 'legal' and can be binding on judicial decisions in the same way that rules can.

However, even though Dworkin (1986, 412) raises the defensive caution: "I have not devised an algorithm for the courtroom", the abstractive dynamic, methodologically obscure and generally impractical nature of law as integrity seriously undermines Dworkin's claim to his general theory of interpretation and also to his claim that this mode of judicial practice can produce right decisions which *best cohere with past legal practice in light of existential principles of political morality.* These conclusions can be drawn for the following reasons.

First, is the objection that Dworkin's adjudicative method is predicated on such abstract premises that, by appealing to past legal structure and existential principles of justice, fairness and equality, one can validly argue a case either way and claim that one particular decision is, in fact, a reflection of the law in its 'best light'. It seems as though

its abstractive dynamic does not include a concise methodology. As Alan Hunt (1992, 37) suggests,

> it is significant that he [Dworkin] makes no attempt to describe the criteria to be employed when the judge...is comparing the formulation of the alternative rules with the formulation of the principles/standards from which is expected to emerge the best or most attractive account.

Failing to provide a methodological strategy to achieve an objectively correct portrayal of the law in its best light opens up law and integrity to interpretation. Has Dworkin provided an adjudicative model that, when adhered to, will produce a right answer? From a critical perspective, I do not believe this to be possible for two reasons. First, due to its abstract proclivities, one can employ Dworkin's adjudicative model and construct multiple decisions that will each arguably interpret the law and develop it in the best moral sense. Second, since in a liberal pluralist society, all principles have counter-principles, attempting to follow Dworkin's law as integrity model will unsuccessfully produce any decisions that can be considered unequivocally right interpretations.

Because adjudication and the attempt to articulate the 'point' of the law is, according to Dworkin, always an 'interpretive endeavor', and due to the abstract nature of the process of constructive interpretation that he articulates, there is reason to seriously doubt Dworkin's self-acclaimed interpretive attitude towards the legal practice.

Moreover, given that Raz's view of the role of coherence in adjudication is necessarily 'local', that is, it functions to maintain coherence in existing legal doctrine in respective branches of the law (Raz 1994, 298), and given that I share this local perspective along with the further belief that the role of coherence serves as a medium between endlessly applied evaluative considerations and strict adherence to precedent

despite a developing change of the law's 'spirit'[21], the remainder of the discussion on coherence will be aimed at exposing what I believe to be a seriously misleading and radical claim made by Dworkin with respect to what constitutes a coherent interpretation of legal practice. I shall refer to this as Dworkin's principle of the "community radicalized."

Dworkin's community personified theory is a manifestation of hierarchy. Consequently, it captures an extremely conservative view of societal values. It is this general thesis from which I will extrapolate my arguments. But first, consider this statement made by Dworkin:

> The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author-the community personified-expressing a coherent conception of justice and fairness (Dworkin 1986, 225).

First, the law, the single author, assumes a hegemonic role in defining the legitimacy of deploying coercion upon its citizens. In a characteristically liberal fashion, Dworkin sets law upon an overarching pedestal of neutrality, acting as the central and instrumental tool to solving society's power imbalances and inequalities, and erecting the proverbial fence between the antimonies of state and civil society. However, conceiving law strictly in this light is to ignore the pressing interrelations between the law and society: "law is not simply a mechanism that seeks to bring under its governance preexisting social relations, but that law both constitutes and is constituted by social relations" (Hunt 1992, 12). There is an alarming sense in which Dworkin claims that it is the adjudicative function of the law that will help realize and articulate the community's principled idealism of justice and fairness.

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[21] Coherence in this respect is a constraining mechanism on judicial discretion, *limiting* the extent to which judges are able to develop the law in light of changing social and political contexts.

However, I think the more pressing concern is how Dworkin conceptualizes who constitutes this community that speaks univocally through the judicial decision, or, in a more Dworkian sense, the supposedly coherent and thus best justification of the law's existing practice. Who constitutes the community? Who is excluded? Are these questions even relevant? I believe that they are. Dworkin assumes that a political community is defined by the common principles that apply to them. By adhering to this abstract formal political equality supposition, he circumvents the socio-economic political realities in all communities, assuming that every person governed by these 'common principles' can be condensed into a single author who speaks with one voice on behalf of the whole. Implicit in these assertions is the ignorance towards those who do not equally benefit from these overarching existential principles of 'justice' and 'fairness' due to their status before law's acontextual empire, the multifarious evaluative proclivities of stratified community members, and the grossly disproportionate contributions by the elite members of the community to the formulations of the principles that are supposed to govern all of the members. The theory is not only reminiscent of the liberal idealism of law's autonomy, but is further a radical depiction of a community's unified social values, and, consequently, an all too eager attempt to theorize how it is that the legitimacy of judicial decisions stems primarily from their authorization from the personified community itself. Hence, the coherence principle of adjudication or Dworkin's law as integrity is a manifestation of obfuscated hierarchy, consequently portraying a radical picture of singular or monistic societal values.

I believe Dworkin's coherence model of adjudicatory interpretation can not be maintained if one accepts, as I do, the principle of the 'community radicalized'. The

problematic obscurities in Dworkin's coherence model, although not necessarily constituting grounds for outright rejection of his theory of adjudication and interpretation, nevertheless raises a substantial reason to question its soundness.

Moreover, the focus on interpretive strategies in what have been identified as easy and hard cases will bring the discussion further into the context of adjudication. The attempt to identify Dworkin and Raz's thoughts on this subject and a critical analysis thereof is what follows.

The Nature of Legal Norms, Gaps, Easy & Hard Cases and Judicial Discretion

The actual institutional practice of adjudication, whether it involves common law precedent application, statutory, or constitutional interpretation, all involve instances wherein the words and hence meaning of a particular law in a particular fact situation cannot unequivocally determine or dictate the appropriate decision to be made. Yet the conceptualizations of these processes have been different and in some instances antithetical. By focusing on the ontology of legal norms, determinate and indeterminate cases and the notion of judicial discretion, it will be clear that these areas of focus only add to the centrifugal force which separates the theoretical tenets of Dworkin and Raz from their commensurability.

Raz (1996b) contends that the purpose of interpretation is in part to identify the purported authoritative directives of past decisions, and such interpretations can be sought in part by referring to the institutional intention of the law in question. However, this paints an oversimplified version of the judicial process. Yet Raz does not refrain from engaging in further explication. The first clarification that must be made in order to

understand the nature of interpretive adjudication is what Raz considers to be the *legal norms* that provide authorities with the tools to substantiate their authoritative capacities. Simply put, Raz (1979, 62-3) contends that legal propositions are expressed in deontic sentences or "sentences about what is or is not to be done, what rights, duties, permissions, liberties, powers people have or lack..." that are preceded by a source indicator. So when answering the question 'what is it that constitutes law or what are legal norms', Raz would invoke his sources thesis and insist that legal norms are rules or general permissive/prohibitive propositions that are true by virtue of their source. Succinctly worded, a source is "an appropriate social fact specifiable without resort to moral argument" (Raz 1979, 65). This line of argument brings us to the next salient point, namely, that where positive law does not permit or prohibit something (some action or occurrence that can be posited in legal language) there is a *gap* in the law.

Raz (1979, 70-71) maintains that "a legal system is legally complete if there is a complete answer to all the legal questions over which the courts have jurisdiction. It contains a legal gap if some legal questions subject to jurisdiction have no complete answer." Given, as a positivist would generally contend, that the interpretation of legal norms involves the discovery of the purported meaning and intention of the author(s), gaps arise both out of indeterminacy when language is disputed or when there are conflicting reasons for action (lack of conclusive reasons). The possibility of gaps in the law brings Raz to his final assertion with respect to interpretive adjudication. This is that there is a distinct difference between judicial application of existing law and judicial legislation of new law.

Since Raz's view with respect to dividing the law application and creation function is predicated on similar if not identical premises as Hart's doctrine of indeterminacy, it suffices to say that judicial discretion is exercised when there is *open texture* (Hart 1994) either of a word or sets of words in a legal rule and the applicability of the rule to the particular fact situation cannot be accomplished without necessarily looking beyond the rule itself and into evaluative criteria as a non-sourced base of adjudicative reasoning.[22] In this instance there is a *hard* or borderline case, not necessarily because it is in fact more intellectually demanding to adjudicate than an *easy* or source-based determinate case or necessarily mechanically applicative, but "where the law can be applied straightforwardly" (Marmour 1992, 124). And so, this implies that there may be a degree of logical inference or analyticity in the process. Thus, the argument posited by Raz in this section heretofore has been fairly uncomplicated. He maintains that source-based norms are 'law' and there are instances where the law fails to speak on a particular issue thus indicating a legal gap. Finally, given these two premises, it can be deduced that in a hard case a judge must be said to exercise discretion where his reasons for action extend beyond the source-based law.

Is there anything substantially misleading or incoherent about this argument? Before moving to Dworkin's attempt at refuting Raz's position, and conventionalism or positivism in general, I believe that there is a particularly revealing comment worth raising on Raz's sources thesis and legal gaps that blurs the divide between discretionary and non-discretionary cases.

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[22] The most obvious and well-known example used to illustrate his point was the operation of the rule which stipulated that there shall be "no vehicles in the park" and the indeterminacy of the case where what constitutes a vehicle for the purpose of the rule is instantiated by the relevant fact situation.

Timothy Endicott (2003, 99) draws attention to what Raz maintains is the third source of legal gaps[23]:

> There is yet a third way in which the sources thesis is responsible for legal gaps and it too arises out of conflict situations. *The law may make certain legal rules have prima facie force only by subjecting them to moral or other non-source-based considerations.* Let us assume, for example, that by law contracts are valid only if not immoral. Any particular contract can be judged to be prima facie valid if it conforms to the value neutral conditions for the validity of contract laid down by law. The proposition 'it is legally conclusive that this contract is valid' is neither true nor false until a court authoritatively determines its validity. *This is a consequence of the fact that by the sources thesis the courts have discretion when required to apply moral considerations* (Raz 1979, 75, emphasis added).

First of all, Raz's exclusivist position does not commit him to the view that moral reasoning in adjudication is contrary to his sources thesis. Raz holds the view that such reasoning in discretionary cases is anything but legal. [24] Thus, to speak of the use of moral considerations in adjudication is completely compatible with exclusive legal positivism. Nonetheless, in the above excerpt it appears as though Raz is explicitly contending that 1) only a court of law can authoritatively decide whether or not a contract is valid; 2) whenever judges appeal to moral considerations they are inevitably exercising discretion (Endicott 2003, 100).Yet, as is identified by Endicott, there is reason to modify the second point insisting that this inevitability is incorrect and that although judges sometimes are legally required to apply evaluative considerations and do thus exercise discretion, it is only because the *moral considerations themselves are vague* (Endicott 2003, 100). Thus, the conclusion is that it is not the case that a *posited requirement* to apply moral considerations to a certain law or set of laws in a given factual context

[23] As previously identified, the first two sources are vagueness in the legal language and inconsistency or inconclusive conflict between existing rules.

[24] The assumption here is that appealing to the moral considerations posited by law is a directed form of moral reasoning with the moral considerations serving as objectives of the law. By holding this view, Raz can endorse moral reasoning while maintaining that legal validity never depends on moral considerations. This view of directed powers and moral objectives will be elaborated on in the third chapter when analyzing inclusive legal positivism.

necessitates the exercise of judicial discretion. The argument rests on the ability to distinguish between clearly posited and understood moral considerations and unclear posited and misunderstood moral considerations. I do not believe that there is any reason to dismiss this distinction as implausible[25].

What this insight clarifies is that Raz's apparent claim that moral considerations and judicial discretion are mutually inclusive is either a misinterpretation of what he meant to postulate as a third source of legal gaps, or, if we assume that he did intend to do so, that this view is seriously misleading. Furthermore, clarifying that only *vague moral considerations* result in unbounded judicial discretion questions the apparent distinct division of the law-applying and law-creating functions of the judiciary. Thus, Raz's third source of gaps (laws subjecting legal rules to non-source based considerations) *does not confer unbounded interpretive discretion in all cases.*

Moreover, the most inimical theoretical challenge towards Raz's conceptualization of legal norms and judicial discretion (and positivism in general) is articulated by Ronald Dworkin. Although Dworkin's legal theory has developed and in some respects changed[26], *the crux of his argument remains against positivist interpretations of adjudication and lies in the connection he makes between the content of legal norms and their justified usage in the constructive interpretation of the law.*

In *Taking Rights Seriously,* Dworkin (1977) attempted to show why judges never exercise *strong discretion* even in borderline cases. This is because Dworkin assumes that the law always purports to provide a decision in any case. Notwithstanding the open texture of rules, and their inevitable indeterminacy (Hart 1994), the combination of *rules*

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[25] See pp 33-4 for my examples of the fettering nature of moral terminology on judicial discretion.
[26] Raz (1986) has identified Dworkin's apparent eschewal of his concept of unequivocally right decisions and his adoption of a much looser treatment of strong discretion.

and directing legal principles are available in order to best constructively interpret the existing or settled law. As has been identified above, determining what the grounds of law are and their purported meaning or purpose is always an interpretive endeavor. This is the point that most diverges with Raz. *Raz does not believe that what Dworkin claims are legal principles have any binding authority. Since they do not, according to Raz's doctrine of authority, create 'exclusive reasons for action', they can not be said to be part of the law.* If we are to assume that Dworkin is claiming that a judge lacks strong discretion if he is "bound by standards set by an authority and those standards purport to control (or govern) his decision" (Waluchow 1994, 196), then we are lead to ignore how the *open texture of the moral concepts themselves*, especially in constitutional or Charter adjudication, appear to leave the judge in the position of arguing, on the basis of such malleable principles, a case wherein he/she is not unequivocally controlled by the standards he/she is supposed to apply, even if such moral terms enshrined in Charter rights do purport to control or govern judicial decisions.[27] As I have stated in the previous section on the relevance of coherence, even though legal standards can be claimed to 'purport to control' decisions, the reality is that *equally 'good' interpretations may arise*, and this inevitably leads to a call for judgment by the judge. It would be misleading to assert that in such a situation just because legal standards 'purport to control' the judge that they therefore deprive judges of strong discretion. It would therefore seem as though judges do exercise 'strong discretion' as identified by Waluchow's interpretation of Dworkin's definition. Therefore, it is difficult to accept

[27] As will be clear in the next chapter, the characterization of the inclusion of moral considerations in constitutional language and their use in the adjudication of hard cases is a significant point of contestation between inclusive and exclusive positivists.

Dworkin's view that legal norms include all source based and non-source based norms and that the positivist's enunciation of strong discretion is untenable.

My theoretical analysis has examined two areas of discussion: 1) the operation and relevance of coherence in interpretation; 2) legal norms, gaps and judicial discretion. By juxtaposing Raz and Dworkin's positions, identifying some of their imperfections and highlighting their criticisms of each other's theoretical claims, several observations have been made. First, contra Dworkin, it was argued that it is implausible to have a general coherence theory of interpretation due to the impossibility of an operational theory of interpretation to effectively objectify subjective moral evaluations, and due to the existence of *equally but incommensurately 'good' interpretations* of a legal text. Furthermore, if one accepts the community radicalized principle and rejects the Dworkian alternative, one has grounds to call into question the validity of Dworkin's coherence model of adjudicatory interpretation. Second, although they do not confer an unbounded strong discretion in all cases, there are what Raz called gaps in the law, and Dworkin's treatment of legal norms as a combination of source and non-source based propositions fails to refute the existence of legal gaps and discretion in the strong sense.

It is on these grounds that one can begin to see that both Dworkin's and, to a lesser extent, Raz's theory of law, tend to reveal shortcomings with respect to a conceptually powerful and descriptively accurate account of the nature of law. The next chapter is a continuation of this theoretical analysis. It attempts to justify the endorsement of Inclusive Legal Positivism as a conceptually powerful and descriptively accurate account of Charter adjudication in which moral considerations and constitutional

validity converge and intertwine, while at the same time further undermining the theoretical claims of Dworkin, Raz and others. It is to this crucial task that I now turn.

Chapter 3: Inclusive Legal Positivism & Charter Jurisprudence

The first three sections of this chapter introduce and defend Inclusive Legal Positivism (ILP) as a theory that can best explicate Charter jurisprudence, in particular, the adjudication of rights cases, and accurately explain the deeply important connections that the law has with morality. Section 1 introduces ILP and places it within the context of the Charter. Section 2 distinguishes between necessary and sufficient formulations of the theory, arguing that the former provides an appropriate understanding within a Charter context. Section 3 discusses what I refer to as the two levels of morality and how such levels are connected to an 'inclusivist' theorization of Charter jurisprudence. Further, in the remaining two sections I address some of the arguments from Raz, Dworkin and others who have directly attacked Inclusive Legal Positivism. Section 4 makes a significant distinction between an inclusivist and exclusivist understanding of moral reasoning in adjudication arguing that the former must be preferred over the latter. Finally, section 5 revisits both Raz and Dworkin, critiques their analytical construal of the rule of recognition and argues that ILP can withstand their arguments. In addition, a critique of the Practical Difference Thesis is offered in response to objections raised by the exclusive positivist Scott Shapiro.

A brief comment on theoretical typologies and the importance of distinguishing between meta-theoretical evaluative and moral-justificatory considerations will serve to preface the discussion of Inclusive Legal Positivism.

Meta-Theoretical Value vs. Moral Value

Jurisprudential theories are multifarious as well as multifaceted. Some purport to describe and explain a particular phenomenon within the legal system or the phenomenon

of law itself, while others purport to ascribe normative and justificatory conditions to the social practice of law. When H.L.A. Hart wrote in the preface to the *Concept of Law* that his work was an exercise in "descriptive sociology", he wanted to assure the reader that he was explicating a general conceptual theory of law that identified necessary descriptive features of legal systems such as the division of primary and secondary rules and the existence of a rule of recognition. Hart and other theorists like Joseph Raz (1979) engaged in conceptual analysis that sought to describe and explain the nature of law in order to elucidate and articulate our understanding of its intricacies. This, then, is evidence of descriptive/explanatory theories in jurisprudence[28].

On the other hand, there are theories the purpose of which is to engage in normative discourse primarily to justify a certain purpose of a social practice. Ronald Dworkin's conception of law as integrity and its fundamental theoretical tenet of constructive interpretation, both overviewed and critiqued in the previous section, are examples of normative legal discourse. They are Dworkin's elucidations of what he believes to be the purpose of a theory of law: To justify morally from a participant's point of view what the law of the community is. In Dworkin's case, contra Hart, the law is identified with the decisions of judges who engage in constructive interpretation to give the best justification for the use of state coercion. Clearly, descriptive theories of law such as Hart's do not purport to highlight elements of legal systems that are morally relevant and that therefore justify the practice itself. This is a description of a

[28] However, there are some critics of Hart's jurisprudence, and supposedly 'descriptive' jurisprudence in general, that have argued that arguing descriptively inevitably involves one to engage in a normative analysis. See Stephen Perry "Interpretation and Methodology in Legal Theory." Ed. Andrei Marmour. *Law and Interpretation.* Oxford: Clarendon Press, 1995. 112-121.

Dworkinian conception, something, as I have shown, that is fundamentally different from a descriptive/explanatory theory of law.

However, to engage in a descriptive/explanatory analysis of a social practice like law does not necessarily eviscerate the inclusion of all evaluative considerations in the theory. There may be 'meta-theoretical evaluative concerns' of a particular theory of law such as *simplicity* and *coherence* that therefore allow "*value* to influence, and indeed in some instances govern, theoretical description" (Waluchow 1994, 19 emphasis added). The difference between the evaluative considerations of simplicity and coherence in legal theory and the moral and justificatory nature of Dworkinian conceptions is that the former, although they are normatively articulated, do not thereby bind or justify the theory. In other words, although coherence may be desirable in legal theory, it does not mean that the existence of coherence is a *necessary condition and justificatory element of the theory.* Waluchow (1994, 22) stresses the point when he states, "discovering certain elements of legal practice worth highlighting because they are morally relevant does not commit a person to the belief that such morally relevant considerations are what justifies the practice." Thus, it is clear that 1) descriptive/explanatory theories are distinct from normative/justificatory theories and 2) evaluative concerns can be meta-theoretical or moral- evaluative, the former guide or govern the theory while the latter serve to bind or justify the practice that the theory analyzes.

