MORALITY AND CENTRAL CASES OF RULES

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George Anthony Barry Townsend

(Bachelor of Arts)

Australian National University

The Department of Philosophy

The University of Adelaide

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ERRATA

Page	Para	Line	Word(s)	Correction
14	2	4	"conditions"	insert after "necessary"
21	1	8	"anymore"	replace with "any more"
24	4	1	"accomodate"	replace with "accommodate"
29	1	11	"may"	replace with "might"
53	1	10	"rejoiner"	replace with "rejoinder"
56	2	3	"prevent"	insert after "to"
65	3	6	"breat"	replace with "breast"
82	2	4	"be"	insert after "would"
97	2	6	"scarely"	replace with "scarcely"
113	1	2	"designed"	replace with "designated"
115	1	18	"be"	insert after "to"
148	2	4	"they"	insert after "that"
152	3	13	"independely"	replace with "independently"
155	1	5	"of"	insert after "only"
160	2	8	"be justified"	insert after "and"
170	3	3	"stronger"	replace with "more strongly"
178	2	4	"ought"	insert after "facie"
178	2	6	"with"	insert before "what"

CONTENTS

STATEMENT.

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university.

To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the text of the thesis.

I consent to this thesis being made available for loan and for photocopying.

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ABSTRACT

This thesis argues that, despite their apparent differences, moral and legal rules may be construed as a central case of rules due to the particular similarities suggested by H.L.A. Hart.[1] Reservations, however, are expressed about attempts to find any 'necessary' connection between law and morality beyond the maintenance of social equilibrium.

G.J. Warnock is central to these considerations since, in The Object of Morality[2] he denied the existence of moral rules or, alternatively, maintained that if there were moral rules they could be regarded as irrelevant to moral considerations.

The Introduction outlines Warnock's claims concerning the object of morality, the non-ameliorative types of propensity which work against it, and the countervailing moral principles required for its attainment. Attention is drawn to two questions arising from Warnock's account which are not satisfactorily answered. The first is how people acquire the necessary principles without coercion, and the second concerns their practical application, given that Warnock appears to discount the sort of referential framework provided by moral rules, by which they might be exercised.

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1. H.L.A. Hart, The Concept of Law, Oxford University Press, 1979, pp. 168.

2. G.J. Warnock, The Object of Morality, London, Methuen & Co. Ltd., 1971.

Chapter 1 posits conditions that might be regarded as necessary and/or sufficient for a rule to be considered a moral one. It is argued that the notion of a moral rule is justified by a sufficient condition, and that moral rules have a rule in moral reasoning.

Chapter 2 examines the discussion by Warnock and R.G. Frey[1] of rules in general and moral rules in particular. It is argued that Warnock is mistaken in his notion of what constitutes a moral rule, and that his claim that there are no moral rules because they do not possess one characteristic allegedly possessed by the 'central' cases of the rules of institutions and the law is suspect. Frey's criticisms of Warnock's alleged 'necessary' condition are examined and found to be inadequate.

Chapter 3 examines Frey's suggestion that some notion of the centrality of certain cases of rules might be established through a family resemblance theory. Wittgenstein's family resemblance theory is tested by the notion of 'game' and found to be incoherent. The theory's failure to give an adequate account of game is taken as sufficient evidence that it will fail also in the case of 'rule'.

Chapter 4 examines Hart's alleged similarities between moral and legal rules and it is argued that, despite differences, they may be regarded as a 'central' case of rules. David Lyon's[2] account of the possible 'necessary' connection between morality and law is then examined and reservations are

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1. R.G. Frey, Moral Rules, Philosophical Quarterly, Vol. 26, No. 103, April 1967, pp. 149-156.
2. David Lyons, Ethics and the Rule of Law, Cambridge University Press, 1984, pp. 78-109.

expressed about the 'necessity' of such connections. An essential aspect of M.J. Detmold's[1] argument for the union of morality and law is then reviewed and argued to be unsatisfactory. The thesis concludes by suggesting that attempts to assert any 'necessary' connection between morality and law, beyond their role in the preservation of social order may be mistaken.

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1. M.J. Detmold, The Unity of Law and Morality, London, Routledge and Kegan Paul, 1984.

INTRODUCTION

In The Object Of Morality G.J. Warnock argued that "the 'object' of morality is to make the (human) predicament less grim than, in a quasi-Hobbesian state of nature, it seems inherently liable to be...".[1] To Warnock, the condition of being a 'proper beneficiary' of moral action "is the capability of suffering the ills of the predicament",[2] and as animals and other creatures are endowed with this capability it may be properly extended to them, domestic animals and pets taking precedence, and others ranking "partly perhaps to the degree to which they are, crudely, 'like us'-mammals in this way outranking birds and fishes, snakes and insects scarely counting at all."[3]

How is this claim to be defended? Warnock suggests that in the general context of the human predicament there are at least four "distinguishable, damaging, or non-ameliorative, types of propensity which tend naturally to emanate directly from 'limited sympathies' - those of malfeasance, non-beneficence, unfairness and deception."[4] We need, therefore, countervailing dispositions, and these will be non-maleficence, fairness, beneficence and non-deception, which Warnock nominates as moral virtues. He suggests that it could "scarely be contentious" to derive from this the proposition that we "have here, by the same token, four fundamental moral standards, or moral principles."[5]

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(1) Warnock, pp. 85-86.
(2) Ibid. p. 151.
(3) Ibid. p. 151.
(4) Ibid. p. 85.
(5) Ibid. p. 86.

Thus, for example, having and displaying the moral virtue of, say, non-deception, could be said to be regulating one's conduct in conformity with the same principle, which is a principle of both judgment and decision. If I accept the principle of non-deception I may judge others to be morally condemnable "in so far as (without excuses) their acts constitute breaches of it, or morally praiseworthy in so far as they (laudably) comply with it in practice".[1] From this flows the definition of a moral reason: "...a consideration, about some person, or some person's character, or some specimen of actual or possible conduct, which tends to establish in the subject concerned conformity or conflict with a moral principle."[2]

Warnock argues that the moral principles he has elucidated are basic independent moral principles, not reducible either to one another or to anything else. They can be grouped, it seems, because "their voluntary recognition would tend to counteract the malefic ent liabilities of limited sympathies, and in that way work towards amelioration of the human predicament".[3] They are independent for there is not "merely one way in which beings of limited sympathies are inherently liable to act to each other's detriment but several ways, and thus several independent 'good dispositions' to be desiderated".[4]

He suggests that it would be just possible, though extremely artificial, to regard non-maleficence as a sub-species of beneficence, but it seems more natural to regard the principle

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(1) Ibid. p. 86.
(2) Ibid. p. 93.
(3) Ibid. p. 87.
(4) Ibid. p. 87.

of abstaining from avoidable and unjustified damage as different from that of doing solicited or unsolicited good. Abstaining from theft is not a special kind of philanthropy; fairness is a different requirement from that of non-malefic ence, or of beneficence: "it may often be the case that a malefic ent act is unfair, but that is to say about it two things, not one thing; and even if, as may not always be the case, some act of fairness is also an act of beneficence, still the reason for judging it to be the first will not be the same as that for judging it to be the second."[1] An act of deception is not necessarily malefic ent, and should I benefit you in acting non-deceptively, to show that I benefit you is different to showing that I do not deceive you; even when these two go together, they are not the same. To tell you the truth to the best of my ability is not the same thing as to tell you what I judge it would be of benefit to you to be told. Warnock suggests that to regard deception as a breach of the principle of justice (which is not one of his enumerated principles) is "undesirably artificial"; it is unjust "only if the victim has some sort of special claim, not merely that which any person has on any other person whatever, not to be deceived. It is perhaps specially unfair for me to lie to you when you have trustingly favoured me with your confidence; but it is not in the same way unfair of me to deceive a total stranger."[2]

Assuming for the sake of argument that the foregoing is unexceptionable, how can we ensure that people act co-operatively towards an amelioration of the human predicament? Warnock

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(1) Ibid. p. 87.