Inclusive Legal Positivism (ILP), as it will be defended in this thesis, is a descriptive theory of Charter law; it describes the intricate interconnectedness of legal validity, reason, authority, meaning and, most significant of all, moral considerations. It does not purport to *justify* the practice of Charter adjudication. The idea is to engage in a

conceptual analysis of the aforementioned interconnectivities, which will ground the overarching argument that ILP most accurately *describes* Charter rights, their relatedness to moral considerations, and the way they *figure* in Charter adjudication. The goal is to illuminate these interconnectivities in such a way as to *legitimize* the semantic indeterminacy that underlies this entire theoretical inquiry.

Section 1: Preliminary Formulations

ILP, compared to legal positivism and natural law theory, is a relatively new and developing theory of law. However, several authors, most notably Jules Coleman and Wilfred Waluchow, have done more than simply explicate a plausible conceptual theory of law. For decades these authors have contributed indelible theoretical and philosophical arguments to a theory of law that can explain and help one understand how the law can and does incorporate moral considerations into its epistemic conditions as well as its validity conditions. As the main concern here is to understand the relationship between law and morality in the context of Charter jurisprudence, I will begin by formulating the ILP thesis and show how it applies in the context of Charter adjudication.

First of all, it is generally undeniable that some degree of moral concern does come from the terminology used in Charter rights and their semantic indeterminacy, and in this way 'morality' is connected to 'the law' in Charter jurisprudence. Terms such as 'equality' and 'fundamental justice' are morally laden terms, which call for an appeal to a mode of reasoning wherein *judgments* of what constitutes equality and justice in certain contexts inevitably come into play. However, ILP does not just point to moral terms in order to ground its theoretical claim that law and morality are contingently connected. *The key point for ILP is that it attempts to show how moral considerations can figure into*

questions of legal validity. This point brings us to two closely connected versions of ILP, formulated by Jules Coleman and Wilfred Waluchow respectively:

> Inclusive Positivists (Incorporationists in my sense) can allow morality to be a condition of legality provided the rule of recognition sets morality forth as a legality condition. Morality then operates by evaluating norms directly on the basis of their merits (Coleman 2001a, 134)

> [S]tandards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g., laws, can and do in various ways figure in attempts to determine the existence, content and meaning of valid laws (Waluchow 1994, 2)

Prior to further examination and articulation of ILP, the elucidation of an important concept is in order.

The Rule of Recognition

The most important element not only of ILP, but any version of positivism, is the presence of an ultimate rule of recognition. Clarity of this concept is of the utmost importance for the understanding of what follows.

H.L.A. Hart, articulator of the rule of recognition as a constitutive (and necessary) element of any legitimate legal system bound together by a combination of primary and secondary rules, provides the grounds for what may be argued as *analytical construal* by subsequent theorists:

> A rule of recognition is a rule for conclusive identification of the primary rules of obligation...whereas a subordinate rule of a system may be valid and in that sense exist even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, *practice* of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact (Hart 1994, 92; 107).

We may draw two conclusions from Hart characterization: 1) The rule of recognition is not a 'rule' in the sense that it imposes obligations; rather, it identifies the validity of

those imposed obligations; 2) The rule of recognition is a practice by the officials of the legal system.

ILP, then, as I defend it, is a theory of law that retains the positivist sources thesis, that is, all valid law can be traced back to a social source of origin, while at the same time maintains that a legal system's rule of recognition *might* contain moral tests for legal validity. If the rule of recognition contains as its criteria of validity justifiable recourse to evaluative or merit-based tests of validity by appealing to questions of political morality, then that legal system's rule of recognition is inclusive[29] or incorporationist, since it has an embedded moral element to it.

Furthermore, the essential claim is that, given that a legal system contains an inclusive rule of recognition, *if a law has membership in the legal system, then it is consistent with the questions of political morality recognized as criteria of legal validity.* It is important to note how different this statement, which accurately states the version of ILP I adopt, is from the following conditional: *If a law is inconsistent with a moral term, it is invalid.* The first identifies consistency as a necessary but not sufficient element in the determination of the law's existence and validity in a legal system. The second maintains that a law's inconsistency with a moral term is a sufficient condition for its invalidity. Prior to articulating and exemplifying how ILP and its contingent law/morality connection thesis operate in Charter jurisprudence, it is significant to highlight why one can not maintain *that consistency or inconsistency with morality suffices to validate or invalidate laws respectively, or is sufficiently indicative of a law*

[29] To be clear, the term 'inclusive' indicates that the positivistic theory is capable of recognizing the possibility of legal criteria, whose meaning cannot be interpreted without recourse to *moral deliberation*, as being *included* in a legal system as criteria of validity. The term inclusive is diametrically opposite to 'exclusive', which is used in exclusive legal positivism to indicate the prohibition of such morally laden legal criteria as being included in a legal system as criteria of validity.

either being or not being a part of a legal system. As will be clear, there is an important distinction in ILP between the use of necessary and sufficient conditions in its formulation.

Section 2: ILP and the Importance of Necessary & Sufficient Conditions

The first argument attempts to show the problem that could result from allowing morality to be a sufficient criterion for legality (existence and validity). Mathew Kramer (2000, 96-8) argues that a 'robust' version of ILP, which would allow conditions of legality to be strictly moral, is untenable because morality as a sufficient condition for legality would result in too irregular and inconsistent claims of legal validity with respect to certain primary laws and thus, the law could not claim to have legitimate authoritative status. The use of moral criteria as sufficient reasons to render a law valid or invalid may be controversial enough to preclude the convergence among officials necessary not only for law to function efficiently but also for its existence as a coordinative and normative social practice. An ILP thesis predicated on sufficient conditions for legality would thus pose the threat of, or at least increase the likelihood of, epistemic uncertainty and inconsistency in the *identification* of the law (existence) and inconsistent invalidation in the *application* of law (validity). However, there are two descriptive claims well worth highlighting that render the existence of purely sufficient moral tests for the *identification* of valid law *restricted,* and for the *invalidation* of law *impossible* in the context of Canadian Charter jurisprudence.

First, it must not be overlooked that there is a difference between the law and its 'institutional force[30]' (Waluchow 1994, 31-79) The point is that even though law may be

[30] The argument from institutional force raises a powerful objection to Dworkin's law as integrity model. Dworkin's integrity theory is based on a community personified vision of the law, and the law is the

considered valid, it may have *no binding force on particular judges.* Judges sometimes escape the institutional force of the law because of the hierarchical structure of courts, which renders lower court judgments non- binding on higher courts and thereby allows for overruling of past decisions. This is not an obscure point and it is certainly not descriptively contestable. However, applying these insights to the context of the Charter and the discussion of necessary and sufficient conditions makes for a strong argument. *The law's institutional force can affect the way moral tests for validity function in Charter adjudication.* In a case where the violation of a right to equality is the determining factor of whether or not a subordinate law is 'consistent' with the Charter and hence the legal system, it would seem that settled law in the lower courts on the issue of equality would not commit a Supreme Court Charter challenge to adopt precisely the same conclusions about what constitutes equality in the case at hand. That is, moral considerations embodied in the form of a section 15 equality right would *not be prima facie sufficient to render a particular law valid because the decision, if made by a court of higher jurisdiction than the court that held preceding decisions, would have the option to escape the law's institutional force.* Therefore, if morality is a sufficient condition to identify the existence of valid law, this claim would be seriously undermined if one considers that the law's institutional force can be avoided by judges when reason warrants[31], meaning that a subordinate law's consistency with a moral term in the Charter

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definition of institutional rights by judges. The theory becomes confused when one takes into consideration the ability of judges to escape the law's institutional force and the different decisions judges would thereby make on the same issue. As Waluchow (1994, 53) asserts: "How can the community speak with one voice if the law to be recognized in one court is different from the law to be recognized in another?"

[31] As I have defended in Chapter 1, the judge, applying a previously decided point of law to a new case, may wish to avoid a manifest absurdity or repugnance that may result in the case at hand by interpreting the law and the meaning of the right from a living tree perspective. Again, as Justice Dickson asserted in *Big M Drug Mart* there must be an "analysis of the purpose of such a guarantee", and it is crucial that at the

would *not always* suffice to render it valid. However, an important point to note is that judges cannot always escape the law's institutional force. Therefore, the argument restricts or limits the possibility of moral tests for the existence of valid law. Given the argument from law's institutional force, it would be inaccurate to claim that if a law is *consistent* with a moral test then it is *valid.* Consistency can not always be a sufficient condition for identifying valid law.

The second point is that no one 'moral test' whether it be determining whether a right to 'equality' or freedom from 'cruel and unusual punishment' exists, or through the moral deliberations sometimes necessary to further substantiate such rights in cases of indeterminacy, can suffice to render a law *invalid.* The point is simple, but its simplicity does not undermine its *descriptive force.* Essentially, all moral tests in the form of appeals to rights of political morality enshrined in the Charter that render a particular subordinate law to have infringed a particular right or set of rights, are always penultimate in nature. In the context of the Charter cases, wherein a particular right is argued to have been infringed, the legislation in question is not necessarily invalidated. This is because in Canada the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (Constitution Act 1982, Section 1). When a right is infringed it is subject to the reasonable limits test under section 1 of the Charter, for the purposes of determining whether or not the infringement is 'demonstrably justified'. The section 1 test, and not the considerations appealed to by the judge when contemplating the violation of the right, is the *final test.* Therefore, the invalidity or unconstitutionality

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same time the "courts to do not overshoot the actual purpose of the right or freedom in question but respect the fact that the Charter was not enacted in a vacuum... and must therefore... be placed in its proper linguistic, philosophic and historical contexts" (344).

of a particular subordinate law is not a necessary condition for the law to be inconsistent with a moral condition of legality. If the law in question is inconsistent with a moral condition (criteria of validity) recognized in the Canadian legal system, it does not follow that it is therefore invalid. It is only invalid if it fails the Oakes test in a section 1 analysis. This 'justificatory' argument asserts that inconsistency can not be a sufficient condition for invalidity or unconstitutionality.

The two conclusions drawn from these arguments are as follows: 1) Consistency *cannot always* be a sufficient condition for identifying valid law; 2) Inconsistency can *never* be a sufficient condition for rendering a law invalid. These two conclusions leave the conditional that I introduced above: *If a law has membership in the legal system, then it is consistent with the questions of political morality recognized as criteria of legal validity.* Consistency with morality as proscribed in the legal system's criteria of validity is thus a *necessary* condition for law to either exist in the legal system or to be rendered valid. Given the discussion of necessary and sufficient conditions, expressing an ILP thesis in the above conditional form accurately reflects the way consistency and validity are related in the context of Charter jurisprudence. Yet much more is needed to support the claim that this version of ILP is a viable descriptive/explanatory theory of law that can accurately describe how moral considerations figure in questions of legality in such a context. Further argumentation is in order.

Section 3: ILP, Charter Jurisprudence & the Function of Morality

As was shown in the previous discussion of necessary and sufficient conditions, consistency with political morality as identified in the rule of recognition is a necessary condition for either identifying the existence of law or determining its validity. That is to

say, *an Inclusive Positivist conception of Charter law and its connection to the law/morality relationship posits that, in the Canadian legal system, there can be (and are) morally-charged tests that function as necessary conditions in the determination of the existence, meaning and content of valid law.* The next tasks are to distinguish what I perceive to be the two levels of morality, or the two distinct ways that morality figure into questions of acceptance, validity and meaning in law. In order to explain how these levels connect with the ILP propositional formulation, I give a conceptual analysis of morality as a prominent source of *acceptance* from the 'internal point of view', and case-based evidence to exemplify how morality can figure into questions of the meaning and content of stipulated Charter rights as well as the validity of subordinate legislation in light of such rights.

Level 1: The Possibility of Moral Commitments

The first level of morality operates at the abstract stage of judicial recognition. That is to say, it seems to be possible that there can be a distinctly moral element to the converging behavioral act of judicial officials who accept the law in light of the criteria of validity contained in the legal system's rule of recognition. Setting aside this claim for a moment, a brief return to the idea of the rule of recognition, the 'internal point of view' and the addition of 'law's normativity' is in order for the purposes of elucidation and argumentation.

As was explained in the discussion of the rule of recognition, w*hen interpreting the validity of a law, the rule of recognition embodies or is a manifestation of the criteria relative to such an interpretive determination.* Based on the theoretical observations of Hart, the rule of recognition is to be understood as a "conventional rule", which exists

because it is adopted and *practiced* by those (officials) who accept it from the internal point of view. This acceptance of the rule of recognition explains how the law (in this case the master rule of recognition), is treated as guiding or creating normative reasons for action (Coleman 2001a, 118-19). However, as Coleman informatively asserts, even though the internal point of view "is an existence condition of a social [or practice] rule, and it marks the fact that people treat the rule as reason giving...it does not explain why or how the rule does so" (Coleman 2001a, 119). What Coleman highlights is of the utmost importance to the existence of law's normativity (which characterizes the law's ability to create reasons for action). If acceptance from the internal point of view itself is not how the rule of recognition provides reasons for action, then what does the internal point of view do? Coleman suggests that understanding the conventional rule of recognition as a 'coordinative convention' that creates a 'system of stable reciprocal expectations' in addition to adopting the internal point of view is *how the rule creates reasons for acting and thus explains law's normativity.* His claim is that adopting the internal point of view and the critical reflective attitude towards non-compliance "creates and sustains a sense of reciprocity: that free riding or non-compliance is subject to public criticism." Furthermore, "stability, reciprocity and mutuality of expectation are created and enhanced by the behavior exhibited by those accepting a rule from the internal point of view" (Coleman 2001a, 120). Thus, the internal point of view causes the creation of reciprocal expectations among individuals who criticize and praise certain non-compliant and compliant behavior respectively. The key part of his argument is that *these reciprocal expectations of behavior provide the reasons for action necessary for the law's normativity.*

Returning to the issue of morality, an interesting question arises: Can it not be true that the normative and reason-causing function of the internal point of view may also include a causal 'moral commitment' to the rule of recognition and the criteria of validity contained therein, the moral element then causing 'reasons for action' necessary for the law's normativity? Secondly, does this notion of a moral point of view[32] in any way affect the grounds on which ILP is based, namely the sources thesis and the contingency of necessity in the relationship between legal validity and the role of moral considerations?

Evidently, as I briefly alluded to in the previous chapter, H.L.A Hart was clearly opposed to the concept of critical reflection and the normative discourse through which it is exemplified and articulated as necessitating a moral commitment to the law. As Hart (1994, 198-99) maintains, just because such normative discourse involves use of terminology such as 'ought' and 'must' does not "thereby [commit one] to a moral judgment that it is morally right to do what the law requires." Continuing this line of thought, he gives the following justification for making such a claim: "[One's] allegiance to the system may be based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting or traditional attitude; or the mere wish to do as others do." What Hart is saying is that acceptance of the law as justified does not require that one takes a moral stance towards the law. That is, moral commitment does not necessarily result from judicial acceptance from an internal point of

[32] The following discussion on moral commitments is inspired by Richard Holten's discussion of judges being morally committed to the law if they accept it. See Richard Holten. "Positivism and the Internal Point of View." Law and Philosophy 17 (1998): 597-625. I do not claim that judges must necessarily take a moral point of view towards the criteria of validity and the subordinate laws of the legal system as Holten does. I claim that there may be a moral element in the acceptance of criteria of validity recognized by the rule of recognition, which influence the officials' critical reflective attitudes and subsequently constituted reciprocal expectations. Following Coleman's line of argumentation, these reciprocal expectations are what form the reasons for law's normativity.

view. Hart's comments actually help my argument: In no way does Hart's argument preclude the possibility that some judges may view some criteria of validity, such as the criteria that constitutional laws do not unjustifiably infringe the right to equality under section 15, as moral or just, which would thereby cause or contribute to reasons for action necessary for law's normativity. In other words, some judges among those whose behavior converges when accepting and practicing the rule of recognition may have a moral commitment to certain criteria of validity. Through such views of righteousness, justness, etc., which characterize a moral commitment, they articulate their critical reflection and contribute to the creation of Coleman's reciprocal expectations. Finally, then, as the argument goes, these reciprocal expectations constitute the reasons for action necessary for law's normativity. So, it would seem that it is possible that the internal point of view taken by some officials may involve a moral commitment to some criteria of validity in the legal system. Therefore, it seems to be possible that there can be a distinctly moral element to the reasons which contribute to the converging behavioral action of judicial officials.

However, given that morality may figure in the abstract level of judicial recognition in the form of 'reason-causing moral commitments', this still leaves the question of whether or not a moral element in the internal point of view, and thus in the reasons for acceptance among officials, in any way affects the grounds upon which ILP is based. ILP, as it has hitherto been defined, is the claim that 1) If a law has membership in the legal system, then it is consistent with the questions of political morality recognized as criteria of legal validity; 2) In the Canadian legal system, there can be (and are) morally-charged tests that function as necessary conditions in the determination of

the existence, meaning and content of valid law and 3) Both 1) and 2) are true if and only if the legal system contains an inclusive conventional rule of recognition. Therefore, if there is any reason at all that the existence of reason-causing moral commitments as part of the internal point of view weakens ILP, it will be because such a moral element in some way vitiates or at least undermines the possibility of an inclusive conventional rule of recognition. I believe that the basis for answering this question is identifying the difference between moral commitments as bases for *acceptance* and moral commitments as bases for *rejection.*

As I have explained, there is no reason to deny the possibility that reason-causing moral commitments may be adopted by certain officials that contribute to their *acceptance* of the criteria of validity and the conventional rule of recognition. Some officials of Canada's legal system may feel that equality provisions are 'morally just' and on this basis they may both choose to accept such a criterion of validity as well as criticize non-compliers, thereby contributing to the creation of reciprocal expectations as reasons for law's normativity. This moral element is not a necessary condition for acceptance from the internal point of view, nor does an absence of moral commitment among officials prevent acceptance from the internal point of view, since, as Hart (1994, 198-99) asserted, normative reasons for acceptance do not necessarily mean moral commitments because "one's allegiance to the system may be based on many different considerations." On this view, the contingent connection between acceptance from the internal point of view and reason-causing moral commitments, parallels and supports the claim made by Inclusive Positivists that there is a contingent connection between law and morality. Furthermore, *the existence of reason-causing moral commitments being*

possible moral elements at the abstract level of judicial recognition is relevant with respect to the law's normativity, or its ability to claim to give reasons for action, but does not in any way affect the rule of recognition and its possible inclusion of moral tests for legal validity in the form of rights of political morality enshrined in the Charter. The type of moral commitments that are being dealt with here function on the level of abstract judicial recognition, not on the level of the content, meaning or validity determinations of legal rights and subordinate legislation.

On the other hand, if such reason-causing moral commitments contributed to the *rejection* of certain criteria of validity and subordinate laws, then it would seem that morality would play a far more decisive role at the abstract level of judicial recognition. In fact, this possibility of rejection due to moral commitments can vitiate the possibility of a rule of recognition incorporating moral tests which serve as necessary conditions for the determination of the existence and validity of law. This is so because the judge's moral views would constitute sufficient conditions or sufficiently warrant non-recognition or rejection of the criteria of validity and/or the subordinate laws that must be consistent with such criteria. As I have shown above, explaining ILP in terms of sufficient conditions is both conceptually undesirable and descriptively inaccurate. However, as I will show in the remainder of this section, reason-causing moral commitments as I have identified them *cannot contribute to judicial rejection.*

At the highest level of judicial recognition, that is, the exercising of the conventional rule of recognition by the officials who accept it from the internal point of view, moral beliefs cannot themselves be sufficient reasons for rejecting certain criteria of validity or subordinate laws that must be consistent with the former. Although the rule

of recognition, as I have explained it, is exercisable via the act of an official, is it reasonable to say that the ultimate criteria of validity rests with how officials choose to act and what they choose to recognize as valid law? Furthermore, is it not the Charter and the Constitution that directly informs their official recognition? This act of recognizing as the ultimate criteria of validity as opposed to the Charter or Constitution (which is the supreme law of the land as stated in s 52) as determinants of validity, to me seems counterintuitive. If judges or other legal officials decided one day that they no longer wished to recognize the Charter on the basis that they had a moral commitment to property rights or economic rights unrecognized by the Charter, this would not only be absurd, but completely untenable. The key point seems to be this: The rule of recognition is so closely linked with the Charter and the Constitution that any reasonable person would assert that the Constitution or the Charter itself functions as criteria of legal validity, even if it is judges who must officially recognize such criteria. Thus, separating the act of recognizing with that which is recognized is conceptually misleading. Recognition is directly informed by the Charter and the Constitution, which embody the Canadian legal system's criteria of validity. It is not likely that a judge could just choose to reject and not recognize rights of political morality enshrined in the Charter if that judge thought a particular right or the absence of a particular right morally objectionable. Officials are therefore subordinate to the rule of recognition: The act of recognition and the criteria of validity which is recognized by the officials are so closely intertwined that the rule of recognition is more like an experience or mode of recognition; the official does recognize the laws, but the official's action is not actually the ultimate criteria of legality. The official merely formally 'recognizes' the superior law. Clearly, due to the

inextricable and interdependent relationship between the act of recognizing and the criteria of validity, the reason causing moral commitments taken by judges could never suffice to reject constitutional rights or the laws subordinate to such superior sources of law. If a critical moral attitude in any way negatively affects judicial decision-making, it cannot be at the abstract level of judicial recognition.