(2) Ibid. p. 88.

claims that humans, "having a certain inherent propensity to act to the disadvantage or detriment of other humans, and even of themselves, then if they are not to do so, they can be made not to do so".[1] How? "If....they are prone to be a good deal less concerned with the wants, needs, and interests of others than with their own, then, if they are to act in some other or in the general interest rather than purely in their own, they can be made so to act."[2] But how? What is required for the suitable modification of the patterns of behaviour towards which people may be naturally prone may be suitably designed systems of coercion. People must be given an interest, which they do not just naturally have, in doing things which they do not naturally feel inclined towards doing. Part of the answer is coercion by legal means, but this cannot be the sole answer because the machinery of coercion would have to be very vast. But in practice a vast apparatus of coercion does not seem to be necessary. Why? Warnock's answer is that "if it (coercion) is to do any good, or to do good rather than harm then it must be directed and executed... properly; and it seems that it could not be solely coercion that brought this about. If coercion is ever to operate, except by pure chance, in any general interest, it seems reasonable to hold that there must be some persons, indeed many persons, prepared to act in that general interest without themselves being coerced into doing so."[3] But we seem no nearer to discovering why this should be (or is) so.

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(1) Ibid. p. 73.

(2) Ibid. p. 73.

(3) Ibid. p. 75.

Warnock suggests that not only must people sometimes be made to do things which they are not naturally disposed to do anyway, but they must also "sometimes voluntarily, without coercion, act otherwise than people are just naturally disposed to do. It is necessary that people should acquire, and should seek to ensure that others acquire, what may be called good dispositions - that is, some readiness on occasion voluntarily to do desirable things which not all human beings are just naturally disposed to do anyway, and similarly not to do damaging things".[1]

Warnock claims that if things are not to "go quite so badly" as, given the nature of the human predicament, they are likely to, there are four sorts of general desiderata - knowledge (so that what is amelioratively practical is brought within the scope of feasability by human action); organization (so that peoples' actions can be directed into co-operative, non-conflicting channels); coercion (so that at least to some extent people are made to behave in desirable ways); and 'good dispositions' (which we have discovered to be non-maleficience, fairness, beneficence and non-deception).

There are two obvious lacunae here. The first is how people acquire the 'good dispositions' without overt coercion. The second is how these find practical social expression given, as we shall discover, Warnock's virtual dismissal of moral rules and his, in that context, illuminating statements that "Morality as here depicted is a system of (fundamental, and thence of course

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(1) Ibid. p. 76.

derivative) principles which, in application to the circumstances of particular cases, generate a certain range of reasons for and against the doing of things"[1] and also that "the exercise of moral judgement involves the taking notice, and due weighting, of all pertinent moral reasons - of the moral pros and cons.... as determined in the case in question by moral principles."[2]

Throughout The Object of Morality there is no real exploration of what Anthony Skillen[3] calls "the idea that morality needs to be understood, partly at least, in terms of 'form', of social and psychological 'structures'."[4] There is, as we shall find, a discussion of rules in general and of moral rules in particular, but in the end we see that Warnock dismisses moral rules (which one might think an essential part of social conditioning) as disposable; in his view they "have nothing to do".

Unsurprisingly I am far from the first to find this account unsatisfactory. Basil Mitchell[5] comments that he (Warnock) is then left with the question how it is that people do after all, for the most part, accept the moral point of view. 'If, as rational beings, they do not have to do so, how is it that they do?' And he answers, somewhat lamely, 'the brief answer here has to be, I think, simply that it is possible for them to come to want to.... one can want to acquire and excercise

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(1) Ibid. p. 152.

(2) Ibid. p. 93.

(3) Skillen, Anthony, Ruling Illusions: Philosophy And The Social Order, Sussex, The Harvester Press, 1977.

(4) Ibid. p. 126.

(5) Basil Mitchell, Morality: Religions & Secular, Oxford University Press, 1980.

the settled disposition to comply with such principles in one's judgement and conduct, to give due weight to the range of reasons that those principles generate'."[1] One might, in this context, be forgiven for thinking that people never learnt anything about morality.

J.L. Mackie[2] not only observes that "... there seems no good reason for excluding from morality such rules as those listed by Hobbes and Hume...."[3] but makes the more elementary but equally damaging observation that "Warnock thinks it is slightly improper for a philosopher to take any account at all of contingent empirical facts about the human predicament; ...".[4] Indeed I shall argue that it is Warnock's insouciance about 'facts' that vitiates so much of his discussion about 'rules'.

In Chapter 2 I raise objections to Warnock's:

(a) Notion of what it is to follow a rule;

(b) Failure to distinguish between moral rules and moral rulings (what Warnock calls 'made moral rules');

(c) dismissal of the social utility of moral rules;

and

(d) stipulative condition that all rules must have the necessary characteristic of being essentially susceptible of deliberate change.

But the implications are, of course, broader than this. It is generally agreed that Hare was mistaken to have

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(1) Ibid. p. 141.

(2) J.L. Mackie, Ethics, Penguin, 1983.

(3) Ibid. p. 114.

(4) Ibid. p. 121.

claimed that "we must ask whether moral reasoning exhibits similar features (to that of scientific enquiry). I want to suggest that it too is a kind of exploration, and not a kind of linear inference, and that the only inferences which can take place in it are deductive".[1] (Italics mine) He seems equally wrong to have argued that "when we are trying, in a concrete case, to decide what we ought to do, what we are looking for (as I have already said) is an action to which we can commit ourselves (prescriptivity) but which we are at the same time prepared to accept as exemplifying a principle of action to be prescribed for others in like circumstances (universalizability)."[2]

The subsequent criticism of Hare's insistence on the combined value of prescriptivity and universalizability to moral reasoning (apart from any difficulties associated with the meaning and use of the terms themselves), and the problems likely to be occasioned by people freely choosing their own 'principles', exposed the inadequacy of his account of what he claimed as a satisfactory moral theory.

But there is a grain of truth, I suggest, in Hare's remarks about the deductive utility of moral reasoning. It is for this reason that I shall argue that Warnock is mistaken as to the role which moral rules can play(particularly as a suppressed major premiss) in the exercise of our moral notions. I do not suggest that the deductive rigidities of either Kant or Hare adequately convey the nuances of moral decision but there is no

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(1) R.M. Hare, Freedom and Reason, Oxford University Press, 1963 p. 83.