Level 2: Moral Deliberations & Charter Rights

The second level of morality operates in the form of necessary validity conditions. The key point for ILP is that the rule of recognition includes in it the recognition of criteria of validity in the form of rights, and that whether or not a particular law is consistent with such criteria of validity (rights) cannot be determined independent of *moral deliberation.* In order to support this claim we would be best to look past the moral terminology itself, since the existence of morally laden legal terms such as equality, fundamental justice and cruel and unusual says nothing about how their explication is involved in determinations of legal validity. Following Waluchow (1994, 144), "perhaps it is not the terminology which is of importance, but rather the way that the judiciary has come to approach and understand it." As I have argued in chapter 1, judges must take a purposive and interest based approach to the Charter in order to substantiate the objects the Charter set out to protect in light of changing contexts. These objects of protection are the rights of political morality. If this is so, and if there is no doubt that seeking to protect such interests involves moral deliberation, then it would seem accurate to say that legal validity is rendered in Charter cases by determining the nature and extent of such rights through moral argument (Waluchow 1994, 145). In order to support this claim, I will

briefly examine *Re B.C. Motor Vehicle Act,* which deals with section 7 of the Charter of Rights and Freedoms, and particularly the legal concept of 'fundamental justice'.

Re B.C. Motor Vehicle Act

In 1985, on appeal from the Superior Court of British Columbia, the Supreme Court of Canada was asked whether or not s. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the Motor Vehicle Amendment Act, 1982, was consistent with the Canadian Charter of Rights and Freedoms (*Motor Vehicle Act*, 493). The nature of the impugned section was such that if a driving offence occurred, such as driving without a license, the offence is proven to have occurred by establishing the actus reus only, thus making it an absolute liability offence. However, the main issue was whether or not the punishment, namely, a term of imprisonment, in conjunction with an absolute liability offence, contravened the Charter of Rights and Freedoms (*Motor Vehicle Act*, 494)

The relevant Charter right dealt with by the Court was section 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Constitution Act 1982, Section 7) In order to determine if the absolute liability offence was inconsistent with the right to liberty as per section 7, the Court had to determine whether or not the morally laden phrase 'principles of fundamental justice' permitted courts of law to review the substantive content of legislation or if it restricted them to matters of procedure. Arguing that the procedural/substantive dichotomy "narrows the issue to an almost all-or-nothing proposition", and that the proper interpretive approach is "purposive" in order to "secure for persons the full benefit of the Charter's protection", Justice Lamer asserted that "the principles of fundamental justice are to be found in the basic tenets and principles, not

only of our judicial process, but also of the other components of our legal system" (*Motor Vehicle Act*, 498-501; 512) The "other components" to which he refers may be *substantive* in nature, and such substantive principles may be identifiable only by recourse to an analysis of the "nature, sources, rationale and essential role of that principle within the judicial process and in [the] evolving legal system" (*Motor Vehicle Act*, 513). Justice Lamer therefore held that section 94(2) was inconsistent with section 7 of the Charter because the combination of absolute liability and mandatory imprisonment was unjust in that it could subject morally blameless and innocent people to a loss of liberty.

This case not only broadened the range of considerations that may be justifiably appealed to within the ambit of 'principles of fundamental justice' such that the court's may further the interests and objectives the Charter and the right to life, liberty and security of the person set out to protect, but it also exemplifies, for the purposes of this thesis, that the existence of rights and the validity of subordinate laws may be dependant on considerations that cannot be contemplated independently of moral deliberation. Fundamental justice, as the Court noted, extends beyond the boundaries of procedure and can involve a substantive element. The Court held that the impugned legislation had the potential of unjustly imposing sentences of imprisonment on morally blameless and innocent people. Surely, a line of thought such as this, which considers notions of 'justice' and 'moral blameworthiness' cannot be created independent of moral deliberation. An analysis of the substantive principles of fundamental justice is an exercise in moral reasoning. Therefore, it is clear that an ILP account of Charter jurisprudence, which stipulates that the determination of the existence and validity of law

may necessarily depend on a degree of moral deliberation, accurately describes the nature of the law/morality connection, and how recourse to moral reasoning may be immanent to interpreting the meaning and content of rights and the terms in which they are written[33].

Therefore, as I have shown in the above discussion of morality in Charter jurisprudence, what I have called 'reason-causing moral commitments' at the abstract level of judicial recognition as well as the possibility of moral tests, such as the adherence to substantive principles of fundamental justice in the determination of the meaning and content of law and the rights to which they must adhere, exemplify the descriptive and explanatory accuracy of ILP. I argued that the contingent connection between acceptance from the internal point of view and reason-causing moral commitments parallels and supports the claim made by Inclusive Positivists that there is a contingent connection between law and morality. Furthermore, by discussing *Re B.C. Motor Vehicle Act*, I argued that the criteria of validity in the Canadian legal system, particularly, the rights of political morality enshrined in the Charter, do involve recourse to moral deliberation when determinations of their content and meaning and the subsequent validity or invalidity of subordinate law is at issue before the court. Hence, ILP accurately describes the way the contingent relationship between law and morality operates in Charter jurisprudence, particularly, in judicial recognition and Charter-rights adjudication.

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[33] A section 1 analysis, which ultimately determines whether an infringement is justified and thus whether a law is valid or invalid, also involves a necessary moral element. The Oakes test forces judges to consider issues of 'proportionality', 'rational connection', 'minimal impairment' and 'fairness', issues which require an appeal to morality or moral deliberations. Although the application of the Oakes test has essential objective elements, and although the way it is approached by judges is influenced and constrained by precedent, this does not suffice to eliminate the clear and necessary element of moral reasoning undertaken by the judiciary when assessing whether an infringed right has been 'demonstrably justified'.

Section 4: Inclusive vs. Exclusive Positivism: Conceptualizing Moral Reasoning

By showing how morality figures in judicial recognition and determinations of the validity, meaning and content of rights and subordinate law, I have given substantial support for ILP. However, there is one paramount issue that has yet to be dealt with. This is the issue on which proponents of ILP and ELP most fundamentally disagree. What ultimately separates the Inclusive Positivist from the Exclusive Positivist is his/her conceptualization of moral reasoning and whether or not such appeal to morality is something that can be properly characterized as 'legal'. The main point, then, is this: The debate over 'theorizing' the appeal to morality involves whether this account of what goes on when morality is appealed to is consonant with our understanding of the very nature of law. This is a legal philosophical question that deserves clear conceptual analysis. It is also a question that can not be answered empirically through the use of case law. In the end, ILP will be a viable descriptive/explanatory account of Charter jurisprudence and the adjudication of rights cases if it can show that the appeal to morality in judges' semantic and validity determinations is a *'legal'* practice and that instead of creating new rights upon their declarations, they are actually articulating *pre-existing rights.*

Although Joseph Raz's exclusive positivism is predicated on a separation of law and morality, this separation does not preclude recognition of the distinctly moral reasoning that takes place in Charter adjudication. Recall Raz's core claim: A law is source-based "if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument" (Raz 1994, 194). Here, Raz explicitly excludes moral judgments from the conditions of legality. The idea is that law is source-

based and any and all semantic or epistemic determinations of source based law must not involve evaluative arguments. However, if Raz recognizes the appeal to morality in adjudication, we appear to have a discrepancy. How can Raz maintain his exclusive thesis while at the same time recognize the moral reasoning of judges? Raz circumvents this conceptual contradiction through his arguments on the existence of *Directed Powers*. The following is an explication of Raz's theoretical circumvention.

First, according to Raz (1979, 46), sometimes certain laws include moral terminology. However, although the law which refers to morality "is indeed law since it is determined by a source..., the morality to which it refers is not thereby incorporated into law." This is due to the fact that "the rule (or law) is analogous to a conflict of law rule imposing a duty to apply a foreign system which remains independent of and outside the municipal law". Thus, Raz's claim is that resort to moral argument is an indication that the source based law has run out on whatever matter is at hand, and that such moral reasoning is 'extra-legal' and constitutive of the judicial law-making function.

Furthermore, Raz (1994, 228) claims that when the courts do resort to moral and extra-legal argument they are being 'directed' by the "guidelines set by the law itself." Therefore, the courts have *directed powers* to develop the law in accordance with the often moral guidelines that the law itself has set out. The bottom line is that an exclusive conceptualization of moral reasoning based on the directed powers of courts maintains that whatever guidelines that lead to moral deliberation are merely 'objectives[34]' that the

[34] There is also the further argument stipulating that there is a difference between the existence conditions of law (determined by social sources) and the justification conditions of law (demands of morality posited in the legal system which are expected to be 'met'). Charter rights are to be viewed as justification conditions or objectives that laws should try to meet. The key for the ELP position is that these objectives *do not function as determinates of legal validity*. See Michael Giudice. "Existence and Justification Conditions of Law." Can J.L. & Jurisprudence 16 (2003):23-40.

law should attain as it is developed in indeterminate cases and that such moral reasoning is distinct from the application of existing law. Relating these claims to the context of Charter adjudication, the following can be asserted: 1) Rights in the Charter do not themselves constitute or contain criteria of legal validity - they only *direct* judges to consider moral criteria when creating new law and 2) The appeal to moral criteria results in the court creating *new rights* upon their declaration by the court and not in the enforcement of *pre-existing rights.*

With respect to 1), the exclusivist conceptualization of moral reasoning and its extra-legal capacity is therefore antithetical to an ILP position which maintains that *moral considerations are themselves often necessary conditions of legality* or, as Waluchow (1994, 155) asserts, such moral standards often "function as tests for the existence or content of valid laws." The ILP position can be stated in the following valid and sound logical argument: Moral argument is sometimes needed to determine the content of rights. Such rights are what ultimately invalidate subordinate laws in Charter challenges. Therefore, morality is a criterion of the *legal validity* of subordinate laws. I have supported this argument through the analysis of *Re B.C Motor Vehicle Act,* which, through the issue of 'substantive principles of fundamental justice', exemplifies how the content of legal rights (in this case the right not to be deprived of liberty) can depend on moral considerations and how the appeal to such moral criteria results in the declaration of invalidity with respect to subordinate legislation (in this case s94(2) of the Motor Vehicle Act). It would appear then that an understanding of Charter rights and their operation in adjudication would be contrary to the idea of directed powers and the moral guidelines or objectives that such a doctrine entails. The judiciary does not receive

'direction' from moral criteria in an extra-legal moral reasoning process. Rather, such moral criteria embedded in *legal* rights themselves often function as necessary conditions of *legality.*

Yet, according to 2), the exclusivist position seems to diverge from ILP on a more philosophical level: The inclusivist position, as articulated by Waluchow, conceives Charter rights as *pre-existing* and *antecedent* to the adjudicative decisions of judges[35]. Consider Waluchow's argument:

> It flouts [an] understanding [of the Charter as creating legal rights] to suggest that the Charter does not in fact serve this role at all, but instead only makes reference to non-legal, moral rights upon the basis of which judges are legally empowered to create new legal rights and invalidate what would otherwise be valid legal measures. In so far as it is part of the fundamental law of Canada, the Canadian Charter is quite naturally viewed as *itself creating basic legal rights enforceable in Canadian courts* (Waluchow 1994, 159; emphasis added).

It is thus counter-intuitive to view the appeal to moral considerations as unequivocally instantiating the creation of new rights.

Furthermore, the position I have argued based on Hart's analysis of indeterminacy and open texture, maintains that Charter rights are ambiguously articulated in order to allow for their substantiation in light of changing and developing social contexts and fact situations. Combining these two positions results in the following elucidating and conclusive assertion: *The Charter of Rights and Freedoms is a manifestation of rights which pre-exist their own application, whose substantiation and articulation over time is perpetual, and which function as the validity criteria to which subordinate law must adhere in order to be consistent with the principled objectives the Charter set out to protect.*

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[35] In acknowledging the 'pre-existence' of rights I am not denying the view that rights are 'developed'. The core of a right pre-exists its application, but in indeterminate cases, the rights must be considered 'new' in a sense that such a point in constitutional law was never decided on prior to the indeterminate case.

Beyond these insights[36], there are at least two other connected claims that countermine the exclusivist perspective. First, can it not be said that the stipulated criteria appealed to in the determination of the content and meaning of rights are not 'moral', but are *legal terms which allow the appeal to moral considerations?* For example, 'fundamental justice' in section 7 of the Charter is a legal term that serves as a criterion of validity of subordinate laws. Therefore, engaging in moral reasoning to consider the substantive merits of laws and whether or not they are in accordance with principles of fundamental justice does not mean that the judiciary is participating in a strictly 'moral reasoning process', in which judges are seen to be 'appealing to foreign law' and consequently deemed to be outside the realm of legal interpretation.

Second, the section 1 analysis of all cases in which rights are deemed to have been infringed, calls for moral judgment. However, this section of the Charter cannot be viewed as a moral guideline that 'directs' judges in their decisions about the constitutionality of subordinate law. The section is a legal test; it is a criterion of legal validity for subordinate legislation. Deciding whether a right is demonstrably justified does require reasoned judgment, which may require some degree of moral deliberation. Yet it would be contrary to the nature of Charter rights and their role in the adjudication of cases to assert that every time a right under the Charter has been infringed by a law, that recourse to the criteria delineated in section 1 are not of *legality* or *validity* but are distinctly *moral* or *extra legal.* The key point is that in positing that the 'criteria are

[36] Waluchow (1994, 160) also argues that the language of the Charter itself confutes the ELP position. When laws are inconsistent with the Charter's contents, they are of 'no force and effect'. Section 52 does not say that beginning with the court's declaration that the law is of no force and effect. Rather, section 52 says that the law's inconsistency pre-existed the judicial declaration and is only receiving the appropriate recognition as a result of the Charter challenge. "Inconsistencies do not begin only when judges declare them to have begun."

moral' and that they are 'legal criteria which often require moral deliberation', is to effectively posit two entirely different claims. The former does not contribute to a descriptively or conceptually accurate account of Charter adjudication, while the latter appears to reflect such an account.

On these grounds, it would seem not only that acceptance of the exclusive account based on Raz's sources thesis does not encapsulate the nature of the Charter rights, but it also fails to explicate a straightforward and intuitive understanding of Charter adjudication. It is difficult to see how Raz can maintain that moral consideration or evaluative argument itself cannot constitute criteria of legality: His exclusivist position improperly conceives the way that moral considerations figure in determinations of the meaning and content of rights, and results in a *failure to appreciate how such moral considerations constitute the criteria of validity of primary rules of obligation.*

Therefore, ILP is a theory that provides a descriptively and explanatorily accurate account of Charter jurisprudence and the adjudication of rights cases. It can show that the appeal to morality in judges' semantic and validity determinations is a *legitimate legal* practice and, because the practice is not 'extra-legal', that instead of creating new rights upon their declarations, judges actually articulate the *pre-existing rights created by the Charter itself.*

Section 5: Further Objections to ILP

To continue the analysis of arguments which attempt to undermine the plausibility of ILP, I explicate what I refer to as Raz and Dworkin's 'analytical construal' of the rule of recognition. The rule of recognition as a topic in legal theory is indeed fundamental since

it *clarifies and identifies a legal system's criteria of validity.* Furthermore, the arguments are those of ILP's most adamant and forceful critics.

Value, Purpose and Content of the Rule of Recognition

Continuing along the lines of a critical theoretical analysis of the previous chapter, a point of contention between Raz and Dworkin and a set of damaging arguments against ILP can be identified in Raz and Dworkin's treatment of the purpose and content of a legal system's rule of recognition. The two theorists employ different hermeneutical approaches and reach what is a fundamental difference as to how one should *understand* the rule of recognition to operate (if at all) as an ultimate rule identifying the grounds of legal validity. As I have shown in the discussion heretofore, the importance of the rule of recognition with respect to the relationship between law and morality is fundamental: *When interpreting the validity of a law, the rule of recognition embodies or is a manifestation of the criteria relative to such an interpretive determination.*

Raz can be identified as having asserted two specific additions to the understanding of the Rule[37] and another general stipulation concerning the overall purpose and contents of the Rule. First, it appears that Raz challenges the Hartian assertion that it is a 'rule' that must be referred to in order to establish the validity of another (subordinate or primary rule) rather than what Raz refers to as a "jurisprudential criterion" or a statement that "does not describe a law but a general truth about law" (Raz 1970, 200). He sees this discrepancy in the fact that not all legal systems have laws which purport to oblige different primary organs by listing the requirements or conditions to be fulfilled with respect to those laws, and further, that even where these laws do exist,

[37] As noted by Jules Coleman (2001a), Raz often refers to the rule of recognition as the manifested "criteria of legality"

they are not acting as a rule of recognition. Rather, it is because the laws are recognized by the primary organs themselves that they are said to be a part of the legal system. I do not think that Hart would necessarily deny this argument. It has already been identified that Hart viewed the rule as a social rule, or a practice rule. A 'general truth about law' is manifested by the practice of such a rule of recognition. That is, the rule of recognition is not a particular written law, but its contents are manifest in the act of officials.

Second, and where I believe Raz's view is unwarranted, is when he raises the possibility of there being more than one rule of recognition: "Why not say that there are various rules of recognition, each addressed to a different kind of officials? Why not say that various rules of recognition prescribe the recognition of various types of laws" (Raz 1970, 200)?[38] To interpret the rule of recognition as potentially plural is to seriously misconstrue its interpretive capacity. When officials decide whether or not to apply statutes, the constitution, or any legal source, the result is a manifestation of their critical reflective attitude towards the particular source in question, which, when acted upon, constitutes *an exercise* of the legal system's rule of recognition. I argue that Hart was interested in setting the rule of recognition above all other 'descriptive or prescriptive' rules because he viewed the rule as a 'universal act of recognizing'. Therefore, because it assumes this 'meta-status', the rule of recognition should, at most, be seen as applicable in different contexts, but, arguably not perceived as being but one of a series of recognizing rules.

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[38] It should be noted that in *The Authority of Law* Raz argues that there are 'ultimate legal rules' whose reason for obedience by officials does not rely on its sources but is due to the existence of the rule itself. These rules are ultimate because there is no higher law that determines its validity. I think the reference to these rules in plural is the extension or elaboration of his idea that there can be more than one rule of recognition.

The Argument from Authority

Furthermore, and more representative of his overall theory of law, is the argument, based on his previously mentioned sources thesis and incorporation of authority as an element of law's normative force, that the purpose of the rule of recognition is to identify the 'criteria of legality' and *its content cannot, without question, ever include moral or evaluative considerations.* This is the main argument Raz uses to undermine ILP. His argument in this respect can be outlined as follows: All legal systems have a claim to legitimate authority. By their nature, then, authoritative directives (legal norms) offer citizens what Raz (1994, 198) termed 'exclusionary' or 'pre-emptive' reasons for action. For the rules to have an authoritative status, they must give, as is posited in Raz's normal justification thesis, decisive reasons for action. Consequently, Raz argues that ILP, which permits recourse to moral considerations involved in evaluating the legality of a law, would thereby vitiate the law's authoritative force because "the mediating role of authority cannot be carried out if its subjects do not guide their actions by its instructions instead of by the reasons on which they are supposed to depend" (Raz 1994, 198-9). Thus, Raz's argument is essentially that *in order to sustain the authoritative nature of the law, there must be a preclusion of evaluative criteria in determining the legality of the particular impugned law or rule.*

Before moving into an analysis of Dworkin's conception of the rule of recognition, the following is a presentation of two powerfully undermining arguments against Raz, which illuminate his radical and "conceptually problematic"[39] depiction of law as a tool that excludes human reasons for action, and the undue epistemic description

[39] Emran Mian uses this term to describe how Raz's enunciation of exclusionary force is quite difficult to fathom.

of the rule of recognition as serving as an identification mechanism for citizens. Evidently, these contestations question the assumptions on which Raz's argument on the rule of recognition is founded and hence its effect on ILP.