(2) Hare, p. 83.

need, in the old phrase "to throw the baby out with the bath-water".

But are there such 'things' as moral rules, and, if so, what are they, and how do they work?

CHAPTER 1

Part 1 : Rules and Principles.

Much of our nomenclature appears to be accidental; it seems nothing to the point that while the games of badminton, cricket, croquet and table tennis have 'laws', those of netball, volleyball and basketball, among others, have 'rules'. No game, however, to my knowledge, has 'principles'.

This may suggest a conventional bias towards regarding principles as being somehow more 'ultimate', 'fundamental', 'original', or less susceptible to change than either 'rules', or 'laws'. But while Websters Dictionary[1], for example, gives the first use of 'principle' as "the ultimate source, origin or cause of something", and the third use as "a fundamental truth, law, doctrine or motivating force upon which others are based (moral principles)" [2], the fourth use is defined as "(a) a rule of conduct, esp. of right conduct; (b) such rules collectively; (c) adherence to them..."[3]. A circularity has already developed, since 'Principle' has now to some extent to be defined in terms of 'rule'.

The first definition of rule is "an authoritative regulation for action, conduct, method, procedure, arrangement etc."[4] but the third we find is "a fixed principle that determines

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(1) Websters New World Dictionary, Cleveland, The World Publishing Coy, 1976.

(2) Websters, p. 1130.

(3) Ibid. p. 1130

(4) Ibid. p. 1245.

conduct..."[1]. And we are no further advanced with the definition of 'law'. Clearly conventional usage is of no help in making a clear distinction between 'rule' and 'principle', and most writers on moral philosophy are no more explicit in this regard.[2]

Singer[3] distinguishes moral rules from moral principles on the ground that, while "a moral rule states that a certain kind of action is generally wrong and leaves open the possibility that an act of that kind may be justifiable",[4] a moral principle holds "in all circumstances and allows of no exceptions".[5]

The principle that it is always wrong to cause unnecessary suffering does not by itself determine whether the suffering caused by an act was or was not necessary or unavoidable. But for Singer the fact that it is somewhat indefinite does not mean that it is useless, "for it sets limits to the rules that are permissible".[6] If an act likely to cause suffering can be justified on other grounds, "if it is required by some other rule",[7] then the suffering likely to ensue from it would not be regarded as unnecessary. "But what this shows is

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(1) Websters, p. 1245.

(2) c.f. G. Wallace & A.D.M. Walker, The Definition Of Morality London, Methuen & Co.Ltd.,1970,particularly pp. 1-20.

(3) Marcus G. Singer, 'Moral Rules And Principles', in Essays in Moral Philosophy ed. A.I. Melden, Univ. of Washington Press, 1958, pp. 160-197.

(4) Singer, p. 169.

(5) Ibid. p. 169.

(6) Ibid. p. 173.

(7) Ibid. p. 173.

that what this principle requires is that an act likely to cause suffering is one that requires justification, and that the justification must consist in showing that the suffering likely to ensue is unavoidable or not unnecessary."[1]

This principle has a moral rule correlated with it, to the effect that it is generally wrong to cause others to suffer. Similarly the rule that it is generally wrong to steal has a correlational principle to the effect that stealing for the sake of stealing is always wrong. And correlated with the rule that lying is generally wrong is the principle that "lying for the sake of lying (wanton lying) is always wrong".[2] These are examples of moral principles that have moral rules correlated with them. But some, suggests Singer, do not. (It would be odd to suggest that one ought generally to do the greatest good'. The practical question is: what is the greatest good).

Why Singer should have used the plural 'rules' in connection with the limits set by the moral principle that it is always wrong to cause unnecessary suffering is unclear, as is his suggestion that it may be "required by some other rule". Neither his generalization principle (what is right for one person must be right for any similar person in similar circumstances), his principle of consequences (if the consequences of A's doing X would be undesirable then A ought not to do X) or his principle of justification (any violation of a moral rule must be justified) appear to require this. Perhaps it is simply

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(1) Ibid. p. 173.

(2) Ibid. p. 174.

to him, associated with the sorts of justifications one might produce for causing suffering.

Principles of the form 'X is wrong' are,of course,not always analytic and tautologous ('Murder is wrong' is analytic but 'killing is wrong is not), and clearly a principle such as 'One ought to do the greatest good' is not. Singer argues that moral rules require the qualification "generally" because of competing claims and obligations. Cases may arise in which rules may conflict, and clearly under some circumstances it may be a right, even a duty, to break a promise, tell a lie, steal or even take a life. This suggests that moral rules mediate between justificatory principles, whether analytic or not, and particular acts; the formulation of moral rules recognises the exigencies of human existence. We could not, in other words, make practical moral decisions by merely employing justificatory principles.

Singer suggests that three kinds of moral rules may be distinguished. The first are what he calls "fundamental moral rules"[1] e.g. those against lying, killing or stealing. There is a second group which he calls "neutral norms", e.g. the rules of the road, though why neutral norms should be regarded as 'moral' is unclear, as Singer specifies that their neutrality is occasioned by the fact that "it would make no moral difference if their opposites were adopted".[2] The third group includes standards, customs and traditions peculiar to different

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(1) Ibid. p. 176.

(2) Ibid. p. 177.

groups or communities, and includes the rules that make up what are known as the 'ethical codes' that prevail in different professions, as well as standards that regulate fair competition between certain business and other activities. Clearly it is only the first group, "the fundamental moral rules", that should retain our interest.

I regard Singer's distinction between moral rules and moral principles as useful and in accordance with conventional usage about the justification of much human behaviour. Subsequent sections of this Chapter establishing necessary and (one) sufficient condition for moral rules will disclose no reasons for disregarding it. In establishing a sufficient condition for moral rules, which are not claimed to be absolute guides to wrongness, and showing how they work in practice, I amplify Singer's contention that moral rules leave open the possibility of justifying behaviour despite the fact that it may generally be considered to be wrong.

Before delineating the grounds of necessary and sufficient conditions for moral rules it will be appropriate to discover whether the law, which appears to make distincions between rules and principles, has anything of interest to add to the distinction Singer has already made. This discussion has the additional point of beginning to focus attention on differences and similarities between morality and the law, which is a recurrent matter in this thesis.

Dworkin[1] suggests that there is a difference in kind between legal principles and legal rules. Rules, he claims, apply in an all or nothing fashion, and where a rule covers a case it must be applied, unless an exception can be found. Theoretically, at least, all the exceptions to it are capable of being listed, thus making more complete the original statement of the rule. Principles however have a dimension which rules lack, that of weight. Courts are not bound to apply a principle in the same way as a rule; they weigh them against other principles. Countervailing principles do not erode a principle as exceptions do a rule. They exist alongside it.

If Dworkin is right then the 'position' of rules and principles is reversed; I have argued that it is moral principles that apply 'all or nothing' and that moral rules exhibit the characteristic of flexibility.

To the example which Dworkin proffers[2], in which a court had five different principles to weigh, Eekelaar[3] replies that rather than pre-empt discussion by definition it would be as well to regard them as normative propositions. What is of interest about the principles cited by Dworkin, claims Eekelaar, is that they are of differing degrees of generality and weight. He suggests that normative propositions "have to them two limbs". The first has reference to a set of

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(1) Ronald Dworkin, Is Law A System of Rules? in Essays in Legal Philosophy, P. Summers (ed.) Oxford University Press, 1968, pp. 25-46.

(2) Dworkin, p. 36.

(3) J.M. Eekelaar, Principles of Revolutionary Legality in Oxford Essays in Jurisprudence, 2nd ser. OUP, 1973, ed. A.W.B. Simpson, p. 31.

hypothetical facts, the second directs what should or should not follow on their happening(or failure to happen). "The reference to facts can follow an infinite gradation in degree of generality, from the very precise to the extremely general, and the direction as to consequences will similarly vary in weight of compulsion".[1]

Clearly there is now some disparity between legal rules and principles and the moral principles and rules earlier mentioned. Eekelaar's notion of normative propositions will 'fit' neither moral rules nor principles, and there can be no question of fundamental moral principles carrying different degrees of weight.

While it appears that most legal propositions formulated with generality will have a weak direction as to consequences, in some cases the direction may be so compelling as to admit few or no exceptions. One such principle is that of double jeopardy, although it may be noted that some legal systems e.g. West Germany do not accept this.

Eekelaar suggests that the degree of weight to be placed on the directive is a matter of subtlety. It may vary over the course of time and according to its source of enunciation. An underlying principle of English law, caveat emptor, once very strong, is now almost eclipsed. An early principle of English divorce law that the courts would be slow to assist an adulterer has been gradually replaced over the course of more than one hundred years by the principle that a marriage that has

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(1) Eekelaar, p. 32.

completely broken down should not be kept in legal existence. But, argues Eekelaar, "Vulnerability to atrophy is not confined to generalized propositions. The precise 'rule' in Rylands v. Fletcher has been steadily eroded by exceptions since its formulation in 1866".[1]

A further difference is now apparent: legal principles can come into and go out of existence and be weakened in the interim; but this cannot be true of analytic moral principles, at least.

Eekelaar concludes that "the gradations in the generality and weight of normative propositions are so fine that no real demarcation can be drawn between those which should properly be called 'rules' and those which should be called 'principles'."[2] Further, propositions described by lawyers as 'principles which are couched in terms of comparatively wide generality with a correspondingly weak directive are also sometimes referred to as 'general rules'.

In terms of general 'characteristics' it would appear that moral and legal principles cannot be matched; the question as to whether moral and legal rules might have more in common than it appears so far will be a matter for consideration in Chapter 4.

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(1) Ibid. p. 33.

(2) Ibid. p. 33.

Part 2 : Moral Rules and Universalizability.

Hare tells us that "the thesis that descriptive judgments are universalizable is quite a trivial thesis "for, as he explains, "any singular descriptive judgment is universalizable - in the sense that it commits the speaker to the further proposition that anything exactly like the subject of the first judgment, or like it in relevant respects, possesses the property attributed to it in the first judgment". But, he holds, moral judgments are "in the same sense universalizable", but that this thesis "is itself not so trivial". [1]

Why not? Hare apparently means that moral judgments have descriptive properties but are not merely descriptive judgments and that universalizability holds even though they are prescriptive judgments. However, as Margolis points out, "even singular imperatives may be construed as universalizable but the relevant respect in which they are, concerns solely the unit class of subjects addressed by the singular imperative. Thus, whoever is "exactly like the subject of the first" imperative (there being none other) is addressed by the further imperative to which one is committed in committing himself to the original singular imperative". [2] How then can moral judgments construed as prescriptive be marked off from imperatives by virtue of universalizability?

To the principle of universalizability there corresponds "a descriptive meaning-rule", from the applicability of

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(1) Quoted Joseph Margolis, Values and Conduct, Oxford,1971,p.84.

(2) Joseph Margolis, p. 84.

of which it is "a direct consequence... that we cannot without inconsistency apply a descriptive term to one thing, and refuse to apply it to another similar thing (either exactly similar or similar in the relevant respect)".[1] Universalizability is then a logical and not a moral thesis; that is "a thesis about the meanings of words, or dependent solely on them". The meaning of 'ought' and similar words "is such that a person who uses them commits himself to a universal rule" - "the thesis of universalizability". But when he first introduces the concept of universalizability Hare says that "it is, most fundamentally, because moral judgments are universalizable that we can speak of moral thought as rational (to universalize is to give the reason".[2] But if to universalize is to give the (morally relevant) reason then the principle of universalizability is a moral and not (or not merely) a logical principle. And if the principle is solely concerned with meanings it cannot be a moral principle.

What is the source of this confusion? Margolis suggests that Hare has conflated the logical principle of universalizability and the moral principle of generality. Both are vacuous and require content, but acquire it in different ways: "Universalizability requires some semantic commitments over which it ranges; generality concerns the range as extension of cases over which particular and different moral rules obtain. Consequently generality is given content by some substantive moral principles or criterion".[3] The judgment that X is a thief, in

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(1) Quoted Margolis, p. 84.

(2) Ibid. p. 84.

(3) Ibid. p. 85.

respect of universalizability, draws attention only to consistency of usage, but in terms of generality, draws attention "to some criterion or principle or rule in terms of which the case at stake is seen to fall within the scope 'of what we call theft'. Universalizability concerns consistent usage respecting relevant resemblances.... Universalizability cannot determine the moral relevance of particular restrictions of generality with respect to given moral principles and rules; and the principle of generality is entirely vacuous without some moral commitment with respect to which the relevance of runs of similarities and differences may be determined and cases codified."[1]

On this showing it is pointless to consider whether universalizability should count as a necessary or sufficient condition of something's being a moral rule. Even if we were to accept the term "universalizability" in the sense in which Hare uses it, it would not do as a sufficient condition of something's being a moral rule because, as Wallace and Walker point out, "many other, indeed perhaps all other sorts of principles are universalizable. Consider, for instance, the principle that in oilpainting bright colours should be painted in last; this is universalizable but would not be classified as a moral principle".[2]

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(1) Margolis, pp. 85-86.

(2) G. Wallace & A.D.M. Walker, The Definition Of Morality, London, Methuen & Co. Ltd., 1970, p. 9.

Part 3 : Moral Rules And Prescriptivity.

Is prescriptivity such a singular feature of moral judgments that it should be regarded as a sufficient condition for some thing's being called a moral rule? Warnock dismisses the claim of prescriptivity to be regarded as an essential feature of moral judgment by suggesting, "That one is supposed to act on 'acceptance of the conclusion that one ought to do something, or that something would be the right thing to do', is not a fact about morality or 'the moral language', anymore than it is a fact about cricket, or long division, or growing runner beans".[1]

Can this dismissal be justified? Firstly, is it true that the essential feature of moral judgments is that they direct conduct? Secondly, can an action guiding moral judgment be distinguished from say, an action guiding aesthetic judgment?

Margolis objects that:

> ".... Surely, moral judgments used to direct peoples' conduct cannot be used merely to direct their conduct: these cannot be merely imperatives but must be imperatives thought to be justified on some grounds or other. And if this is so, then the judgment of what is morally appropriate or required, on which the imperative logically depends for justification, cannot itself be an imperative. Either so-called moral imperatives are arbitrary, without justification, or the admission of morally justified imperatives (directing conduct) presupposes a kind of moral judgment that is not itself an imperative. From this point of view, an imperatival function assigned to moral judgments can never be more than a subsidiary function." 2

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(1) Warnock, Morality And Language, OUP 1983, p. 170.