The first argument challenges Raz's notion of the law's 'exclusionary force'. Emran Mian (2002, 125) states that "there is no functional, teleological or existential reason" for one to presume that the law effectively excludes our dependent reasons and itself becomes a reason for action, and that the law's claim of authority is established when it satisfies the 'normal justification' thesis. The reason for these assertions is that it appears to be far more likely that the law *outweighs* rather than *excludes* the dependant reasons. As Stephen Perry clarifies (1987, 223), authoritative directives are "second order reasons [which are] reason[s] for treating a first order reason as having a greater or lesser weight than it would ordinarily receive, so that an exclusionary reason is simply the special case where one or more first order reasons are treated as having zero weight." Furthermore, the establishment of 'exclusionary force' seems untenable if we accept that Raz's articulation of law's mediating function with respect to citizens is misleading. We then have reason to question whether or not the law can ever be said to function so instrumentally as to 'control' or at least strongly guide one's practical reasoning. If the law is to be viewed as affecting human reason, and if its authority is established only if the law in question effectively replaces the need for deliberation over the dependant reasons[40], then we have a radical characterization of the law as becoming the bearer of moral expertise, the manifestation of an uncontestable reason for action. The law at best provides citizens with a reason that strongly outweighs the need for deliberation over

[40] Again, as identified in Raz's three theses, dependant reasons are the reasons that apply directly to the subject; the reasons that are supposed to be replaced by the reason of the law.

dependant, first order reasons, but it does not, with respect to practicality, effectively *cancel* the need for one's own moral reasoning. *If it cannot be said that the law is authoritative on the basis that it provides pre-emptive reasons for action, then we have reason to question the strength of Raz's claim that the law 'mediates' practical reasoning and vitiates the role of moral considerations in establishing the authority and hence the validity of the law.* Even if the law may be 'exclusionary' if it has been given zero weight through the practical deliberations of those to whom the law applies, this is an *exception* of the law being authoritative through preemption, not the *rule.*

The Epistemic Argument

The second challenge to Raz, offered by Jules Coleman, argues that Raz's conceptualization of the rule of recognition can only hold if one assumes that its function is to identify the legal norms that are binding on both citizens and officials (Coleman 1996, 292-3). Yet, the role of the rule of recognition is not geared towards citizens who wish to identify the laws that apply to them. The rule of recognition *guides officials* who seek the *validity* of laws. Thus, there is a substantial set of claims against Raz that are implied: *Validating* the law through the rule of recognition is entirely different than the epistemic function of *identifying* law, the authority of the law is not dependent on citizens' ability to identify the law via a preemptive rule of recognition, and finally, validating law does not preclude recourse to moral considerations. Coleman makes a distinction between the rule of recognition identifying valid law itself, and validating law through its criteria. Coleman says that the legitimate authority of law is not put into jeopardy if we consider that citizens do not use the rule of recognition to identify valid law (only judges do). Explaining the difference between the identifying and validity

functions of the rule of recognition, Waluchow (2002, 147) asserts that "[people] can be guided by a law whose *validity* depends on excluded moral principles, but which doesn't have to be *identified* on the basis of such excluded moral principles."

Raz does not appear to consider that determining the validity of a law and identifying it are two totally different functions, and that *validity determination can involve reference to moral standards incorporated into the rule of recognition without thereby undermining the authoritative nature of legal rules generally* (Coleman 1996). As I have stressed, this inclusion of morality is descriptively accurate. This insight identifies an excluded consideration in Raz's argument for the value-free rule of recognition as well as establishing that his argument from authority is confused when the difference between the epistemic and semantic functions of the rule of recognition are highlighted. Hence, it is arguable that Raz's conceptualization of the purpose and content of a legal system's rule of recognition is based on unwarranted assumptions, presenting the reader with cause to question the persuasiveness of his arguments both for the legitimacy of his theory and its effect of vitiating ILP.

Dworkian Principles as Legal Norms

Ronald Dworkin treats the rule of recognition in a far more critical manner. Contrary to Raz, Dworkin argues that the rule of recognition as depicted by Hart is conceptually and descriptively untenable. Dworkin's argument against the presence of a master rule of recognition is fundamentally based on his conception of legal norms. As is clarified by Brian Bix (1999, 21), Dworkin's argument against ILP and other forms of positivism included the line of reasoning stipulating that judges are obligated to apply, in their process of constructively interpreting the law, principles of political morality. Further,

the rule of recognition is unable to account for the aforementioned nature of legal practice, because "moral principles [can] not be identified (and their weight ascertained) by the content-neutral pedigree criteria of the rule" (Bix 1999, 21). That is, principles, because they do not "apply in an all or nothing fashion" (Dworkin 1977, 41), cannot be 'valid' and thus cannot satisfy the pedigree or source-based criteria of validity recognized by the rule of recognition. However, there is an argument to be made that Dworkin's dismissal of the rule of recognition because it is unfounded is formulated by an analytical construal of Hart in an attempt to weaken not only Hart's positivism but all positivist theories including inclusive and exclusive positivism.

The problem with Dworkin's view of the rule of recognition is that it erroneously limits the rule to being constituted by pedigree criteria, or, in the epistemic sense, limits it as *identifying* legality on strictly source-based criteria. Dworkin cannot be correct in asserting that the rule of recognition *cannot* refer to the *content* of a legal norm as indicative of its legality and thus validity and further, that the legal principles of a legal system *cannot*, under the Hartian conception, be considered identifiable legal norms. One must not look further than the writings of Hart himself to undermine Dworkin's claims about abandoning the rule of recognition. Identifying Dworkin's assertion that the rule of recognition is not compatible with the interpretive nature of the law, Hart states: "This preoccupation has, I think, in fact led [Dworkin] into a double error: first to the belief that legal principles cannot be identified by their pedigree, and secondly, to the belief that a rule of recognition can only provide pedigree criteria" (Hart 1994, 264). The fact is that principles can be identified by reference to precedent cases wherein some principle was employed to facilitate a decision. In Hart's words, "the starting point for

the identification of any legal principle to be brought to light by Dworkin's interpretive test is some specific area of the settled law which the principle fits and helps to justify" (Hart 1994, 266).

However, Dworkin's (1977) claim appears to go further: He says that sometimes principles count as law that have never before been officially recognized (no pedigree). Yet, there seems to exist what may be called a *chain of validity*. If one considers that even if we were to accept Dworkin's argument that in cases like *Riggs*[41], principles counted as law that seemed not to originate from any source, the settled standards that are being interpreted in the case are themselves valid in that they satisfy some criteria of validity. Furthermore, between the settled area of law that is itself valid according to some criteria of validity, and the new fact situation that casts the determinacy of the case into the 'penumbra of uncertainty', the unrecognized principle (of the sort in Riggs) may be viewed as the missing link in the chain of validity. The principle, not existing as a source based norm prior to its incorporation, becomes part of the extant law through a reasoned process of legal interpretation involving the avoidance of literal readings which could lead to absurd results[42]. Not only is the avoidance of absurdities through a broader or more purposive reading of a law a *legally recognized rule of adjudication*, but it is also analogous to the purposive approach to rights argued for in the first chapter. Although the version of ILP I have defended does not recognize legality criteria that do not link to a source, it would not flout or undermine ILP to concede that a legal system may

[41] Dworkin (1986, 16-20) uses the *Riggs v Palmer* case to show how the principle "no one should benefit from their own wrongdoing", was used to decide a case that, given a plain and literal reading of the law, would have undoubtedly been clear and determinate. The defendant, Elmer Palmer, had murdered his grandfather (Riggs) in order to inherit his grandfather's will, to which he was entitled. According to the law, Palmer was entitled to the inheritance. However, under the impression that a decision to this effect would be absurd and that the intentions of the lawmaker's could not have been to allow murderers to inherit wills, the court used the aforementioned principle to decide against Palmer.

[42] This rule of interpretation in adjudication is often referred to as the 'golden' or 'contextual' rule.

recognize certain source based adjudicatory rules that guide the interpretation of cases such as Riggs, and that allow for the reasoned and justificatory incorporation of non source-based norms as *new* legality criteria. The incorporation of such norms often results in the inclusion of the missing link in a chain of validity.

Second, even though the specific principle used in a particular case may itself not be explicitly recognized as a criteria of validity, this does not mean that there is a condition that would restrain a legal system's rule of recognition from making moral value or merit (of the sort in the unrecognized principle) a criteria of legality (Coleman 1996, 287-88) That is, the legal system may allow for a previously unrecognized principle to function as a valid legal norm because that legal system recognizes, through the practice of its officials, that such norms may be valid on the basis of their merits.[43]

Therefore, Dworkin's view that only a constructive interpretation of the law can identify legal principles and the consequential dismissal of a rule of recognition seems unwarranted. Even more compelling is the fact that contrary to what Dworkin believes to be true, both legal rules and principles are identifiable, in Dworkian terminology, 'in plain fact', and as such, the judicial identification of such sources for decision must be guided by the very rule which Dworkin dismisses. Essentially, what Dworkin has done amounts to an interpretation of the rule of recognition as operable only in a Razian legal

[43] This is essentially the 'morality as sufficient conditions for legality' argument that I rejected in the above analysis of necessary and sufficient conditions when characterizing ILP as a theory which explains the role of law and morality in Charter jurisprudence. Although I have rejected the sufficiency claim in the context of the Charter, this does not mean that I endorse a position which precludes the possibility that in *some legal system*, there may exist merit or content based criteria of validity. My claim is that, in the context of the Charter, inconsistency with a moral norm cannot be a sufficient condition for the invalidation of a law. The purpose of introducing it here was to show that there is a version of ILP based on sufficient rather than necessary conditions that undermines Dworkin's claims.

system, a legal system which, as I have already shown above, is descriptively and conceptually misleading.[44]

In sum, the preceding analysis of Dworkin and Raz's conceptualization of the rule of recognition, including its purpose and content, highlights their divergent views on the interpretation of legal validity. More importantly, it shows that their arguments are incapable of undermining ILP. Whereas Raz erroneously sees the rule of recognition as pedigree based and free of an 'inclusive element', Dworkin expunges the rule of recognition precisely because it is pedigree based. Furthermore, it is clear that both Raz and Dworkin's claims are, in some respects, either conceptually and descriptively problematic or inadequate. Raz's concept of authority and exclusionary reasons is questionable, and he fails to recognize the ILP argument that distinguishes between the rule's two epistemic functions of identification and validation. Dworkin fails to draw the connection between legal principles and their often pedigree or source based conditions of validity as well as how unrecognized principles may be thought of as linked in a chain of validity under the guidance of source-based interpretation rules of adjudication.

Although the critique of the aforementioned Dworkian and Razian arguments based on the rule of recognition against ILP gives further credence to ILP as a descriptively accurate theory, there is one argument in this chapter that remains to be addressed.

Law & Practical Difference

In addition to the law's legitimate claim to authority, another central feature of law is its ability to guide conduct or to control behavior. From the general observation that law

[44] I am referring here to the fundamental tenet of Raz's theory, which grounds all of his subsequent claims. This is that the dependence of law's authoritative force is on its 'exclusionary' nature and that determinations of legality are made through the application of value-free, source-based criteria only.

provides reason for action which purports to guide conduct, Jules Coleman has observed the importance of explaining what sort of criteria a law must meet in order for it to be capable of fulfilling such a guidance role or function. This criterion is articulated in the form of a general thesis known as the Practical Difference Thesis. Coleman (2001b, 121-22) defines the Practical Difference Thesis as

> the basic claim...that law must in principle be capable of making a practical difference. It must be capable of affecting deliberation and action...[It] asserts that legal rules must in principle be capable of making a practical difference, and that they must be capable of doing so in virtue of their being law.

In an attempt to undermine ILP in favor of ELP, Scott Shapiro argues that one cannot accept the possibility of an inclusive rule of recognition and at the same time accept the contents of the Practical Difference Thesis. His argument is challenging and is generally as follows:

First, the law must be capable of guiding conduct either 'epistemically' or 'motivationally'. The former is the type of guidance one receives when one "learns of his [or her] legal obligations from the rule provided by those in authority and conforms to the rule" (Shapiro 2001, 173). However, it is not necessary that the person complies with the rule because of the rule itself. This is what distinguishes epistemic and motivational guidance. According to Shapiro (2001, 173), "someone is motivationally guided by a legal rule when his or her conformity is motivated by the fact that the rule regulates the conduct in question.... To be motivated to conform to a legal rule by the rule itself is to believe that the rule is a legitimate standard of conduct and to act on that belief." Therefore, in order for the law to be capable of making a practical difference in our deliberations, it must be capable of guiding conduct either epistemically or motivationally.

The next logical step in Shaprio's argument is the claim that an inclusive rule of recognition would preclude the possibility of epistemic and motivational guidance. His arguments are essentially that both sufficiency and necessity versions of ILP, and the connection between morality and legal validity that they both engender, are inconsistent with the thesis and thus inconsistent with a positivist conception of law. Because I have already shown that sufficiency versions of ILP are conceptually untenable in the context of the Charter, the focus will be on Shapiro's arguments with respect to versions which posit that moral considerations sometimes serve as necessary conditions for legal validity.

First, under an inclusive rule of recognition, wherein the criteria of validity often include legal terminology whose clarification in meaning and content require some degree of moral deliberation, legal rules are incapable of fulfilling an epistemic guidance function because an individual cannot "learn of his legal obligation [directly] from the rule" (Shapiro 2001, 184). A rule whose validity depends on moral deliberation, then, "cannot epistemically guide when the only way a person can figure out whether he or she should follow the rule is to *deliberate about the merits* of following the rule" (Shapiro 2001, 184-85, emphasis added).

Second, Shapiro (2001, 185) makes the claim that since "content-independent" and "peremptory" rules are what give reasons for action, and that motivational guidance occurs when a rule is obeyed because it provides such reasons for action, then rules whose validity may depend on incorporated morally-laden legal criteria *cannot motivationally* guide anyone because moral deliberation vitiates the possibility of the *rule itself* being a peremptory reason for action. It is on these grounds that Shapiro rejects

ILP. ILP is incompatible with the law's claim to be capable of making a practical difference in one's deliberations because it allows moral tests as conditions for legality

Response

Although there have been a few 'inclusive' responses to this thought-provoking line of critique (Coleman 2001a, 2001b, Himma 2001; Waluchow 2000), I shall focus on two claims: One is based on the transposition of the Practical Difference Thesis into Charter jurisprudence, while the other seeks to vitiate the *conceptual universality* of the claim that law must constitute 'peremptory reasons for action' which are capable of practically affecting human deliberation.

First, it is hard to fathom why criteria of validity in the form of Charter rights, recognized in the Canadian legal system, must necessarily be peremptory reasons in order to provide guidance that can make a practical difference. Extrapolating from Shapiro's line of argument, it would appear that his claim in the context of the Charter would be that the moral deliberation involved in determining the content and meaning of a right and its relation to a subordinate law would be equivalent to assessing the law (right) on its 'merits' and the right would therefore be incapable of acting as a peremptory or content-independent reason for action. If the criteria of validity in the form of a Charter right cannot function as a 'peremptory reason', then the judicial official cannot be motivationally guided by it.

Yet this line of argument fails to realize that Charter rights cannot always be applied without appealing to morally-laden legal terms such as 'principles of fundamental justice' and 'equality before the law' in order to properly adjudicate Charter challenge cases. In cases such as *Re B.C. Motor Vehicle Act*, a section 7 right to life, liberty and

security of the person and the particular impugned section from the Motor Vehicle Act were given contextual meaning by an inevitable appeal to 'the principles of fundamental justice'. As I have already clarified, this involved the consideration of substantive principles and thus involved recourse to moral deliberation. More importantly, this case exemplified an instance wherein the interpretation of Charter rights (criteria of validity) and the terms in which they are written can not occur without an appeal to moral deliberation and hence constitute necessary conditions of legality for subordinate laws. Can one properly claim that in this instance the section 7 Charter right did not affect the judges' practical deliberations simply because they appealed to moral considerations? To claim this would be tantamount to a fundamental misconstrual of the nature of Charter rights and their application in case law. This is so because the appeal to moral considerations often *necessarily constitutes the reason for judicial action* and that such recourse to moral deliberation is *inevitable*. Therefore, to assert that rights must be 'content-independent' and 'peremptory' reasons in order to effect the deliberations of judges as the Practical Difference Thesis requires, is simply descriptively inaccurate. The fact is that the appeal to moral considerations inevitably constitutes 'reason' for the judge to *accept* and apply the right itself. In this respect, it would seem that, without such appeal to moral considerations, the *right itself* could not suffice to constitute a reason for action. Thus, it is the very nature of legal rights that they are not 'peremptory reasons' for action.

However, on this basis, it would be absurd to then make a Shapiro-based claim that legal rights therefore cannot motivationally guide judges. When judges make meaning, content and validity determinations via moral deliberation during the course of

Charter adjudication, this does not mean that they have essentially abandoned the right itself from 'guiding' their reasoning.

Even if the right is not a peremptory reason, it still *partially guides* the judges by providing a contextual legal framework[45] in which they can adjudicate. *In the context of Charter rights, motivational guidance is instantiated by the right itself and the moral considerations appealed to in the course of determining the meaning and content of the right.* Shapiro's argument, when considered in the context of the Charter, actually undermines the force of the Practical Difference Thesis, while at the same time it misconstrues the way in which Charter rights function as reasons for adjudicating Charter cases.

The final argument against the Practical Difference Thesis goes beyond the illumination of its inconsistencies with Charter rights and focuses on a more general conceptual claim that it appears to make. Jules Coleman has made the insightful distinction between the claim that law must be capable of making a practical difference and each law, in order for it to be law, must be capable of making a practical difference. As he has pointed out, the general conceptual claim the Practical Difference Thesis makes "simply does not entail any claims about what must be true of any *particular* law....What is or must be true of *the law* need not be true of *a law.*" Furthermore, "the claim that each law must make a practical difference in order to be law seems to be an

[45] A contextual legal framework is comprised by precedent cases wherein particular morally-laden legal terms are given meaning and whose definition is further defined. For example, when a section 15 Charter Challenge is brought forth on the basis of discrimination, the right itself does not *fail to guide* the judge when he or she engages in a legal reasoning process which is characterized by moral deliberations about the meaning and content of the particular right in question and its relationship to the subordinate law. Rather, the Charter right itself provides a source-based (precedent) framework on the concept 'discrimination' in which the judges are constrained to adjudicate. Even if appeal to the Section 15 right of equality does not directly determine the legal decision (give a peremptory reason), it does, through a combination of the contextual legal framework it provides and the moral deliberations of the judges, *indirectly* guide conduct and thus *does* affect the practical deliberations of the judges.

instance of the fallacy of composition" (Coleman 2001b, 144). The idea is that not every law must *necessarily* be capable of making a practical difference through either epistemic or motivational guidance. Although Coleman (2001b, 144) makes the Hartian argument that not all laws are commands and therefore not all laws actually exist to directly guide human conduct,[46] I argue that rejecting the sweeping claim that 'in order for a law to be a law it must be capable of making a practical difference' goes beyond discussions over distinguishing types of law and is grounded on the misleading depiction of how law functions in the lives of citizens.

The Practical Difference Thesis mischaracterizes the real 'multifaceted' nature of law. By claiming that law must make a practical difference it treats 'law' only as conduct governing norms that actually effect individuals' day to day deliberations. This characterization of law results in a confluence of law's more subtle and impractical features with its feature as a direct conduct-guiding norm. Surely, to treat laws as such powerful disciplinary mechanisms overlooks how ineffective the existence of law can be on human action.

Although it would appear that due to the occurrence of juridification characterized by the expansion of law in the modern welfare state (Habermas 1987, 356-73), and therefore because there is more regulation of the market, increased social rights, and the overall expansion of rights discourse, that the law should be capable of making a practical difference in our deliberations. But should we go so far as to say that in order for law to be 'law' that it must be capable of making a practical difference in our lives?