(2) Margolis, Values and Conduct, p. 39.

Further, there seems to me no reason for insisting that all moral judgments, qua moral judgments, are, or must be, action guiding. Some may be appreciative e.g. in cases where someone did something wrong but it is difficult to see how the action could be improved. Others may be nothing more than exclamations.

As to the second objection, surely Ezra Pound's instruction to the young T.S. Eliot to cut the length of The Wasteland and begin at the line "April is the cruelest month" was action guiding.

On this showing it would be false to claim that prescriptivity is a sufficient condition of something's being called a moral rule.

Part 4 : Moral Rules And Sanctions.

There are two different kinds of sanctions which might be said to attach to moral rules. Firstly, moral rules might be said to be accompanied by specific forms of social pressure; a person who breaks a moral rule might invite hostility, contempt, unfriendliness and perhaps even ostracism. Secondly, a person who fails to act in accordance with a moral rule he regards highly may suffer feelings of guilt, shame or remorse.

It may be true that if a person ignores or flouts a moral rule of his community or suffers guilt, shame or remorse by failing to live up to a personal moral standard, but how does this elucidate the meaning of 'Moral' or 'Morality'?

Surely neither of these forms of sanctions can be taken as a sufficient condition of a flouted rule being a moral one. Some people suffer from neurosies that accompany misplaced guilt feelings. Because some neurotics feel guilty if they do not constantly wash their hands it would be implausible to conclude that such people have, or think they have, a moral duty to occupy their time washing their hands, or that their feelings of guilt or shame prove some moral lapse. Similarly one may invite contempt of hostility by breaking a rule of an initiation ceremony, but this does not establish that _that_ rule is a moral rule. But, of course, it would be if contempt and hostility is a _sufficient_ condition of moral lapse.

How does the presence of sanctions fare as a _necessary_ condition of a rule being a moral one? One may question the morality of despising or ostracising someone, and the morality of an individual or group may contain a rule to the effect that it is wrong to treat people this way.

> "Someone who violated basic rules of behavior and harmed you was, by Navajo definition, "out of control". The "dark mind" had entered him and destroyed his judgment. One avoided such persons, and worried about them, and was pleased if they were cured of this temporary insanity and returned again _to horzo_. But to Chee's Navajo mind, the idea of punishing them would be as insane as the original act. He understood it was a common attitude in the white culture...." 1

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(1) Tony Hillerman, _The Dark Wind_, London, Victor Gollarcz Ltd. 1983, p. 109.

This suggests that the absence of ostracism or contempt cannot mean the absence of morality.

Must a person who never feels guilt or shame be either perfect or without moral standards? If it is a necessary condition of one's having moral standards or of one's acceptance of moral rules that one feels guilt or shame on failing to act in accordance with them, then it seems that he must be one or the other. The plausibility of this thesis arises from the same considerations as those on which many prescriptivist arguments rely, those relating to the action-guiding role which moral rules and judgments are claimed to play. If a person claims that torture is morally reprehensible and yet does so without a morally acceptable reason then his sincerity is clearly in doubt. If we subsequently discover that he feels shame and remorse then these doubts may be suspended.

While this may show that these feelings are "good indices" of sincerity the thesis requires more than this. If true, it must be impossible for a person to act contrary to a moral rule and not feel guilt, shame or remorse. But what of situations where one or more moral principles conflict? If I believe that it is wrong both to tell lies and to endanger the lives of innocent people I may feel obliged to tell lies. Why should I feel guilt or remorse?

Could this thesis be reformulated to accomodate the possibility of conflict between moral rules or principles? Wallace and Walker[1] suggest this might be done by relating

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(1) Wallace and Walker, p. 16.

the concepts of guilt and remorse to that of moral wrongness. The reformulated thesis would now maintain that it is a necessary condition of one's holding a particular action to be morally wrong that one feels guilt or remorse when one does the action. (In a footnote they observe that this would need further qualification to deal with actions done unintentionally, and so on).

But this reformulation is not without its difficulties. It would make it impossible for a person to hold that what he has done was morally wrong while feeling neither guilt nor repentance. But suppose that a child whose parents were brutally murdered before his eyes vows revenge and eventually takes it without subsequent pangs of conscience or feelings of repentance. He is able to say 'I know what I did was wrong, but I would do it again'. Wallace and Walker rightly question whether the reformulated thesis is sufficiently strong for us to conclude that he does not really believe that what he did was wrong.

There is another, perhaps even more persuasive, argument against social sanctions being regarded as a sufficient and perhaps even necessary conditions of something being a moral rule. Hart advanced three criteria for distinguishing duty-conferring rules,only one of which need concern us in this context. He suggests, that "Rules are conceived and spoken of as imposing obligations when the general demand for uniformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great".[1]

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(1) Hart, H.L.A., The Concept of Law, Oxford, Clarendon Press, 1979, p. 84.

This is surely neither a necessary or sufficient criterion. The parable of the Good Samaritan is clearly intended to imply that the Samaritan had a duty to assist the Jew,[1] and this is neither a self-contradictory nor linguistically improper use of the word "duty". But we know that there were at that time heavy social pressures against co-operation between Jews and Samaritans. So Hart's criterion is not a necessary test of duty. On the other hand, MacCormick[2] argues there is strong social pressure in an Oxford Common Room on men to wear trousers rather than skirts, yet it would be inaccurate to speak of dons having a 'duty' to wear trousers. There is simply a conventional rule about the correct clothes for men to wear. So Hart's criterion is not sufficient either.

The deficiency of this test, to employ his own terminology, is that it is a criterion specified in terms of an 'external point of view'.[3] It provides a test for distinguishing duties from other rule-governed acts from the point of

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(1) It is possible to construe (in the dictionary meaning of the word) the Samaritan's action as 'supererogatory'; but this is surely not the meaning of the parable.

(2) D.N. MacCormick, "Legal Obligation And The Imperative Fallacy' in Oxford Essays in Jurisprudence, Second Series, Oxford University Press, 1973, pp.100-129, p. 119.

(3) c.f. the 'internal point of view': "What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism(including self-criticism), demands for conformity, and in acknowledgements that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'. Hart, p. 56.

view of the social observer. This might be regarded as a useful rule of thumb for distinguishing those social rules conceived of by members of a group as imposing duties from other rules; but the presence of transvestites, for example, will make it not wholly satisfactory.

Part 5 : Moral Rules And Overriding Considerations.

What is being claimed, Wallace and Walker[1] ask, when it is said that moral rules override other kinds of rules? There are two radically different answers. First, it might mean that when people are confronted with a choice between acting in accordance with a moral rule and acting in accordance with a non-moral rule, they always act in accordance with the moral rule. Since, however, people do fail to act in this way, that is, in accordance with moral rules, the first answer will not do.

Secondly, it might mean that people who accept moral rules believe that they ought to act in accordance with those rules when they conflict with other kinds of rules. But, suggest Wallace and Walker, if this thesis were correct we should be obliged to say that a man who, while recognizing that he has a duty to paint, must have,or believe that he has,a moral duty to paint. Surely, however this would only apply if the thesis

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(1) Wallace and Walker, pp. 10-11.

meant that. It is true, they suggest, that sociologists and anthropologists sometimes count as part of a society's morality those rules which are taken to be of overriding importance. But, they argue, it is far from clear that the meaning of 'moral' obliges us to say that the painter believes he has a moral duty to paint. Further, if this thesis were true, one should expect such remarks as, 'Other kinds of rules ought sometimes to override moral rules' to be self-contradictory, but this does not appear to have been established.

The foregoing does nothing to disturb the assertion that moral rules are generally thought to be concerned with overriding values; whether people choose to consider them as of paramount importance is a purely contingent matter.

Part 6 : Moral Rules And Their Importance.

Two different ways[1] can be distinguished in which the notion of importance could be useful in an attempt to define or isolate the term 'moral'. A rule or principle, it might be said, is a moral rule or principle if it is (i) held to be important by its holders or (ii) is important. Since no one appears to have maintained that either interpretation provides a sufficient condition of a rule's or principle's being a moral rule or principle, it would be more productive to consider these interpretations taken as stating necessary conditions.

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(1) Wallace and Walker, pp. 12 - 13.

How could one decide whether it is true that a necessary condition of a rule's being a moral rule is that it is, or is held to be, important? One can speak of things being morally important, but also of things being legally, politically, aesthetically and economically important. We cannot shed any light on the meaning of 'moral' by maintaining that moral rules are those which it is morally important to keep. As far as importance is concerned we shall need some basis of comparison other than that of moral importance. One possibility is that the importance of moral rules is to be located in the fact that if certain moral rules were to be widely disregarded social chaos may ensue. Although moral rules are of differing importance in this respect it appears to be true that as a kind they are important when compared with other sorts of rules. But this is also true of legal rules.

One way of arguing for the importance of moral rules would be to suggest that the acceptance of a moral rule necessarily commits one to being prepared to give second place to one's own wants, desires and interests. But would this not rather exhibit the importance of the rule rather than the morality since, for example, in sporting contests,one must be prepared to do things, under the relevant rules, which one would rather not do?

But might this not be construed as begging the question? A definition of the type under consideration asserts that part of what it means to call a rule a moral rule is that it should be accepted even in the face of strong desires and inclinations. What has been said, suggest Wallace and Walker, is open

to this objection; but an appropriate reply is to say that to call a rule a moral rule manifestly does not mean this. If it did, we should be faced with the paradox that should no one ever feel a strong urge to kill others, the rule that one ought not to kill would cease to be a moral rule. This is not, however, paradoxical to those who hold that the point of moral rules is to curb strong and possibly anti-social desires.

Part 7 : Moral Rules And Their Content.

Wallace and Walker suggest that there are several possible variants of this thesis. It might be said that a moral rule or principle is such because it mentions as good or bad, or right or wrong, certain types of actions. Or it might be said that a rule or principle is a moral rule or principle if its holder justifies it by appealing to considerations of certain kinds. Again, it might be suggested that moral rules and principles are to be characterised by reference to their being rules and principles with a certain kind of purpose (e.g. the promotion of social harmony) or, slightly differently, by reference to their being rules and principles such that the consequences of an individual's accepting, or of everyone's accepting them are, or are believed to be, of a certain kind.

Wallace and Walker suggest that while this classification is not exhaustive, nor the lines between the three views distinguished entirely clear cut, the differentiation is sufficient for the purpose of illustrating the difficulties associated with this contention.

They assert that, whatever the specific form of the criterion proposed for the rule's content, it must be inadequate as a sufficient condition of a rule or principle's being a moral rule or principle. The reason for this is that, whatever the content, it is possible that non-moral, e.g. legal, rules could be about the same criteria, could have action in accordance with them justified in the same way, or could have the same purpose as moral rules.

However, Wallace and Walker agree that, if regarded as a necessary condition of a rule or principle's being a moral rule or principle, this view has "considerable attractiveness".[1] A reluctance to describe a rule such as 'always wear a pink tie' as a moral rule does seem to stem from one, or perhaps all, of the related facts that it is not about the appropriate kind of actions, could hardly have action in accordance with it justified in the appropriate way, and could scarcely have the appropriate purpose.

They suggest that definitions of the first type, according to which moral rules and principles are those which mention, as good or bad, right or wrong, certain specified kinds of actions, are less promising than definitions of the second

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(1) Wallace & Walker, p. 18.

and third types. This is because, on the first type of definition, certain kinds of actions could never be the subject of moral rules and principles; but given the eccentricity of human beliefs about the consequences of actions it would be rash to make such a claim. They argue that in an amended form this kind of thesis might fare better. This would assert that "a necessary condition of a rule or principle's being a moral rule or principle is that the actions it enjoins or forbids are describable or can be seen in very general ways e.g. as contributing to human well being".[1]

But this amendment seem open to the objection that a Nazi could claim the status of a moral rule for a rule connected with the purging of Jews from society on the ground that their elimination would contribute to human wellbeing.

A definition of the second type, which affirms that a necessary condition for a rule or principle to be a moral rule is that its holder should justify action in accordance with it, or be at least prepared to do so, by appealing to considerations of certain kinds (e.g. to do with human well-being), appears to assert that anyone who uncritically accepts certain rules and principles and is unable to provide reasons for their justification cannot have moral rules or principles! Wallace and Walker do allow, however, that, provided this thesis merely states what sorts of consideration must be appealed to if a justification is to be given, the objection loses its force.

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(1) Ibid. footnote p. 18.

Definitions of the third type are not open to this objection because they state that it is the purpose of the rules or the consequences of their acceptance - rather than the kind of justifying considerations - which places them within or without the moral sphere. But this type of definition has its own drawbacks.

The notion of the purpose of a moral rule can hardly be elucidated without reference to the considerations its holders use or would use to justify action in accordance with it; therefore, definitions in terms of the purpose of moral rules will all suffer from weaknesses similar to those of the second type. If we then appeal to the putative consequences of the acceptability of moral rules we have the problem that a person may, conceivably, have no views about the consequences of acting in accordance with his moral principles. Nor will it help to appeal to the consequences of his acceptance as this will entail that moral rules and principles based on erroneous beliefs cannot be moral rules and principles after all. It might be claimed that the upshot of the acceptance of moral rules and principles was the promotion of social harmony; but might one not be obliged to admit that moral rules and principles which were based on erroneous beliefs and in fact created social disharmony were actually not moral rules and principles? "A definition along these lines might give an adequate account of 'moral' as a term of approval; but would quite clearly be inadequate with 'moral' as a classificatory term."[1]

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(1) Ibid. p. 19.

On this showing it appears that the content of moral rules suggests that it can only be a necessary and not a sufficient condition of a rule's being a moral rule that it should be concerned with overriding values, divorced from the contingent and presumptive values of particular agents.

Part 8 : Moral Rules And Immunity To Change.