Despite the fact that Canada is a modern, constitutionalized, welfare state, characterized by the increased expansion of law as a regulatory mechanism, we should be

[46] Hart (1994, 27-33) argues that laws often confer powers and do not always impose duties by command.

wary of characterizing law just as norms that directly guide conduct, and pay attention to how law functions in everyday social life. Not only is it doubtful that ordinary citizens characterize themselves as 'legal subjects' in day to day actions, but they are even more likely to be unaware of the laws which regulate their day to day actions. The bottom line seems to be this: 'Law' is not just formal rules in the form of rights and propositions that seek to guide our conduct directly. Law is also located in more subtle areas of everyday life such as day to day contractual transactions, institutional regulations and human/property interactions. If the abundance of legal regulations are so procedurally subtle and they rarely, if ever, function as direct modes of conduct-guidance in citizens' day to day lives, then the conceptual claim that laws must be capable of making a practical difference via motivational or epistemic guidance is unnecessary. The Practical Difference Thesis obfuscates an understanding of the diverse nature of law, instead constituting it as a universal, unitary mechanism of conduct-guidance. It is on the basis of this fundamental misconception about the function of law that undermines the argumentative force of the Practical Difference Thesis.

In the end, although some law when appealed to (whether by a judge or a citizen) can be capable of making a practical difference in one's deliberations, it would flout an understanding of the very nature of law and its operation in day to day social life to claim that the Practical Difference Thesis be a universal criterion to which any law must meet in order for it to be law at all. Thus, the claim that law must be capable of making a practical difference is contingent: Not all laws must necessarily be capable of epistemically guiding citizens in order for them to be law at all. Through the exposition of such conceptual imperfections, the Practical Difference Thesis must be confined to the

general claim that *law* and not *each law* must be capable of making a practical difference on human deliberation. Given this conceptual and definitional clarification, and the argument in my first line of response, it would then seem that ILP can be compatible with the Practical Difference Thesis.

Summary of Analysis

The purpose of this theoretical analysis has been to advance a means by which one can understand Charter jurisprudence, in particular, Charter rights, their relatedness to moral considerations, and the way they figure in Charter adjudication. Inclusive Legal Positivism (ILP), as it was defended, is a descriptive theory of Charter law; it accurately describes the intricate interconnectedness of legal validity, reason, authority, meaning and morality within the context of the Charter. Through the prefatory comments on ILP contained in the first section in conjunction with the discussion of ILP as a theory properly articulated in necessary rather than sufficient conditional statements contained in the second section, the result was a three part theoretical formulation: 1) If a law has membership in the legal system, then it is consistent with the questions of political morality recognized as criteria of legal validity; 2) In the Canadian legal system, there can be (and are) morally-charged tests that function as necessary conditions in the determination of the existence, meaning and content of valid law and 3) Both 1) and 2) are true, if and only if, the legal system contains an inclusive conventional rule of recognition.

The remainder of the chapter was an argumentative effort to defend this version of ILP. The third section included an analysis of what I have termed the 'two levels of morality'; one in the abstract level of judicial recognition in the form of reason-causing

moral commitments and the other as those moral deliberations appealed to by judges in the course of adjudicating Charter rights cases

The fourth section involved a distinction between an exclusivist and inclusivist interpretation of moral reasoning in the context of the Charter. It was argued that an exclusivist depiction of moral reasoning as equivalent to a process of appealing to foreign law, and an entirely extra-legal, thoroughly moral practice, does not accurately reflect an understanding of Charter jurisprudence and the adjudication of rights cases. On the other hand, ILP's conceptualization of moral reasoning explains that the appeal to morality in judges' semantic and validity determinations is a *'legal'* practice and that instead of creating new rights upon their declarations, they are actually articulating the *pre-existing rights* located in the Charter. *In this sense, then, the semantic indeterminacy of morally laden legal terms in Charter rights is a legally legitimate phenomenon.*

Finally, in the last section some of the most forceful arguments advanced by Dworkin and Raz, as well as a significant criticism offered by Shapiro, were analyzed and ultimately undermined. It was argued that both Dworkin and Raz each erroneously construe the concept of a rule of recognition and that their arguments founded on such a construal ineffectively undermine ILP. In addition, Shapiro's argument on ILP's incompatibility with the law's capability of making a practical difference was ultimately rebutted not only on the basis that it improperly reflects the nature of Charter rights, but also because it mischaracterizes law as a normative enterprise whose sole function is to directly guide conduct.

Ultimately, the theoretical analysis advanced yields the following conclusion: Inclusive Legal Positivism in the form I have defended it is a descriptive/explanatory

theory that best explicates Charter jurisprudence, including the nature of Charter rights, their operation in Charter adjudication, and the interconnectedness of legal validity, reason, meaning and moral considerations within the context of the Charter. By doing so, ILP legitimates and legally justifies the semantic indeterminacy inherent to Charter jurisprudence.

Although this chapter has purposely included a descriptive methodology, the final chapter takes a partially normative turn. The reason for such change in jurisprudential approach from descriptive to normative is primarily due to ILP's failure to provide a theory of adjudication. Although ILP can show that the judicial appeal to moral considerations often constitute necessary conditions of legality, it does not purport to describe the *interpretive* process. Furthermore, it does not purport to *mitigate* the *semantic indeterminacy* associated with the judicial appeal to moral considerations as raised by scholars such as Allan Hutchinson who 'problematize' the instability and uncertainty in Charter adjudication. Therefore, the final chapter attempts to reconcile the asserted undesirability of indeterminacy in rights cases by advancing a justificatory adjudicative typology consisting of an explication of an ideal 'attitudinal model' of decision-making in penumbral cases, which is grounded in and inspired by a Gadamer/ Habermas-influenced legal hermeneutics.

Chapter 4: Stabilizing Legal Reasoning: A Hermeneutical Endeavor

Now that I have established that ILP perspicuously explicates our understanding of the way that moral considerations figure in the determination of the meaning and content of valid law in a Charter jurisprudential context, the lingering critique of indeterminacy in legal reasoning and interpretation remains to be re-addressed and subject to analysis. The concerns that will guide the structure and content of the remainder of this thesis, then, are as follows: 1) How does one go about explaining the concept of legal interpretation? 2) How can the charges of semantic indeterminacy in Charter adjudication be ameliorated or at least mitigated in light of the wider ontological context of understanding itself?

I argue that the answers to both of these questions can be found through an examination and appropriation of conceptual insights contained within the literature of philosophical and critical hermeneutics. In establishing that legal interpretation is best conceived of from an ontological perspective, by dismantling the objective/subjective dichotomy in the structures of epistemological thought, and focusing on how reaching an understanding is a dynamic, intersubjective and contextual process, I maintain that such a Gadamer/Habermas inspired hermeneutical approach can still be infused with a *moderate foundationalism.* That is to say, although methodology as the sole route to the attainment of truth is discredited, and, on the other hand, that idealistic situations wherein truth is achievable due to undistorted communication are equally unlikely, there may still be a mediating route towards the attainment of decisions in legal interpretations. This 'mediating route' will take the form that I call an 'attitudinal model' or an 'adjudicative

typology'. By fusing the intellectual insights of Gadamer and Habermas, I purport to substantiate such a model or typology.

This chapter will be broken down into 4 main sections. The first section will focus on the inherent limitations of theory involving practical wisdom, or what Heidegger referred to as 'mindless coping skills'. With such limitations established, the second section introduces the hermeneutical approach in the spirit of Hans-Georg Gadamer and Jurgen Habermas, focusing on their contributions to this area of thought and the points to which they take contrary positions. Based on the preceding sections, the third and main section connects legal interpretation to the hermeneutical insights and advances the idea of an attitudinal model/ adjudicative typology, which is constituted by the recognition of difference in the community involving the tension between, and fractured existentialism of, societal values, and the importance of consequentialist thinking. Finally, the last section will utilize the explicated adjudicative typology and revisit the *Little Sisters* case, exposing the flawed decision and arguing that the court fundamentally failed to recognize and apply the underlying concept of *difference*. Ultimately, the aim of the argument in this chapter is to render interpretation in Charter adjudication indeterminate but *constrained* and show that legal interpretation in this hermeneutically-based light is capable of yielding judgments that exemplifies an understanding of the text in its current situation, and, more importantly, that elucidates what is involved in the interpretive endeavor to achieve 'understanding' itself.

Section 1: A Message from Heidegger

An appropriate starting point for examining legal interpretation in Charter adjudication and in what ways it should be guided is to elucidate the nature of 'theorizing'

adjudicatory practice and how such a task is limited. When one speaks of a 'theory of adjudication', one refers to a set of descriptive and prescriptive normative assertions that govern judicial decision making. In a lexical conjoining of description and normativity, a theory of adjudication purports to describe what judges do in the adjudicatory process and what they ought to do[47] (Leiter 1996, 257). However, apart from illuminating the standards to which judges turn for legitimate authoritative guidance when formulating their deliberations, a theory of adjudication further deals with "how judges do and should construe... authoritative sources to determine what rules they stand for and also which authoritative sources are controlling in any particular case" (Leiter 1996, 259). Thus, what ILP can inform us about adjudication is that one of the 'standards of decision making' is that moral considerations instantiated by morally laden legal terms of Charter rights can and do operate as necessary conditions of legal validity when ascertaining the meaning or content of law. This is a standard of decision making that is primarily source-based as it flows from a norm, namely, the inclusive rule of recognition.

However, ILP can only remain a theory of Charter law in a descriptively narrow sense; although it describes the relationship between law and moral considerations in Charter jurisprudence it does not amount to an explication of how judges go about *choosing* reasoning methods or *how they ought to choose* one interpretation of a law over another. Simply, it is not a theory of adjudication. This means that although ILP does identify and articulate the way law and morality are connected in the context of the Charter, it does not go far enough to conceptualize the wider context in which legal interpretation occurs, and, ultimately, what informs the judge's practical or evaluative

[47] Perhaps the most obvious example of this descriptive/normative theoretical fusion is Dworkin's theory of adjudication. His theory of law as integrity and constructive interpretation are meant to depict how judges decide cases and how they ought to decide them.

reasoning in the deciding of indeterminate cases. The task for theory, then, would seem to be significant. Yet, there are reasons to believe that the achievable theorizations of adjudicatory practices are inherently fettered and circumscribed.

German philosopher Martin Heidegger suggested that the way that people 'are' in the world is based on a 'Background' "which renders the world meaningful and intelligible but which also resists explicit articulation in cognitive terms" (Leiter 1996, 263). In an insightful and informative article, Brian Leiter tries to connect this thought of the impossibility of articulation with adjudication. The underlying assertion is that a description of adjudication may be impossible because what judges do escapes cognitive articulation (Leiter 1996, 263).

Heidegger's intelligibility of the world is based on the recognition of the importance of 'everydayness' which forms the 'Background' that he speaks of as that which renders the world meaningful. Leiter explains what this means by way of exposition of Heidegger's use of the concepts of 'present at hand' and 'ready at hand'. Things are ready at hand when we assign a function to them and use them in accordance with that function. For example, our interaction with objects such as a pen could yield the following intuitive through process: 'pens are for writing as opposed to cutting'. On the other hand what is present-at-hand refers to a 'detached looking' at certain objects and being able to individuate them intelligibly. Such theoretical knowledge is wholly dependent on the practical know- how we have when relating to things as ready at hand (Leiter 1996, 265-66). Yet the most important connection that Leiter highlights is Heidegger's belief that it is the non-cognizable practical and intuitive skills that humans beings have that make the world around them intelligible, and that these are often

incapable of being articulated in propositional form: What we do with practical ease is often incapable of being theorized.

This ideal is central to understanding Heidegger's explication of "Being in the World". Leiter (1996, 270) further describes this notion: "The way human beings exist or dwell in the world is fundamentally in a state of practical absorption in tasks and skills, in which theoretical knowledge of things (as present at hand) is only a secondary and parasitic phenomenon".

A theory of adjudication, then, appears to be a formidable and virtually unattainable achievement. Leiter (1996, 271) connects his account of Adjudication to Heidegger:

> ... we need only to see that the capacity for making relevance judgments [judicial determinations of what past cases apply to present cases] depends on the 'Background' of mindless coping skills, and, as a result, no theory of such judgments will be possible.

If Leiter's Heideggerian inspired argument is correct, then what judges are doing when deciding cases cannot be wholly articulated. The ability to state in propositional form the intuitive reasoning process of a judge deciding a Charter case would be an impossible task because to do so would amount to an infinite endeavor to articulate all of the concepts in the 'Background', the reference to which, according to Heidegger, makes all meaning intelligible. These 'mindless coping skills' that constitute practical knowledge often escape articulation. Without an exhaustive discursive capacity, a theory of adjudication that purports to describe and prescribe will no doubt come up short.

Yet, although this Heideggerian message shifts the focus from epistemological methods of achieving knowledge to the ontological concern of how understanding relates

to our 'being in the world', thereby focusing on phenomenological explications of the way things 'are', the task ahead for ameliorating the charges of semantic indeterminacy is not necessarily undermined. This is because the development of exhaustive rules of adjudication to constrain judicial discretion, which both describe what judges do as well as what they ought to do, is not a necessary approach to take. The appropriate method is to ground legal interpretation in a *hermeneutical* perspective and develop a model or approach to adjudication that, while offering a constraining path for the judiciary, equally recognizes the dynamic, contextual and intersubjective nature of legal interpretation. Thus, the turn to hermeneutics as grounding, meta-theoretical perspective on interpretation and adjudication is in order.

Section 2: Gadamer: Philosophical Hermeneutics

"Understanding is to be thought of less as a subjective act than as participating in an event of tradition, a process of transmission in which past and present are constantly mediated" (Gadamer 1989, 88)

To study hermeneutics is, essentially, to consider the principles of understanding. However, since the insights of Hans-Georg Gadamer, the original instrumental task of hermeneutics to uncover meaning of texts through interpretive methods has been imbued with a far more philosophical importance; Gadamer's purpose is not to develop a scientific method or procedure to attain understanding, but to investigate the interpenetrative forces between the individual in the world and the text, that shape the very *possibility* of understanding. The following discussion of Gadamer's hermeneutics will be broken down into a discussion of the break with scientific methodology and the turn to *ontology*, and the fundamental idea that interpretation is *dialogical*, which focuses on the attainment of truth from a intersubjective standpoint.

Understanding and Being

Modern social thought, in its entirety, is comprised of conceptual bipolarities or dichotomies, the most conspicuous one being the tension between objectivity and subjectivity. Hermeneutics, with a focus on the explication of meaning and understanding, seeks to go beyond these categorical and objective bipolarities and emphasize 'interpretive possibilities' rather than correct or methodologically proper ways of interpretation. Gadamer's fundamental insight is the idea that truth must not be confined to method[48]. This assertion supports the idea that meaning itself cannot be extracted from an 'object' by an independent 'subject'. Rather, "it is a relation between a *historical* being and the continually manifested being of the artifact [text] as it is experienced through *tradition"* (Mootz 1988, 528, emphasis added). For Gadamer, beings in the world are constantly shaped by a historically and linguistically constituted structure called 'tradition'. By virtue of such tradition, the subject or interpreter is always 'thrown into history'. Hence, our being in history is a "finite changeable being" (Douzinas et al 1992, 126). The past is constantly re-interpreted and reworked through new interpretations and thus the very nature of tradition presents us with a pre-informed, perceptual frame of reference to understand the present.

Ultimately, by depicting the individual as a historically and linguistically shaped being in the world, Gadamer has effectively situated the hermeneutical study of the explication of understanding through interpretation in an ontological category. The idea

[48] The basis for Gadamer's approach to truth apart from method is his critique of the Kantian 'subjectivization' of aesthetics. For Gadamer, labeling artistic interpretation as merely opinion or the exemplification of taste is to erroneously subsume art to the methods of modern science. For Gadamer, there is truth in art; it is to be found not in the process of decoding an objects meaning, but in the aesthetic experience which is itself an experience of being. For a thorough exposition of Gadamer's ideas on art and its relationship to truth as grounds for his ontological approach, see Grondin, J. *The Philosophy of Gadamer.* McGill-Queen's University Press, 2003. 28-54.

is that to understand is not so much to follow an actualized set of methodological principles but rather 'understanding' is itself the "fundamental predicate of human existence" (Douzinas et al 1992, 126). Gadamer's philosophical hermeneutics breaks free from the dichotomous confines of the natural sciences and focuses on illuminating the *experiential* attainment of understanding through interpretation. However, Gadamer's explication of this does not stop after a discussion of history and tradition. His insights with respect to the *relationship between the text and interpreter as entities situated in tradition* brings us closer to understanding the fundamental connection between hermeneutics and legal interpretation.

To and Fro: The Dialogical Nature of Interpretation

If human beings who attempt to understand are guided and constrained by the traditions in which they are situated, how is their perspicacity in the present affected by the voice of the past? The answer to this question is simply that perspicacity, which allows us to understand, is inextricably connected to and reliant on our own prejudices and presuppositions. Not only does Gadamer (1989) argue that an interpreter brings his/her preconceptions, created in and informed by history, to the text, but that understanding itself is not possible without such preconceived, prejudicial fore-judgments. Essentially, interpreters "cannot occupy some neutral vantage point outside of... history and tradition", because the text is always confronted by an interpreter with a linguistically and historically shaped perception (Douzinas et al 1992, 127). The particularistic and prejudicial vantage point from which the interpreter perceives is given the term 'horizon' by Gadamer, a term that encapsulates the idea of a prejudiced forestructure of meaning.

The interpreter, then, is a being situated in and influenced by historical tradition that brings to the text preconceptions from a particular vantage point or 'horizon'.

With this forestructured thought, the interpreter engages with the text in an *intersubjective dialogue*[49] via the reciprocal imposition of questions:

> The central task of the interpreter is to find the question to which the text presents an answer; to understand the text is to understand the question. At the same time, a text only becomes an object of interpretation by presenting the interpreter with a question. In this logic of question and answer a text is drawn into an event by being actualized in understanding which itself represents an historic possibility (Bleicher 1980, 114).

The engaging nature of interpretation, including the dialogue between text and interpreter, reflects a *circular* process in which the former prejudices and understandings of the interpreter are reassessed in light of the text's horizon, culminating in the 'fusion of horizons', which is tantamount to achieving a historically and linguistically shaped understanding. The hermeneutic circle is the ambit within which the holistic interpretive process takes place. This concept is meant to be exemplificative; it symbolizes how interpretation involves "constant revisions in the anticipation of understanding" (Grondin 2003, 81) The dialogical and circular nature of interpretation, then, reveals that understanding is reached via the constant *to and fro* between past and present, question and answer, encounter and response, and the general and particular. This intersubjective and dynamic process breaks free from the methodological account of interpretation based on the application of universal rules to particular situations from a position outside of our

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[49] In Gadamer's critique of aesthetics, he uses the term 'play' to conceptualize the dialogical interpretive experience. As Francis Mootz explains, "to be at play with a work of art [or a text in general] is to relinquish the pretext of subjectivity and to follow the possibilities offered by the work, without losing one's individuality or perspective... or wholly subordinating the meaning of... [the text] to one's creative powers. The work of art [or text] has an autonomous existence apart from the viewer's subjective aims, and like two dancers who are given over to the dance, the artwork and the individual each make claims of meaning upon the other"(Mootz 1988, 531-32).

history and tradition. Essentially, what Gadamer reveals is that historicity is inescapable and, as such, understanding of both past and present is shaped by tradition which, through the limitations of prejudices influenced by that very tradition[50], prevents both the objectivity and subjectivity of interpretation.

Gadamer's ontological hermeneutics presents us with an account of the phenomenology of the interpretive process and asserts that the adherence to epistemological inquiries via scientific methodology obfuscates rather than clarifies questions of truth. However, Gadamer's ideas, especially those concerning his reliance on the authority of tradition, have been subject to vehement critique. Therefore, prior to connecting legal interpretation to the hermeneutical perspective, I will elucidate the critical work of Jurgen Habermas, which, by its penetratingly insightful quality, contributes significantly to the modern hermeneutical enterprise.

Jurgen Habermas: Critical Hermeneutics

"Critical Sociology [universal pragmatics]... asks what lies behind the consensus, presented as fact, that supports the dominant tradition of the time, and does so with a view to the relations of power surreptitiously recorded in the symbolic structures of speech and action" (Habermas 1973, 11-12)

Although Habermas' academic work is complex and prolific, his approach to hermeneutics can best be articulated by elucidating his response to Gadamer. Habermas views Gadamer's hermeneutics as not being 'critical' enough. This claim is directed at Gadamer's emphasis on the consensus assumed among interpreters with respect to the tradition in which they are situated. Habermas does agree that tradition plays a large role in influencing interpretations, but he questions the 'deep structural biases' that underlie

[50] The idea here is that it is our historically, linguistically and communally constituted prejudices that injects an interpretive freedom into the process of achieving a fusion of horizons and, at the same time, prevents the interpreter from imposing his or her own meaning on the text.

the tradition. Because of his primarily ontological endeavors and his strict adherence to the authority of tradition, critique of structural biases, so it is claimed, is something that Gadamer cannot account for. As Josef Bleicher (1980, 156) explains, "by giving hermeneutical processes an ontological underpinning, Gadamer is led to make light of economic and political factors which may drastically limit the 'horizon' of some or all of the participants [in the dialogical interpretive process]".