Hart suggests that while new legal rules may be introduced and old ones changed or repealed by deliberate enactment, moral rules and principles, by contrast, "cannot be brought into being or changed or eliminated in this way."[1] It makes sense to say that as from such and such a date it will be a criminal offence to do so-and-so and to support such a statement by reference to a law which has been repealed or enacted.

> "By contrast such statements as 'As from tomorrow it will no longer be immoral to do so-and-so' or 'On 1 January last it became immoral to do so-and-so' and attempts to support these by reference to deliberate enactments would be astonishing paradoxes, if not senseless." 2

The reason is, for Hart, that it is inconsistent with the part played by morality in people's lives that moral rules, principles or standards should be regarded, like laws, as capable of creation or change by deliberate act. Hart asserts that "Standards

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(1) H.L.A. Hart, p. 171.

(2) Ibid. p. 171.

of conduct cannot be endowed with, or deprived of, moral status by human fiat, though the daily use of such concepts as enactment and repeal shows that the same is not true of law". [1]

But this seems to be arguable. One might object that certain notions about chastity or motherhood were altered by the legality of selling contraceptive tablets or the availability of pensions to unmarried mothers. While there may always be those who object to the notion of an unmarried mother it may also be true that there is, partly as the result of legislative initiative, no longer a social stigma attached to conceiving and bearing a child out of wedlock. The same might be said of the legalization of homosexual behaviour and the introduction of legislation to prevent discrimination against homosexuals in employment. And any legislative changes, must at least in a democratic society, reflect public opinion to some extent.

What are we to make of Hart's assertion that the sense of something 'there' to be recognised, not made by deliberate human choice, is not a peculiarity of moral rules?

> "For in this respect, though not in others, any social tradition is like morals: tradition too is incapable of enactment or repeal by human fiat. The story, perhaps apocryphal, that the headmaster of a new English public school announced that, as from the beginning of the next term, it would be a tradition of the school that senior boys wear a certain dress, depends for its comic effect wholly on the logical incompatibility of the notion of a tradition with that of deliberate enactment and choice." 2

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(1) Hart, p. 171

(2) Ibid. p. 172.

But however logically incompatible the combination of tradition with that of deliberate enactment and choice, this is what occurred when the rejuvenated English grammar schools set out to attract pupils by imitating the well established public schools in the latter half of the nineteenth century. Thus in 1851 Mill Hill adopted, from nowhere as it were, a coat of arms - legless martlets.[1] In effect the new schools were pretending they were old. And soon they began to feel old. When Henry Newbolt penned the lines:

> 'This is the Chapel: here my son,
> Your father thought the thoughts of youth...,'

he was writing not about Rugby or Harrow but about Clifton, founded twentyfive years before in 1852, the year Newbolt was born.

> "There was no question of anyone's father thinking the thoughts of youth there when Newbolt wrote; or it there was he would be exhorting a son aged five."[2]

Thring's speech to the first meeting of The Association of Headmistresses at Uppingham in 1887 is an illustration of this self-deception. "You are fresh, and enthusiastic, and comparatively untramelled",he cried, "whilst we are weighted down by tradition, cast like iron in the rigid moulds of the past...".[3] But what tradition? Thring had no tradition to contend with when he arrived at Uppingham, a tiny run-down grammar school with twenty eight boys."Any traditions were brought by him and imposed by him, deliberately."[4]

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(1) J. Gathorne-Hardy, The Old School Tie, The Viking Press, N.Y. 1978, pp. 133-34.

(2) Ibid. p. 134
(3) Ibid. p. 134.
(4) Ibid. p.134.

The perfect refutation of Hart's claim is afforded by the case of Plumtree, founded in Rhodesia in 1900:

> "...there was no nonsense about waiting for traditions to grow up. A Master called Hammon sailed out from Winchester and slapped them on entire - fagging, colours, prefect justice, monitorial beatings, everything." 1

Hart suggests that the enactment or repeal of laws may well be among the causes of a change or decay of some moral standard or tradition. Thus a traditional practice like Guy Fawkes night may go out of existence because the celebrations at that time, e.g. the explosion of fireworks, may be forbidden by law. He suggests conversely that if laws require military service from certain classes this may ultimately develop a tradition among them that may outlive the law. But then, surely, social changes may cause these social classes,to disappear and the tradition with it. The point is that we do not normally think of moral rules disappearing, in the way that Guy Fawkes or the Polish aristocracy may disappear.

The logical fact which reflects the truth that moral rules are not man-made and cannot be promulgated is that there is nothing analogous, in the language of 'morally ought not to be done', to the difference between saying that something is not to be done before and after this has been said by some accredited or authoritative person. If I, who am not an authoritative person says, 'No boy may walk in the quadrangle after dark' before the Headmaster, who is an authoritative person has said, 'no boy may walk in the quadrangle after dark', I am making a false statement. If, on the other hand, I say this after

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(1) Gathorne-Hardy, p. 123.

the Headmaster has said "No boy may walk in the quadrangle after dark', I am making a true statement. However, with moral rules there is no body of people whose having said the words 'Such-and-such is not to be done', with all due procedure, subsequently makes it correct for anyone else to say these words.

This looks more promising: no one or body of persons is authorised to make moral rules. But then no one is authorised to make some arithmetical rules which exhibit a recognised immunity to change.

But are moral rules immune to change? We have seen that they mediate between justificatory principles and particular acts. In respect of the analytic content of a moral rule there is clearly no person or group of persons who, by common consent, are authorised to make changes to or promulgate moral rules. But as they take account of human exigencies, they exhibit a conditional phrasing, which allows for exceptions comprehended under these rules. As these exceptions might be said to reflect conventional judgments, is it possible that moral rules are capable of change or amendment?

I suggest that moral rules can change (to say 'can be changed' suggests deliberate enactment which can be misleading) in two different ways. Many people might phrase a moral rule about killing thus: 'Killing is generally wrong.' To indulge in anthropological speculation for the moment, one might conjecture that their remote ancestors might have phrased the rule as 'Killing (such and such) people is generally wright'

In other words their sympathies were limited, and there were groups of people whose killing might have been acceptable or even desirable under any circumstances. The narrowness of their sympathies would not likely have extended to other creatures except perhaps domestic animals and birds. The second stage in our projected evolution is that their ancestors have broadened their sympathies to include people in general, so that the rule is now 'Killing people is generally wrong'. These sympathies in respect of other species would still, in general, only extend to domestic animals and birds, although the presence of Zoos suggest that there is at least some public curiosity about unfamiliar species of life, and a willingness to keep certain numbers of them alive in captivity.

The final stage, and this is comparatively recent, is a complete broadening of sympathies, 'Killing is generally wrong', to include the preservation of all forms of life not seen to be threatening to man. A consideration of the socio-economic reasons for the change in sympathies over a long period is irrelevant here, but the indignation over the annual killing of baby seals, the abolition of whaling by all but two nations, the concern over the culling of kangaroos and the welfare of dolphins are symtomatic of this final stage.

This is not deny that there are variations in attitude towards say, particular species, or that some who embrace the widest sympathies may at the same time support abortion,(perhaps under certain conditions) regarding this as a permissable exception comprehended under the moral rule. It appears that

it is in the matter of exceptions that the second possibility of change lies. Thus in at least several countries euthanasia, under certain conditions, is behavior that excuses 'killing' although this has clearly not always been the case.