At the root of the 'biases' to which Habermas refers, are conflicting ideologies and the communicatively distorting influences of labour and domination. Essentially, the Habermasian critique rejects the innocuousness of tradition and seeks to construct "a more adequate framework of interpretation that would account for the systems of labour and domination which, in conjunction with language, constitute an objective context from which to interpret social actions" (Honeyball & Walter 1998, 146).

Habermas thinks that the only way to achieve an undistorted dialogue in communication is through an emancipating reconstruction of the dialogue between the participants engaged in argument. The ideal reconstruction is one in which communication between participants becomes rational; it is free from the repressive and distorting consequences of imbalance among communicants. Habermas' idea of rational reconstruction - his attempt to analyze the modes of communication between people from a critical perspective, is not meant to make a science out of communication (in the empirical sense). His view is that "reconstructive procedures are not characteristic of sciences that develop...hypotheses about domains of observable events" rather, "these procedures are characteristic of sciences that systematically reconstruct the intuitive knowledge of competent subjects" (Habermas 1979, 9). The point is that this

communicative reconstruction is more of a rubric for communicating that escapes empirical measurement. Habermas has, in a way, 're-injected' a methodological element into the hermeneutical approach, albeit not one that parallels the sort that Gadamer labeled as characteristic of the natural, analytic sciences.

The reconstructive effort is premised on Habermas' concept of the 'ideal speech situation'. Expounded by Habermas, the ideal speech situation is a situation wherein intersubjective communication is undistorted, free of domination and symmetrical:

> Ideal speech is that form of discourse in which there is no other compulsion but the compulsion of argumentation itself; where there is a genuine symmetry among the participants involved, allowing a universal interchangeability of dialogue roles; where no form of domination exists (Habermas 1970, 372)

Ultimately, this ideal situation is meant to function as a point from which to critique society's institutional structures. Furthermore, such an idealized communicative situation provides an epistemological justification for social critique from a *meta-hermeneutical* perspective.

This externalization of critique is precisely what Gadamer deemed impossible due to the universality of tradition. For Gadamer, achieving a "transcendental rationality or universal norms outside of history and language" as basis for a critique of the assumptions embedded in tradition does not take into account the fact that "those material conditions and hierarchies that, according to Habermas, influence symbolic meaning and language, are potentially hermeneutically retrievable". However, critique itself does exist "but only as a moment in the dialogue that tradition allows". Thus, "as tradition creates all meaning it is impossible either to retrieve fully all its presuppositions, or to plan consciously its transcendence" (Douzinas et al 1992, 130-31).

Arguably, through his explication of universal pragmatics as a method of critiquing society, Habermas has attempted to reinvigorate the hermeneutical enterprise with a truly critical element. Questioning the assumptions that underlie our traditions and exposing the distortions in communication justifies the emancipatory goal to rationalize argument through the reconstruction of argumentative dialogue on the basis of ideal speech situations. Such a project is both methodological and attempts to leave the internal realm of 'tradition', ascending into an idealistic, externalized and objective framework for a critique of society.

Both Gadamer's and Habermas' thoughts create a significant theoretical-philosophical framework for legal interpretation. In the following section, a hermeneutically-inspired account of legal interpretation is outlined. Additionally, a combination of Gadamer's and Habermas' insights will subsequently provide the basis for developing a constraining 'adjudicative typology' or 'model' in order to mitigate the negative force of semantic indeterminacy generated by the arguments considered in the first chapter.

Section 3: Legal Hermeneutics & Moderate Foundationalism

The ideas generated in the Gadamer-Habermas debate on hermeneutics presents a useful theoretical lens through which the process of legal interpretation may be perceived. Specifically, the interpretation involved in Charter cases can be more readily understood. With that being said, an appropriate starting point for connecting hermeneutics to Charter interpretation is to establish the reason why interpretation is inevitable in Charter cases.

Indeterminacy & Interpretation

As I have established in the preceding chapters, two of the paramount features of Charter adjudication are that the determination by the judiciary of the meaning and content of rights and subordinate legislation (valid law) often require the appeal to legal criteria whose substantiation involves moral deliberation. Hence, the legally permitted moral reasoning becomes a necessary condition for legality. Second, the *open texture of the legal concepts themselves* appear to leave the judge in the position of arguing a case wherein he/she is not unequivocally controlled by the standards he/she is supposed to apply, even if such morally-laden legal terms enshrined in Charter rights do purport to control or govern judicial decisions. Ultimately, this characterizes Charter cases as 'indeterminate' or 'penumbral'. Essentially, the indeterminacy in Charter cases is premised on the inability to unambiguously justify decisions on the basis of legal reasons. As Jules Coleman and Brian Leiter state, "At its core, the [notion of indeterminacy] is a claim about the ability of reasons...to justify fully the outcomes in favour of which they are adduced." The specific claim is that a set of legal reasons can "never uniquely warrant or justify one and only one outcome in important or... [indeterminate] cases" (Coleman & Leiter 1995, 215).

In short, not only do Charter cases involve the competition of principles which attempt to justify particular interpretations of rights, but the interpretive process in its entirety is inescapable. Therefore, adjudication in Charter cases is essentially a process of *weighing the validity of competing interpretations.* The turn to hermeneutics, I argue, illuminates and provides a basis for the further and *fundamental* understanding of the inevitably interpretive nature of adjudicating Charter cases.

The Judge as Interpreter: Legal Hermeneutics

Applying Gadamer's hermeneutical concepts, we can state with relative approximation the general process involved in Charter interpretation, from the initial appropriation of the law by the judiciary including the challenged right(s) and subordinate legislation, to the achievement of an understanding of the relevant law as it reveals its meaning in the particular situation at hand.

As any interpreter finds him or herself embedded in and inextricably linked to tradition constituted by history and language, so too the judge is situated in a traditional legal framework, which is comprised of a combination of primary and secondary rules. Thus, not only is the judge cognizant of past cases, but is also cognizant of particular legal doctrines such as stare decisis. One can see, then, that the 'tradition' not only refers to the substantive law, embodied in statutory legislation, precedent, Charter cases or constitutional rights, but also includes the secondary rules of adjudication and interpretation, which provide a means to guide the interpretation and application of the primary rules of obligation.[51]

Furthermore, the insight provided by Gadamer of the 'fore-structure of meaning' reveals that judges, due to their ties to tradition, have historically and linguistically shaped prejudices or fore-conceptions that they bring into the hermeneutical circle. The judge can never occupy an entirely neutral and objective vantage point from which to approach a Charter challenge. Yet, due to the constraints of the judge's historical consciousness and its influence on the horizon from which the judge perceives the case at hand, this also prevents the decision from charges of subjectivity, arbitrariness and

[51] The terminology I have chosen to use to explicate the idea of a legal tradition is influenced by H.L.A Hart (1994).

relativistic nihilism. However, although adherence to precedent as part of the traditional framework is an important part of the process, it does not entail a "blind turn from reality". Stare Decisis does not "insulate the precedents from critics" and a precedent does not have an immanent rightness or wrongness. The interpretive tradition in which the precedent is situated must be subject to criticism through the recognition of the expansion in meaning that a legal text may acquire in new circumstances (Eskridge 1990, 661-62.) In short, the tradition in which the judge is situated makes the eventual interpretive process a dynamic, integrative blend of interpretive freedom and constraint.

Finally, in the search for an understanding of the case at hand the traditionally-influenced judge and the effective-history of the text(s) engage in a dialogical process in which meaning is extracted from the communication between both the judge and the combination of Charter rights and subordinate legislation. The key insight, however, is that the judicial prejudgments are always subject to reassessment in the course of the dialogue. That is to say, it is not only the judge who imposes his/her pre-understandings onto the Charter challenge, but that the situation in which the Charter right is challenged also imposes its meaning on the judge. In this sense, there does not exist a subject and object in the process of interpretation. The idea is that the process reflects a dialectic in which the participants (judge and legal text) codetermine the eventual understanding through a reciprocal engagement of question and answer.

This succinct application of Gadamerian hermeneutics to Charter interpretation, and to legal interpretation in general, reflects the importance of recognizing the dynamic, dialogical and intersubjective nature of reaching decisions in legal cases. However, there are other significant implications of a hermeneutical version of legal interpretation that

challenge longstanding ideals in legal theory. Two of these implications are the rejection of singular interpretive methods and the rejection of the doctrine of intentionalism in statutory and constitutional interpretation.

First, as has been established, the purpose of adjudication in Charter cases is to decide between competing interpretations. Such interpretations, I have argued, are dialogical engagements between the judge and the effective-history of the text from which understanding is established. Due to the nature of the process, the recourse to reasoning as being an entirely *objective justificatory process* misses the mark and breaks with reality. Looking to deductive reasoning methods for proper decisions distorts and ignores the hermeneutical nature of interpretation. The absolutist argument that law must be determinate and objective to be legitimate is impossible because there is no essence to a text; there is no one unitary 'meaning' to 'discover'. Foundationalist theories, or canons of construction like textualism, intentionalism and the 'present-minded' or pragmatic approach to interpreting texts, cannot themselves yield determinate answers and thus these methods do not really, by themselves, constrain the judge at all (Eskridge 1990, 646). Therefore, the answer to the critics who claim that Charter interpretation is undemocratic and that judicial review gives the judiciary an undeserving legislative role cannot be based on a methodological construction.

Furthermore, the common debate in legal interpretation between objectivity and subjectivity or the 'either/or' Cartesian dualism, misses the mark entirely. If legal interpretation is to be justified in a Charter context it must be on the basis of what can actually happen – it is an existential matter: the judge and text or right engage with one another in a playful encounter wherein a balance of freedom and constraint is established

by the reciprocal imposition of questions that ends in a fusion of horizons, or a situational understanding of the text. In short, although the canons of construction and rules of interpretation are an inevitable part of the tradition or legal framework from which a judge must adjudicate, the application of one particular method can never suffice to reveal 'the truth' or 'the meaning' of the Charter right in light of the factual circumstances of the particular case at hand.

Second, a more specific criticism is the rejection of authorial intent or the doctrine of 'originalism'. Generally, originalist hermeneutical thinkers such as Emilio Betti, subscribe to the notion that the particular text means what the framers of the text intended it to mean. This conservative method of attempting to 'objectify' proper answers by abstracting the law from its context, fails to consider the inevitable 'pre-structuring' effect of tradition and the unification of interpretation and application as indicative of a 'situational understanding'.

With respect to the notion of 'pre-structured' thought, judges are inevitably influenced by the intervening tradition in which they are situated. The judge is thus influenced by the past interpretations of the particular legal text at hand, giving that judge a horizon from which to perceive the legal text in its present context. Thus, it is impossible to return to the original intent of the authors. Furthermore, the return to the intent of the framers erroneously assumes that the interpreter can abstract the particular law from its current situation and analyze it as if it were separable from context. This is to fundamentally misconstrue the nature of understanding in interpretation. As Gadamer laments, understanding can only be revealed through a unitary phenomenon of interpretation and application:

> We can, then, distinguish what is truly common of all forms of hermeneutics: the meaning to be understood is *concretized and fully realized only in interpretation,* but the interpretive activity considers itself wholly bound by the meaning of the text...neither jurist nor theologian regards the work of application as making free with the text" (Gadamer 1975, 332, emphasis added).

We see here Gadamer's recognition of meaning being concretized through an application of the text. This interpretive process belies modes of understanding that are predicated on the separation of the text and its context or the attribution of a universal meaning to the text. Furthermore, although the interpreter does not 'make free with the text', this most certainly does not entail 'an enslavement by the text'.

Essentially, what the intentionalists argue is not compatible with the nature of understanding the legal text through interpretation. Not only are judges influenced by a forestructure of meaning which undeniably shapes their perception, but, when adjudicating constitutional or statutory matters, they are also engaged in a unique dialogical process of interpretation with the legal text as it imposes itself on them from a particular *situation or context.* Hence, understanding the legal text can only be realized within concrete contextual parameters.

The influence of a historically and linguistically constituted tradition on the judiciary, the idea of prejudices and forestructures of meaning and the insights that the interpretive process is dialogical, intersubjective and dynamic encapsulated by the metaphor of the hermeneutic circle, provides a illuminating understanding of how Charter cases, which inevitably involve indeterminacy, are thoroughly interpretive in nature. It also provides sufficient grounds for rejecting the possibility of deterministic methodologies, which have erected the false subject/object dichotomy, as well as truth seeking doctrines that focus on the possibility of attaining legislative intent. However,

the critical insights of Habermas, as previously outlined, reveal the shortcomings and limitations of a strictly Gadamerian legal hermeneutics, and provide the remaining grounds for explicating the forthcoming normative adjudicative typology. Thus, a consideration of Habermas' thoughts as they specifically relate to and shape legal interpretation is in order.

Habermas & the Significance of Prejudice

In a critical light, Habermas challenges the concept of prejudice to which Gadamer attributes such a positive connotation. By readily accepting that judges bring prejudices, which are formed through their familiarity with and influence from the legal tradition, to the interpretive encounter, there is a consequentially grave omission to recognize the difference between prejudices that shape our understanding and those that perpetuate a misunderstanding. In other words, "Gadamer is unable to distinguish between those forestructures and preunderstandings that are the necessary foundation of all understanding, and the unnecessary prejudices, which prevent our forming of a critical perspective" (Douzinas et al 1992, 130).

The implications of the occurrence of patterns of 'systematically distorted communication', which are manifested by the force of prejudices that perpetuate misunderstanding, for the hermeneutic consciousness and the social level in general, are significant. Arguably, what Habermas' thoughts on distorted communication reflect is as follows: Due to the dominant ideological themes located primarily in an elitist, capitalist framework, subjugated or subordinate masses have become victims of a false consciousness, resulting in their continuous consent to a regime that confounds the different norms and values which underpin society. If individuals in society operate in

such an obfuscated existence, then their ability to communicate with one another will most likely be distorted through the ideology that has embedded itself in discourse. Habermas' goal is to free this discourse from the barriers of domination; it is an idealistic route that demands departure from Gadamer's 'internal' hermeneutics.

In an effort to validate judicial decisions, arguments must take place in a rational atmosphere. For Habermas, we see that the ideal goal is to enable discursive argumentation that takes place in paradigms of undistorted communicative rationality in order to overcome the effects of the dominating and obfuscating discourse found in the legal system. Yet, such dominating discourses such as the rule of law and formal equality demarcated in the legal tradition have the effect of perpetuating the idea of legitimacy in the legal system. Thus, the main thrust of Habermas' critique when considered in the context of legal hermeneutics is that we must expose such biases and illegitimate prejudices in order to truly achieve 'the truth' in interpretation.

Furthermore, by simply acknowledging the influence of social power structures as part of an ontological hermeneutics does nothing to rectify the problem. By simply denying that critique is precluded in tradition, Gadamer does nothing to explain how such critique might be carried out (Valauri 2001, 1096). Therefore, the Habermasian critical insight along with Gadamer's concept of interpretation transposed in the context of Charter adjudication may be articulated as follows: *The judge must bring a critical attitude to the interpretive game. While adjudicating within a pre-existing legal framework, to which she is constrained, the judge must at the same time let her prejudices be reevaluated by opening up to the text and analyze the assumptions on which such prejudices were grounded in the first place.*

However, incorporating Habermas' critical perspective into the adjudicatory realm does not include the necessity of achieving idealized, transcendental objective positions from which proper or right decisions can be reached. To claim this would be to contradict the Gadamerian insights that the application of singular monistic methods of interpretation is incommensurate with the true dialogical nature of the interpretative process, and that critique can never totally break free with the universality of tradition. Rather, critique must play a different role:

> Critical theory cannot posit a timeless ideal, but can only *expose the ideology at work in a particular historical situation.* Although this critique is never exhaustive, it can reveal the constraints on communication whose removal would facilitate a more genuine discourse and provide the basis for a continuing radical critique (Mootz 1988, 590).

Critical reflection in adjudication, therefore, has a realistic as opposed to idealistic function. It is the remaining paramount task of this thesis to substantiate the incorporation of such a critical attitude in the adjudication of rights cases through the articulation of an 'attitudinal model' or 'adjudicative typology'. However, before turning to this, the concept of *moderate foundationalism*, the core ideal behind the adjudicative typology, must be elucidated.

It is crucial to understand that my intention in explicating an attitudinal model/ adjudicative typology is not meant to be methodologically sound or proper, nor is it meant to provide a clear arena for undistorted communication. The idea is to propose a moderately foundationalist adjudicative typology which, far from yielding 'right' answers, will nonetheless generate justificatory reasons on the basis of a constrained 'path' that can be taken by the judiciary, *which mitigates the charges of instability and indeterminacy in legal reasoning typical of Charter cases.* Moderate foundationalism,

then, is the resulting concept of a theoretical integration or synthesis of Gadamer and Habermas' hermeneutical approaches. It is a concept that recognizes both the importance of the dialectic of question and answer as well as the importance of guiding the dialogical process in a quasi-structured, epistemic base. As Neil MacCormick (1987, 205) states, although generating answers to questions may be plausible but "never demonstrable with certainty; nevertheless [s]ome ordered and structured taking up of position, with a discursively stable and defensive internal logic, is necessary to every serious engagement with... questions." To imbue this statement with jurisprudential merit, it can be perceived as claiming that legal questions, which demand answers via the interpretive efforts of judges, although incapable of being metaphysically 'correct' or 'right' may nevertheless be pursued in accordance with an underpinning normative framework.

Thus, relating the concept of moderate foundationalism back to hermeneutics, it essentially pushes the Gadamerian boundary that tradition and the dialogical relationship between the interpreter and the text cannot be externally constrained, but at the same time it does not achieve a Habermasian transcendental idealism in the process.

It is on the basis of this concept of moderate foundationalism that my following explications are founded.[52]

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[52] This combination of Gadamerian insights on tradition and dialogical interpretation and Habermasian insights of critique as a basis for developing such a moderately foundationalist adjudicative typology, is a project that parallels the theoretical ideas of Paul Ricoeur. Ricoeur bases his mediation of the Gadamer and Habermas dispute by describing the concept of belonging (the reader and text both belong to a tradition) and alienation (the idea that an interpreter must alienate or distance him/herself from the immediate and distorting effects of tradition to overcome prejudice) not as opposing concepts but both as creating a dialectic. The idea is that the playful hermeneutical encounter between interpreter and the effective history of the text also involves a tension between adherence to tradition and distance from such tradition through alienation of the self from the immediacy of prejudice. We see here the fundamental idea that critique is a crucial element of the hermeneutical process and not one that transcends it. See Paul Ricoeur *Hermeneutics and the Human Sciences: Essays on Language, Action and Interpretation. E*d., Trans. John B. Thompson, Cambridge University Press, 1981.

Road to Mitigation: The Adjudicative Typology/ Attitudinal Model

Before proceeding, a caveat must be entered. The defense of Charter adjudication through the hermeneutically inspired adjudicative typology is not an attempt to obliterate the obvious hierarchical proclivities in our legal system, nor will it denounce the *possibility* of political or extra-legal usages in judicial decision making. Rather, such hierarchical proclivities, as will be articulated, must be acknowledged and embedded in the critical discursive framework which a judge must bring to the dialogical process of interpretation.

Before explicating the elements of the adjudicative typology, there is one major theoretical link to be identified which connects the acknowledged importance of critical reflection with the insights of Inclusive Legal Positivism. We can recall that the 'transcendental' nature of Habermas' argument, although inappropriately distancing itself from the hermeneutical consciousness by externalizing and idealizing critique, nonetheless serves as an indication that some set of 'values' must be appealed to when appropriately criticizing the obscuring nature of 'tradition'. This appeal to 'value' in Habermas' theory is analogous to the appeal to value referred to in constitutional theory. However, contrary to the 'fundamental value theories' of constitutional theorists who embrace a noninterpretivist position[53], the values appealed to by judges are not entirely extricated from the constitutional text. That is, they do not *transcend* the text into an entirely autonomous extra-legal realm. Rather, as ILP recognizes, the values that are appealed to are legitimated through a *source based process*. The source based process to

[53] As John Valauri (2001,1085) points out, a critic of noninterpretivist constitutional theory characterizes its central position as the view that "the judiciary has the authority to constitutionalize values, such as the fundamental principles of justice, not fairly inferable from the Constitution's text or structure" (Grano 1981, 3). Thus the notion of 'noninterpretivism' means that there is no interpretation involving the pedigreed text itself.

which I am referring is the fundamental insight provided by ILP with respect to the connection between deciding questions of law and the moral considerations involved therein: 1) If a law has membership in the legal system, then it is consistent with the questions of political morality recognized as criteria of legal validity and enshrined in Charter rights; 2) In the Canadian legal system, there can be (and are) morally-charged tests that function as necessary conditions in the determination of the existence, meaning and content of valid law and 3) Both 1) and 2) are true if and only if the legal system contains an inclusive conventional rule of recognition. Arguably, then, the idea of value-appeal endemic to Habermas' theory is equally endemic to Charter reasoning. The key point is that just as Habermas' interest in critique and its underlying appeal to some set of values must be applied from *within 'tradition'*, so too should the idea of appealing to value in Charter reasoning be recognized as legally legitimated moral deliberation which is a part of or within a *valid legal framework. Acknowledging this connects Habermas' critical element to ILP and moral deliberation in Charter cases.*

So what remains is a moderately foundationalist task to substantiate and ground the Habermasian insight of critical reflection in a discursive, normative framework, which a judge should bring to the dialogical process of Charter interpretation wherein moral deliberation is likely to occur. This appeal to moral deliberation is the pinnacle reflection and source of semantic indeterminacy which critics cite as a fatal blow to the *legitimacy* of the Charter of Rights and Freedoms (Hutchinson 1995). Thus, the first point of substantiation to which I now turn is also a contribution to the process of

mitigating the negativity of indeterminacy beyond the arguments I have given in the first Chapter.[54]

Embracing Difference: The 'Fractured' not 'Fraternal' Community

In addition to the constraints placed on the judiciary by the totality of the legal tradition, including statutory and constitutional rules of interpretation, precedent, and the fixity and circumscription generated from the language of the law itself, another constraint a judge should face is the need for a critical reflection on the underpinning *norms and values* in which each party to a particular case is enmeshed and on which they base their respective arguments. This constraint is realized through a 'critical reflective attitude' taken by the judiciary involving its acknowledgment of the importance in weighing the factor of *difference* in moral deliberation. The clearest way to explicate the *theoretical* basis for endorsing this particular attitude is by revisiting Dworkin's idea of the 'community personified' and reintroducing the concept I have identified as 'the community radicalized.'

The political-theoretical basis for Dworkin's theory of law and adjudication, specifically his justification for the judicial deployment of state coercion through the application of law as integrity, begins with a rather idealistic depiction of the community: "The adjudicative principle of integrity instructs the judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a *single author-the community personified-expressing a coherent conception of justice and fairness*" (Dworkin 1986, 225 emphasis added). Dworkin (1986, 225) further states that "according to law as integrity, propositions of law are true if they figure in or follow from

[54] The arguments from the first chapter are based on Hart's doctrine of the inevitability and desirability of indeterminacy, the concept of the Constitution as a 'living tree' and the idea of the nature of legal language entailing a degree of 'fixity and circumscription'.

the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."

In these passages, one can extract some of the most damaging and undermining implications for his overall theory. First of all, it is clear that Dworkin tries to extract justification for judicial decisions (the deployment of state coercion) by idealizing the community as a moral agent (the community personified) which speaks through the judicial system to the masses both principally and coherently. Thus, the community is depicted as a "univocal subject" (Hunt 1992, 19) which embodies the collective and unitary voice of the community. Second, Dworkin's assumption is that a political community is 'fraternal' in the sense that it accepts that each and every member is subject to and guided by 'common principles'. In fact, he goes so far as asserting that the community is not 'genuine' unless it exhibits this archetypical 'fraternal association' (Dworkin 1986, 211). Finally, although Dworkin has appealed to an "institutionalization of communitarian standards of shared meaning" (Swan 1990, 353) thereby distancing himself from the purely individualistic basis of his political theory, his recourse to communitarian rhetoric is but a scheme to *mask* the individualistic tendencies of individuals in modern society, who pursue fundamentally *different* courses of action and whose action is grounded in fundamentally *different* normative values. In short, Dworkin's theory, in its entirety, is a manifestation of obfuscated hierarchy. To treat all citizens 'equally' in the Dworkian sense is to *deny the fractured community* and to consequently depict a univocal and monistic set of communal or societal values. This radical portrayal of the community as a theoretical basis for the deployment of state coercion via adjudication is unrealistic, untenable and lacks justificatory merit.

Contrary to Dworkin's theory, through the intersubjective discourse of the interacting citizens in a community, such citizens are constituted by their own beliefs and by the effects of communicating such beliefs to others. There is thus a multitude of values that interact, not in an entirely individualistic or communitarian, but pluralistic society. *The judiciary, then, must be attentive to this idea of a fractured community premised on the interaction of differing values and bring such an awareness to their adjudicatory task in the form of critical questions to which the text, from the contextual perspective in which it is situated, may provide answers.*

Although it would be contrary to the Gadamerian insight about the inseparability of the text and its context to devise universal, a priori, critical questions that judges must bring to the interpretive process, such questions must nevertheless have an *epistemic foundation* based on the following: 1) The avoidance of moral repugnance and substantive injustice/inequality; 2) The exposure of ideological underpinnings to subordinate legislation; and 3) The embrace by the judiciary of competing norms rather than the suppression of one set in favor of the other through judicial rhetoric.

As a hermeneutical account of legal interpretation suggests, the only way to reach an understanding is through the dialectic of question and answer, and, as such, the only way to further substantiate and justify the aforementioned attitudinal model (epistemic foundation) is through its application in a particular context where such a dialectic takes form. Therefore, the remainder of this thesis involves an analysis of the *Little Sisters Art Emporium* case via the adoption of a critical reflective attitude grounded in and informed by the preceding three conditions. However, prior to this endeavor, an analysis of the concept of consequentialism as an integral component of second order justification in

interpretation will suffice to complete the elucidation of the adjudicative typology/ attitudinal model.

Second-Order Justification: The Importance of Consequentialism

Second Order Justification simply means justifying a decision between two or more 'rival rulings', typical of penumbral cases (MacCormick 1978, 101). However, once judges enter this indeterminate area, a number of questions arise: How do judges choose between these rival universal rulings when confronted with a problem of interpretation of the rule, or the problem of what, if any, rule is legally warrantable to administer a decision. What is, and what should be, the underlying basis for their justification of which rulings they will adopt? These questions can be answered by explaining the process of second-order justification and the concept of consequentialism.

The principle of second-order justification may be understood as involving a process of deciding between possible rulings to effectuate an appropriate normative outcome that will govern conduct. The 'appropriateness' of the decision essentially connotes something that is sensible or, as Neil MacCormick terms it, "what makes sense in the world" (MacCormick 1978, 106). What is sensible in the world is the meta-principle that judges must consider when employing a 'consequentialist' argument. The implications of adopting or undertaking this consequentialist attitude are worth noting. Judges should look at what the consequences of adopting each rival ruling could conceivably produce by evaluating them in light of such considerations as public policy, justice and common sense (MacCormick 1978, 105). These considerations include the notions of moral repugnance, substantive injustice and ideological and multi-norm/value exposure that I delineated as bases for the epistemic foundation that should

inform/constitute the judge's critical reflective attitude. *Essentially, then, the employment of a consequentialist argument, common to judicial reasoning in second order justification, can be imbued with a critical element. Likewise, the critical attitude taken by the judge can now be grounded in an actual legal reasoning process, so as to further depict it as moderately foundational.*

Furthermore, adopting this consequentialist attitude towards argument necessarily involves some degree of subjectivity based on the particular judge's perception of what criteria are relevant to consider. The skeptical reader may raise the question: What then, if anything, prevents a judge from acting arbitrarily in that the process which she undertakes involves a quasi-subjective analysis? Surely critical legal theorists would describe this process as necessarily involving extra-legal considerations? However, by channeling this subjective tendency through an epistemic base involving the three conditions outlined above, it is possible that the resulting critical attitude toward considering *consequence* may in fact circumscribe the arbitrary potentialities of the process and provide a clearer overall picture of the context in which the case is situated. Through a *critical reflection* of what *consequences* a particular judicial decision may effectuate, in addition to the legal framework from which judges must adjudicate, there is a case to be made that Charter cases, notwithstanding their indeterminacy, may nevertheless be adjudicated under legal and principled constraints.

What remains is an analysis of *Little Sisters* and an application of the moderately foundationalist attitudinal model thereto in order to exemplify the possibilities of adjudicating with a critical reflective attitude. Through this the fundamental connections between philosophical and critical hermeneutics and legal interpretation will be complete.

Section 4: Little Sisters Art Emporium v Canada (Minister of Justice)

Facts

The Little Sisters Art Emporium is a small incorporated business that operates in British Columbia. The Little Sisters boutique sells a number of products that cater to the gay and lesbian community including materials such as "gay and lesbian literature, travel information, general interest periodicals, academic studies related to homosexuality, AIDS/HIV safe sex advisory material and gay and lesbian erotica" (*Little Sisters,* 1135). Due to the lack of production of gay and lesbian materials in Canada, Little Sisters has been reliant on importing products from the United States. Due to the importation, the material is subject to inspection pursuant to the Canadian Customs Act by Customs officials. Such Customs officials are legally required to issue a tariff classification to potential imports and must prohibit the importation of a variety of items from books to drawings that are deemed to be obscene pursuant to section 163(8) of the Criminal Code. This particular section of the Code claims that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene" (R.S.C., 1985, c. C-46).

At trial it was established that Little Sisters had been unfairly and prejudicially targeted by Customs officials implementing the legislation. Materials were erroneously seized and sometimes even without explanation. What is striking is that this was not a case of occasional selective targeting; rather, it had been occurring for approximately 15 years (*Little Sisters*, 1136). At both trial and on appeal at the Superior Court of B.C and the Supreme Court of Canada, the Charter of Rights and Freedoms was invoked by Little

Sisters to challenge the constitutionality of the relevant Customs legislation and regulations. Little Sisters claimed that the legislation was not in accordance with their section 2(b) right to freedom of expression, nor was it in accordance with their section 15(1) right to equality as prescribed in the Charter of Rights and Freedoms. Further, they argued that these infringements could not be justified under section 1.

Supreme Court Judgment

The first of the constitutional matters dealt with was the determination of whether or not the Customs legislation *unjustifiably* infringed the appellants' right to freedom of expression under section 2(b) of the Charter. Both the appellants and the Crown agreed that that the Customs legislation did in fact prima facie violate the appellants' rights to have access to expressive materials. However, beyond this agreement, the two parties adamantly disagreed on the violation's justificatory merit.

First, the appellants grounded their most significant argument on the shortcomings of the *Butler* test as it applies to the gay and lesbian community. Created by the then Justice Sopinka, the Butler test functioned to determine whether materials were obscene on the basis of the community's standard of toleration. This standard was based on the extent to which 'harm' inflicted on the community as a whole from the materials was acceptable. Materials that inflicted a "substantial" risk of harm were deemed to be obscene (*Little Sisters*, 1156-57).

Specifically, the appellants argued that the "National Community Standards Test" as defined in *Butler* was a heterosexist construction, inapplicable and insufficiently sensitive to gay and lesbian culture. The appellants charged that "importing a majoritarian analysis into the definition of obscenity (e.g. what the broader Canadian

community will tolerate), inevitably creates prejudice against non-mainstream, minority representations of sex and sexuality." Furthermore, they argued that "the 'national' community is by definition majoritarian and is more likely than the homosexual community itself to view gay and lesbian imagery as degrading and dehumanizing" (*Little Sisters*, 1159-60). Rejecting this line of argument, Justice Binnie made it clear that "there is some safety in numbers, and a national constituency that is made up of many different minorities is a guarantee of tolerance for minority expression". He further argued that the Community Standards Test was "related to harm not taste" and thus the community's toleration of expressive materials was therefore neutral towards heterosexual and homosexual erotica (*Little Sisters*, 1162). The majority thus based their rejection of re-considering the *Butler* test in the context of gay and lesbian communities simply because the standard of a 'reasonable apprehension of harm' was formally neutral and unbiased. Both heterosexual and homosexual groups were treated equally.

Second, the appellants argued that the source of the violation was not merely at the level of legislative implementation, but it was the machinery or scheme created by the legislation to govern the Customs officials' practices that was the source of the violation and thus unconstitutional. Despite the lax oversight of expressive materials crossing the boarder, including a poor adherence to time requirements for classification assessments and administrative reconsiderations of material defined as obscene, Justice Binnie held:

> A failure at the implementation level, which clearly existed here, can be addressed at the implementation level. There is no constitutional rule that requires Parliament to deal with Customs treatment of constitutionally protected expressive material by legislation rather than by way of regulation or even by ministerial directive or departmental practice (*Little Sisters*, 1172).

Despite the Court's acknowledgment of the prima facie violation of the appellants' right to freedom of expression via the legislative scheme, they failed to acknowledge the inherent problems of the *Butler* test and they did not find that the legislation itself unjustifiably infringed the appellants section 2(b) rights.

The remaining argument turned to equality and discrimination on the basis of section 15(1) of the Charter. Similar to their freedom of expression argument, the appellants maintained that the legislation itself unduly discriminated against them by "operating with disproportionate and discriminatory effects on the gay and lesbian community" (*Little Sisters*, 1182). There was no question that the Little Sisters Book Store had been subject to differential treatment by Customs officials. When compared to the frequency of seizing and or delaying heterosexual materials, or even homosexual materials that were being exported from the United States and abroad to general bookstores in Canada that often carried the same titles as them, Little Sisters was targeted far more often (*Little Sisters*, 1185-86). Justice Binnie asserted that the recognition of discrimination was based on the fact that materials "that [were] not obscene but nevertheless detained, damaged, misclassified or without justification turned back at the border" were treated as such because "[the material] was destined for the gay and lesbian community" (*Little Sisters*, 1188). Nonetheless, even after acknowledging the discrimination and scorning the Customs officials for their poor implementation practices, Justice Binnie held that the legislation itself in no way encouraged the differential treatment of gay and lesbian materials. The fault was placed on the administration and not the source. Further, he argued that the legislative scheme did permit Customs officials to act in accordance with Charter rights.

Dealing with the section 1 justification of both the freedom of expression and equality rights infringements, Justice Binnie immediately reinforced his decision that a section 1 justification could not ensue with respect to an equality rights infringement because the unconstitutional action of people implementing a *constitutionally valid* legislative scheme permitted of no such justification.

However, the freedom of expression violation was subjected to the reasonable limits test under section 1. The violation was found to be *justifiable* except with respect to a reverse onus clause that forced the importing party, upon challenging a seizure, to prove that the material seized was not obscene. Applying the *Oakes* Test, Justice Binnie found that, contrary to the appellants' argument that the *Butler* test was vague and inapplicable to the gay and lesbian community, that the Customs tariff, which incorporated the Butler test as grounds for determining obscenity, was 'prescribed by law'. Furthermore, the prevention of expressive materials inflicting harm on Canadian society was 'pressing and substantial' and the Customs legislation acting as a mechanism to enforce the criminal law on obscenity was found to be an action that passed the 'rational connection' criterion. Finally, Justice Binnie asserted that the legislative scheme was indeed capable of being administered in a manner that would cause 'minimal impairment' (*Little Sisters*, 1198-1200). In short, the entire justification was based around a difference between the legislation and its implementation. The abrogation of the plaintiffs' rights was a result of poor administration, not the legislative scheme itself.

Having shown that the prima facie violation of the appellants' freedom of expression was justified, there could be no remedy under section 52 of the Charter. The main part of his judgment was a declaration that the impugned sections of the Customs

Act were not to be construed by officials so as to violate Charter rights and that Customs Officials should improve their administration of the legislation. Therefore, the remedy was nothing but a moral victory. The appellants' crucial arguments were all rejected.

The Dissent

As is typical in Charter cases, and an overall exemplification of the indeterminacy of unique reasons to justify outcomes, there was a minority opinion. Justice Iacobucci dissented in part and, while agreeing with the majority that the *Butler* test need not be revisited and that the appellants' equality rights were not infringed by the legislation itself, he also provided a line of reasoning in support of the position that the appellants' section 2(b) right to freedom of expression *was, in fact, unjustifiably infringed by the legislation itself.*

Justice Iacobucci emphasized how the Customs officers are informally trained, how they are not professionals at judging art or literature, and how the general process of obscenity determination is context-insensitive and perfunctory. In a short passage, Justice Iacobucci reflects this standpoint:

> Incorrect determinations are the inevitable result of these factors. If Customs officers have no literary training; if they receive no arguments or submissions from importers; if they do not take artistic merit into account; if they do not attempt to investigate the literary reputation of the author; if they know nothing about the culture for which various books are written; one perhaps should not be surprised that mistakes will often be made. And indeed, the record is full of mistaken determinations by Customs (*Little Sisters*, 1217).

The proper focus for consideration, then, is to be the limitations of the legislation itself. Clearly, Justice Iacobucci has posited that Charter rights must be protected by creating a legislative structure that cannot merely 'possibly' be applied constitutionally, but must

ensure that such rights are respected by making a 'reasonable effort' to ensure that it will be applied constitutionally.

The section 1 analysis therefore must fail because such unacceptable inadequacies do not cause 'minimal impairment' to the appellants. Summarizing this failure, Justice Iacobucci states:

> Absolute discretion rests in a bureaucratic decision-maker, who is charged with making a decision without any evidence or submissions, without any requirement to render reasons for decision, and without any guarantee that the decision-maker is aware of or understands the legal test he or she is applying. Such a system cannot be minimally intrusive (*Little Sisters*, 1243).

The legislation's deleterious effects were, according to Justice Iacobucci, serious enough to warrant such a lack of justification. The hardship done to Little Sisters and the overall further suppression of a factually recognizable minority group was the result of the Customs legislation. The shortcomings of the legislation and the unfortunate results stemming from such shortcomings amounted to an unjustifiable and discriminatory over-censoring of expressive materials being exported to Little Sisters. The violations, then, could not be demonstrably justified in a free and democratic society. Justice Iacobucci suggested that the part of the legislation empowering Customs officials to make obscenity determinations should be of no force and effect and that structural reforms be implemented by Parliament in order to attempt to ameliorate the serious flaws of the Customs legislation.

Expanding Horizons: Interpreting with a Critical Reflective Attitude

The appropriate starting point for the following hermeneutical analysis is to describe in Gadamerian terms the relationship between the judiciary and the text, the latter including the impugned Customs legislation as well as the rights of political morality manifest in

sections 2(b) and 15(1) of the Charter of Rights and Freedoms. Following this, a critical analysis of the case in light of the proposed attitudinal model will ensue and an argument will be made that 1) The *Butler* criteria fails to accommodate homosexual values and is therefore inherently discriminatory; 2) The ideological underpinnings of the Customs legislation overwhelmingly and disproportionately tip the balance of interests in favor of violating rights; 3) The legislation, as it operates in the contextual situation of *Little Sisters*, yields morally repugnant results that cannot be offset by criticizing implementation practices as opposed to striking down the legislation altogether. These conclusions, I argue, are appropriate in this particular situation. Following the attitudinal model creates a guiding path which leads to an ideal understanding.

The Supreme Court in *Little Sisters*, as in all Supreme Court cases, was projected into the 'history' of the case within an underlying tradition or legal framework. The trial and appeal courts of British Columbia each rendered decisions on the basis of a set of factual and legal considerations, all of which were transferred into the immediate historical consciousness of the Supreme Court. Thus, the factual elucidations and legal holdings of the lower courts form a part of the tradition in which the Court is situated to adjudicate.

Furthermore, *Little Sisters* also exemplifies the role of tradition as constitutive of a particular horizon from which the judiciary, influenced by prejudicial and pre-judgmental forces, is able to perceive the case at hand. Particularly, the Court's forestructure of meaning was primarily constituted by the approach to obscenity as defined in *Butler*. The relevance of *Butler* in *Little Sisters* culminated in the unanimous rejection of the appellants' argued plea to reconsider the universal test, ultimately ending

in a repeated claim by the Court that the proper meaning of the *Butler* test is to prevent 'harm' to Canadians and that it should not be construed to differentially treat groups of people with different norms and values than that of the majority. The legitimate prejudices of the Court, including the holdings from relevant precedent cases, and longstanding approaches to dealing with rights claims, such as subjecting rights violations to justificatory analysis, are but one type of prejudice that constitutes the Court's particular horizon. The remaining prejudices may reflect certain personal beliefs the judges may have, but cannot, with certainty, be detected by simply analyzing the attitude they take towards the discourse with which they engage in their deliberations. The inability to deterministically separate the legitimate or legally valid prejudices from those that are formed from the personal biases of judges is a critique of Gadamerian hermeneutics that, in my view, can not be rectified.

Moreover, the historically and linguistically shaped 'interpreter' is only one half of the dialogical process in which the hermeneutical act occurs. In *Little Sisters*, the 'text' was a complex combination of constitutional rights and subordinate legislation. Sections 2(b) and 15(1) of the Charter of Rights and Freedoms were the central legal propositions to which the Customs legislation was subject for determinations of constitutional (legal) validity. Yet, as the insights of Gadamer maintain, the text, in its entirety, acquires an effective history of its own through its relation to the context in which it is applied. The Customs legislation cannot be affixed with a particular meaning absent the context in which it applies, nor can an understanding of a right to freedom of expression or equality be attained absent its concrete application. The meeting of the judiciary and the texts therefore must appropriately be perceived as a playful encounter

wherein prejudices are challenged, the imposition of questions is reciprocated and, ultimately, *horizons are expanded.*

First and foremost, adopting a critical reflective attitude in this case would have brought the importance of the obvious conflict of heterosexual and homosexual norms to the fore. Although the Supreme Court acknowledged that Little Sisters was targeted because it dealt with expressive materials that catered to the homosexual community, such acknowledgment was all that Little Sisters received; they were recognized as targets but did not achieve any substantive change.

Upon adjudicating this case and recognizing the *context* in which they are situated to commence such adjudication, some of the underlying critical questions imposed by the judiciary should have been as follows: 1) What are the competing value systems involved in this case and what sort of legal mechanism, if any, has attempted to ameliorate this competition? 2) Can the equal treatment of groups with fundamentally different values effectuate the recognition of rights in a free and democratic society? Both of these questions would have constituted the impetus necessary to re-consider the *Butler* test as it applies to the homosexual community. The obscenity test devised in *Butler* bases its legitimacy on the assumption that a 'community standard' of harm, can, without question, be applied neutrally across the board. The 'competing values' are thus masked through the rhetoric of equal application. The answer, then, to the latter part of the first question is a clear and compelling 'yes'. The legal mechanism acting as both the protector of society against harm and the device which ultimately conflates societal values into a unified, monistic whole, is the *Butler* test used in the determination of obscenity. The rejection of a truly 'national' and 'universal' community standard of harm

that treats both homosexual and heterosexual individuals on an *equal plane* deserves closer analysis.

When rejecting the appellants' arguments that the *Butler* test, based on majoritarian, heterosexist norms, could not be applied to a fundamentally different context without the 'toleration' of the community changing and thus differentially treating the homosexual community, the Supreme Court of Canada stood by the view that because the national community recognizes the rights to equality and freedom of expression of all individuals, that it would be unreasonable to assume that the national community standards test could suppress the sexual expression of the homosexual community. Unfortunately, the Court failed to expand its horizon to encompass the appellants' arguments. The fact is that prevailing norms on sexuality dominate and repress the norms of the minority. Beyond this, abstracting a test which relies on the toleration not only of the community as a whole, but of a community in which majoritarian norms already marginalize those of the minority, arguably fails to come to grips with the contexts in which gay and lesbian material is created and distributed. This is often exacerbated, as it was in *Little Sisters*, by poor, unprofessional and simply grossly inadequate Customs procedures to determine the entire context in which a particular expressive material attains its meaning and purpose. In short, the judiciary failed to realize that creating a standard that supposedly applies in equal fashion to all members of society is inherently flawed because the test is merely a reflection of the domination of heterosexist beliefs over homosexual culture and identity.

In addition, by insisting that only harmful expression can be obscene regardless of the sexual orientation of the group towards which it is projected, the Court did not listen

to the question imposed by the contextually situated text and reinforced by the appellants: Do heterosexual and homosexual materials both receive the same treatment as to what is 'harmful' to society? Part of the appellants' argument was that due to the heterosexist nature of the community, homosexual expressive materials may be perceived as inherently more harmful than heterosexist materials precisely because they are not 'the norm'. What more evidence did the Court need to support this argument than the blatant mistreatment of materials going to Little Sisters? The Court even recognized that discrimination took place through the maladministration of Customs Officials. Harm was associated with sexual preference, and this challenges the coherence of simply saying that the community is unbiased towards heterosexual and homosexual expressive materials. Arguably, this ensuring of equal treatment by the Court just exemplifies its failure to let the hermeneutical act occur; the Court did not open up to the challenge presented by the context in which the entire case was predicated and it therefore did not overcome the prejudice of *Butler.* Therefore, if the Court had adopted a critically reflective attitude in this case, an appropriate understanding of the legal, political and cultural circumstances would have occurred and the Butler test would have been determined to be the source of discrimination under section 15(1) of the Charter of Rights and Freedoms.

Second, the operation of the Customs legislation, in the context of *Little Sisters*, exposes the unacceptable effects of its underpinning ideological propensity. What is common in all statutory and constitutional law is that each law has an ideological purpose; the law is promulgated and enforced to effectuate a certain outcome based on a set of beliefs. In *Little Sisters* the Customs legislation was viewed as an attempt to balance the right to free expression and the government interest in protecting society

from obscene materials. The underlying ideological concern is the balance of interests, yet the scheme created to effectuate such a balance is inherently flawed so as to negatively affect particular communities' rights to free expression. The balance is therefore unjustifiably biased in favor of the ill-informed measures embodied in the procedural scheme to supposedly 'protect' society from harmful expression. Fortunately, in his encounter with the legislation, Justice Iacobucci recognized this ideological purpose and also sought to rectify the consequences it permitted by attributing the source of the constitutional violations to the legislation itself. Labeling the legislation as permitting grave and systemic maladministration which could not be dealt with at the level of implementation, Justice Iacobucci recognized that such consequences were not minimally intrusive to Little Sisters and that their expressive rights were unjustifiably infringed.

Unfortunately, it was only the dissenting opinion that properly exposed the ideological forces underlying the subordinate legislation. Justice Binnie for the majority failed to appreciate the connection between what the legislation itself caused and what the Customs Officials caused. The simple observation to make is that if it was not for the poorly constructed legislative scheme, the Customs Officials would not likely have engaged in such egregious practices. What is even more striking is that Justice Binnie reflects a very conservative approach to interpretation that is, in fact, anti-hermeneutical. What he shows in this case is his willingness to abstract the legislation from its application and make a constitutional judgment on the basis of such de-contextualization. As Gadamer informs us, understanding is only reached through the unitary phenomenon of interpretation and application (Bleicher 1980, 124). Justice Binnie's treatment of the

Customs legislation contradicts this insight. Simply holding that the legislation permits of constitutionally valid implementation, is a failure to fully open up to the text. Thus, as shown in the argument of the majority, an understanding cannot be reached by ignoring context. The conclusion, then, is that the ideological underpinnings of the Customs legislation considered in the overall context in which such legislation is applied, overwhelmingly and disproportionately tip the balance of interests in favor of justifiably violating the rights of those who wish to gain access to expressive materials.

Finally, the attitudinal model suggests that a critical reflective attitude consist of protecting Canadian citizens from the moral repugnance or substantive injustice that may result from the operation of subordinate legislation. Further, it also consists of protecting Canadian citizens from such effects resulting from justifications to rights violations. Little Sisters was, without a doubt, an undeserving victim of moral repugnance and injustice. The financial and personal hardship the appellants endured as a result of their victimization was indeed beyond unacceptable. No individual or collectivity should ever be put in a helpless position in which the law permits their blatant differential treatment. Recalling the absurdity of the situation, the materials that were being exported to Little Sisters were subject to seizure and delay *specifically because they were destined for the gay and lesbian community.* A simple reassurance by the government that the application procedure will improve cannot reasonably be thought to correct the hardship endured by Little Sisters. As reflected in the position held by Justice Iacobucci, the legislation itself must be improved so as to prevent the inexorable mistreatment of expressive materials by Customs Officials. This, indeed, is the only solution that is indicative of reaching a fully

informed understanding of the entire context in which the judiciary and the text are engaged.

Beyond the issue of how the legislation is applied, it would appear that the majority's justification of the freedom of expression violation as well as their complete disregard of the *Butler* test's role in causing an unjustifiable equality rights violation, has also exacerbated the moral repugnance and injustice inflicted on and experienced by Little Sisters. In Justice Binnie's application of the *Oakes* test to the freedom of expression violation, an uncritical decision was made; the legislation was considered to be minimally intrusive because it was '*capable*' of being applied constitutionally. Little Sisters was further victimized on the basis of the majority's failure to distinguish between protecting Charter rights through the creation of a legislative structure that can *possibly* be applied constitutionally, and protecting Charter rights by making a 'reasonable effort' to *ensure* that they will be applied constitutionally. By basing his justification on the former conception of Charter rights protection, Justice Binnie failed to make a 'reasonable effort' to mitigate the injustice experienced on behalf of Little Sisters. In fact, through this justificatory approach to a Charter right violation, Justice Binnie effectively told Canadians that groups may indeed justifiably suffer such hardships that stem from their Charter rights violations if the people responsible for enforcing the 'constitutional' legislation do so erroneously. Such an argument is riddled with contradiction and can not reasonably be said to prevent moral repugnance and/or substantive injustice.

As for the Court's ultimate failure to understand that the root of the problem for Little Sisters was the universal *Butler* test, such an omission is the epitome of incurred

injustice. Ultimately, the majority's opinion reflects a Dworkian 'radicalized' community, wherein the fundamentally important concept of difference, although it may be recognized, is effectively overridden by the monistic and all-encompassing value of formal equality. As I have emphasized in discussing the attitudinal model, it is the judiciary's obligation, when pursuing a critical reflective attitude, to be cognizant of the 'fractured' nature of the community where the discourse that is created through the intersubjective communication between individuals and groups in society is comprised of fundamentally different sets of norms, values, beliefs etc Reinforcing this concept of the community through their deliberations, therefore, is of primary importance in order for the judiciary to achieve a fully-informed *understanding*. Such an understanding could have been reached had the Supreme Court adjudicated with a critical reflective attitude. Instead, not only Little Sisters, but the entire gay and lesbian community incurred an injustice that bespeaks ignorance. By being treated equally through the rhetoric of 'community standards' based on 'harm and not taste', the homosexual community was deprived of its identity in the eyes of the law.

In sum, although a dialogical process occurred in *Little Sisters* through the slew of constitutional questions imposed by the Court and the questions concerning the importance of distinguishing between 'implementing the legislation and the legislation itself' that arises in the interpreter's contextual confrontation with the text, it was 'fragmented' because the majority's opinion was reflective of a lack of understanding. The judgment against Little Sisters Art Emporium was the culmination of a dialogical process that *failed to fully incorporate the importance of critique*. In short, the majority failed to *expand its horizons* to see the case not only from the minority position argued by

Justice Iacobucci, but also the deeper and underlying existential dimensions of ideology and community values.

I conclude that through the adoption of a consequentialist prerogative and critical reflective attitude, a judge may be able to produce decisions that, although not unequivocally 'right' may nonetheless be *ideal, rational and justificatory in the circumstances of the case.* By applying the model to the *Little Sisters* case, it was revealed that a proper understanding of the case would have been based on a rejection of *Butler* and the finding of an unjustifiable violation of the appellants' equality and freedom of expression rights. Such a decision, I argue, is the 'ideal' one in this case.

This adjudicative typology/ attitudinal model -an exemplification of a moderately foundationalist hermeneutical account of legal interpretation and a mechanism of *guidance and constraint,* in addition to the arguments propounded in the first chapter, arguably mitigates the negativity associated with semantic indeterminacy in Charter cases. Consistently seeking to prevent moral repugnance and substantive inequality, to reveal and rectify the underlying ideological effects of legislation and to embrace instead of ignore competing norms and values, is a critical approach to adjudication that, if taken by the judiciary, will allow the hermeneutical act to occur. It would thus seem that the inevitability and desirability of indeterminacy, in conjunction with the totality of constraints placed on such indeterminacy, establishes a degree of stability in Charter reasoning that may thought to have been entirely undermined.

Conclusion

Under the 'meta-objective' to defend the Charter of Rights and Freedoms from the charges of semantic indeterminacy, I have attempted to answer the following four part research question:

1) How can we *conceive* the Charter in order to justify its indeterminacy? 2) What are the existing legal theories (and the shortcomings thereof) which purport to depict the relationship between legal validity, interpretation and morality? 3) Can the appeal to moral considerations even be theoretically explained as an *essential* element of Charter jurisprudence? 4) Can there be an adjudicative typology, which, when adhered to, stabilizes the interpretive process in Charter adjudication and further mitigates the charge of indeterminacy?

By answering each of these questions in the four chapters of this thesis, I have reached several interconnected and intellectually stimulating conclusions. Considering all of the conclusions drawn and summarized at the end of each chapter, there are essentially three *overall* conclusions to note.

First, the Charter of Rights and Freedoms is properly conceived as a document which resembles a 'living tree' and therefore grows and changes as the beliefs and values embedded in society change. By conceiving the Charter in this manner and by recognizing the inevitable and desirable nature of indeterminacy in language, one must conclude that the rights enshrined in the Charter must not be restricted, fixed moral commitments to specific objectives, but must have the capacity to be interpreted in light of changing contextual circumstances. This observation leads to another question: If the indeterminacy inherent in legal language is in fact desirable, how can it be 'constrained'

to prevent radical semantic indeterminacy? This later issue dealing with the freedoms and constraints of the judiciary was dealt with by insisting that the there is indeed a degree of *fixity and circumscription* in legal language which inherently restricts interpreters from applying such terms arbitrarily.

Second, as I asserted in the introduction, in order to deal with an issue like indeterminacy that is embedded in Charter jurisprudence, it is essential to reveal what *actually occurs* in Charter jurisprudence by examining how prominent concepts such as legal validity and, the concept that itself bespeaks indeterminacy, morality or moral considerations, are related. By examining the theories of Ronald Dworkin and Joseph Raz, it was concluded that their ideas fail to give an accurate account of the nature of law both in a Charter context and in general. Due to the ultimate inability of these theorists' ideas to undermine Inclusive Legal Positivism, and Inclusive Legal Positivism's explanatory and descriptively powerful capacity, we see that this theory of law in the context of the Charter has the ability to describe, in theoretical terms, what 'occurs' in Charter jurisprudence: The appeal to moral considerations does not result in a freewheeling creation of new rights based on the directed powers of judges. Rather, it is a legal process that operates within an existing legal framework. Furthermore, moral considerations not only 'exist' in Charter adjudication at the abstract level of judicial recognition, *but they often themselves constitute or manifest the criteria of constitutional validity.* Finally and most significantly, we not only have an entire legal theory that appropriately describes the interconnectedness of legal validity, reason, authority and morality, but we see that the most fundamental of the interconnections, namely, that between legal validity and moral considerations, *justifies and legitimates* the

'indeterminate nature' of moral deliberation in Charter adjudication through an inclusive rule of recognition and the criteria of validity it encapsulates.

Finally, a crucial observation was made in the third and fourth chapter that introduced the necessary context in which Charter *interpretation* could even begin to be understood. The crucial distinction was made between a descriptive/explanatory theory of law, one of the primary tasks of which is to explicate the *standards of decision making*, and a theory of adjudication, which purports to conceptualize the interpretive process and to further explain how the judiciary should approach interpretive decisions. This distinction revealed both the limitations of Inclusive Legal Positivism as a 'theory of Charter law' and set the justificatory grounds on which it was proposed that hermeneutics is the appropriate theoretical and philosophical lens through which to perceive Charter interpretation. The fusion of Gadamerian and Habermasian insights resulted in a powerful conceptualization of Charter interpretation as an ontological, dynamic, intersubjective and dialogical experience, wherein the tension between the adherence to legal tradition and the critical distance therefrom, provided the ideal grounds for reaching an 'understanding' of the text in light of its effective history. Not only is this hermeneutical account theoretically appealing from a descriptive and conceptual standpoint, but it is also *justificatory.* In addition to revealing what *actually occurs* in Charter jurisprudence, the other ineluctable route to fully justifying the existence of semantic indeterminacy is to provide a theoretically supported account of what *should occur.* Thus, the hermeneutical account of interpretation set the necessary *justificatory* grounds for establishing a normative discursive framework to which a judge *should* be committed when adjudicating penumbral Charter cases. Premised on the theoretical

ground of moderate foundationalism, an adjudicative typology/ attitudinal model was established. This attitudinal model provides an epistemic base for the judiciary to adopt a 'critical reflective attitude' in adjudication, effectively mitigates the charges of semantic indeterminacy, and stabilizes the reasoning process involving rights questions that are recognizably 'penumbral' in Charter adjudication. *Ultimately, then, one can at the same time accept that the Charter of Rights and Freedoms creates and sustains a degree of indeterminacy, and maintain that there are guiding and constraining factors that mitigate the negativity associated with such indeterminacy.*

Although I have attempted to defend, and mitigate the negativity associated with, semantic indeterminacy by turning to theories of law and a theoretically grounded model of adjudication, several questions, which, although they go beyond the scope of this thesis, remain unaddressed and are both relevant and deserving of exploration.

One particular concept that comes to mind is power. Although power as something which distinguishes the dominated from those that dominate finds its way into the discussions of judicial elitism and socio-economic status of the first chapter, as well as in the discussion of critique and the exposure of structural bias in the last chapter, no explicit discussion of the implications of a Foucaultian concept of power is given. According to Foucault, power is interspersed in relations among individuals and is often exemplified in how such individuals' behaviour is affected by the discourses that they create:

> Power is employed and exercised through a net-like organization. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising power. They are not only its inert or consenting target; they are always also the elements of its articulation... *individuals are the vehicles of power, not its points of application* (Foucault 1980, 98 emphasis added).

Thus, it is apparent in Foucault's theory that he envisages the concept of power not in terms of unitary directionality and possessiveness but as being de-localized and constitutive. It is constitutive because the knowledge or discourse created in human relations constitutes human identities amounting to a process of subjectification. Applying this constitutive notion of power to the realm of Charter jurisprudence opens up an interesting path into the exploration of how rights discourse itself may 'constitute' subjects. Some interesting lines of inquiry may be as follows: To what extent does the engagement in 'rights discourse' by competing individuals pre-determine their capacity to communicate with each other? Furthermore, how does the use of rights discourse to articulate one's 'identity' as a legal subject reflect the operation of power-knowledge? Finally, on a more critical level, what are the implications of positing that the Charter of Rights constitutes the legal subject as a mere *categorical product* of rights discourse?

Beyond such a focus on additional concepts such as power, it would also be interesting to explore the extent to which the concept of moderate foundationalism and the attitudinal model on which it is based could apply to other forms of dispute resolution such as mediation or arbitration. Could a non-binding process like mediation benefit from the adoption of a critical reflective attitude by the participants, or would such an approach introduce a procedural or structural element that is typically avoided in mediation practices?

Finally, is it conceivable to perhaps expand this attitudinal model from a suggestive guiding route to adjudicating indeterminate cases into a theory of constitutional adjudication? Would the articulation of a 'theory' entail the introduction of a particular 'method' that contradicts the insights of Gadamer, or is it possible to simply

expand the epistemic base of the attitudinal model without turning it into a set of methodological criteria? Then again, perhaps theory, as Heidegger would have it, is secondary to the practical wisdom and intuition of judges that not only allows them to intelligibly formulate decisions, but also more often than not escapes theoretical articulation. All of the aforementioned lines of inquiry push beyond the limitations of this thesis and may indeed be worth pursuing.

Ultimately, by elucidating and defending conceptualizations of law and interpretation, this thesis does more than take a pro-Charter stance that answers the charge of semantic indeterminacy; it also informs us of the proper way to *theoretically understand* the operation of an institutional system in which judges are at the same time free and constrained to make decisions that can have an effect on the entire nation.

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