Thus I suggest that moral rules might change in two ways, by a broadening, or extension, of sympathies and by the inclusion of additional exceptions comprehended under the rules.

However, even if moral rules were not subject to change in any way, immunity to change would only be a necessary condition of somethings being a moral rule.

Part 9 : Moral Rules And The Distinction between Exceptions Which Are Part Of The Rule And Deserving Cases.

In maintaining that if one has adopted the moral point of view then one acts on principle, Baier[1] suggests that while Kant is right to argue for this and for the fact that a moral agent should not make exceptions in his own favour, he is wrong in suggesting that moral rules are inflexible and without exceptions. Since we think, for example, that killing a man in self defence is not wrong, how is it possible to salvage some of our deepest moral convictions, which Kant was prepared to reject? The only alternative, suggests Baier, to

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(1) Kurt Baier, The Moral Point of View, N.Y. Random House, 1969, pp. 96-100.

saying that acting on principle does not require us not to make exceptions in our own favour, seems to be equally untenable.

However, Baier claims, this problem arises only because of a confusion, the confusion of the expression 'making an exception to a rule' with the expression 'a rule's having an exception'.

Baier illustrates this by way of traffic regulations. 'No parking' regulations have a number of recognised exceptions which are part of the rules themselves e.g. 'except in the official parking areas', 'except for permit holders', 'except on Saturday mornings and after 8 pm every day'. A person who does not know the recognised exceptions does not completely know the rule, for these exceptions more precisely define its range of application. A traffic attendant who does not book a motorist for parking in an area reserved for permit holders outside the hours which are specifically reserved for permit holders, is not granting an exemption to, or making an exception in favour of, this motorist. His is applying the rule correctly; if he did apply the no-parking rule to the motorist he would be applying it where it does not apply because this is one of the recognised exceptions which are <u>part</u> of the rule. On the other hand, a parking attendant who does not book a motorist parking in a prohibited area during a prohibited time, is making an exception in the motorist's favour. If he does so because the motorist is his friend or because he is reluctant to embarrass an influential person he grants the exemption illegally. If he does so because the motorist is a doctor who has

been called to treat someone who has collapsed on the pavement, this is a 'deserving case' and he grants the exemption legitimately.

Baier asks us to apply this distinction to the rules of a given morality. He points out that moral rules differ from laws and regulations in that they are self administered. Nevertheless it makes sense to speak of making exceptions in one's own favour. One may refuse to apply a rule to oneself when one knows it does apply and this is true also of making exceptions in favour of someone else.[1]

When we say that a person who has killed in self-defence has not done anything wrong we are not making an exception in the person's favour: 'Thou shalt not kill' has several recognised exceptions, among them, 'in self-defence'. We would say that someone did not fully understand our moral rule 'Thou shalt not kill' if he was not aware of the recognised exceptions to the rule. Moral judgments are, therefore, only presumptive; killing is wrong unless it is killing in self-defence, killing by the hangman, killing of the enemy in wartime, accidental killing. These types of killing are not wrong. But again, even if it is one of the wrongful acts of killing, it is so only prima facie. There may have been an overriding moral reason for killing someone e.g. he was about to blow up a train and this was the only way to prevent this.

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(1) For an unexplained reason Baier considers it "almost as immoral" to make exceptions in favour of one's relatives as in favour of oneself.

When a magistrate is empowered to make or grant exceptions in 'deserving cases' the question of what constitutes 'a deserving case' is not answered in the regulation itself. If it were, the magistrate would not be exercising his power to grant exemption but would merely be applying the regulation as provided in it. What in such circumstances constitutes 'a deserving case'? The answer is a morally deserving case. The doctor who is called to treat an injured person and who parks 'illegally' in order to do so is clearly a morally deserving case.

In the case of moral rules however, there is no distinction between exceptions which are part of the rule and deserving cases. "Only deserving cases can be part of the moral rule, and every deserving case is properly part of it"[1]; while, in the cases of laws and regulations, there is a reason for going beyond the exceptions allowed in the regulations themselves (in morally deserving instances) there is no such reason in the case of moral rules.

What of the Common Law, which Detmold suggested[2] may have an analogous structure?

What appears to happen in the Common Law is that:-

(a) A case which constitutes an existing exception(a case in search of a precedent) may itself become a precedent, i.e. a new rule.

Thus Donoghue v. Stevenson (1932) A.C. 562, "which, to speak broadly, established the liability in negligence of a

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(1) Baier, p. 194.

(2) to me in discussion, October 1984.

manufacturer of goods".[1] Mullen v. Barr & Co; McGowan v. Barr & Co. (1929) S.C. 461, a case indistinguishable from Donoghue v. Stephenson except upon the ground that a mouse is not a snail, was disallowed, on appeal, in 1929. Had the 1929 appeal been allowed it seems correct to say that Donoghue v. Stevenson would have been subsumed under "the rule in Mullen v. Barr & Co.; McGowan v. Barr & Co."

(b) The precedent (i.e. rule) may be extended to cover conditions not contemplated when the law was laid down.

Thus Haseldine v. Daw (1941) 2 K.B. 343, where the now established liability in negligence of a manufacturer of goods was extended to cover the case of a repairer as well.[2]

Clearly (a) has no analogy in the case of moral rules, because no new moral rules can be created, in turn because no persons have the authority to create them.[3]
(b) however looks more promising. Writing in 1970 Margolis regarded the "thalidomide babies" as a hard case. He remarks that

> "One cannot simply say that the killing of these babies is right as one can say that the killing of the enemy is right. I think we are prepared to concede, however, that though - according to the teaching - it is wrong to take another's life, it might have very significant bonific(or even optimif ic) consequences to end the lives of such terribly handicapped infants;that, furthermore,since such an act would have good consequences(and avoid evil consequences) it might therefore be right. I am not saying that it would be right or wrong but only that we would regard the debate as eligible." 4

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(1) Detmold, M.J. p. 172.

(2) Detmold, M.J. p. 172.

(3) We have noted the possibility of their change through broadening of sympathies and the addition of exceptionsto be comprehended under them.

(4) Margolis, p. 162.

One reason why the debate was not considered eligible was because the children (or at least a majority of them) were normal except for malformation or absence of limbs. Suppose however, as might have been the case, that the babies exhibited gross mental defects as well as the malformation or absence of limbs. Suppose further, that after the first few were born, and despite strenuous opposition from the Roman Catholic Church and some other groups and individuals, public opinion, the medical profession, the law, parents etc. agreed that future children exhibiting such tendencies should be humanely put to death. The remaining children are born and this is done. This is now a precedent. Future case, e.g. some resulting from male parents' participation in the Vietnam War, could be treated in the same way, depending on the consensus reached in the thalidomide decision, the details of which are, for our purposes here, irrelevant.

But the possibility of this analogy does nothing to suggest that in common law cases there is any distinction between exceptions which are part of any particular rule and deserving cases. Indeed one might argue that to some degree the exceptions are the deserving cases; in the light of Donoghue v. Stevenson, Mullen v. Barr & Co.; McGowan v. Barr & Co. was a deserving case, but the common law is a matter of temporal sequence, and the "earlier" case "misses out".

Exceptions to moral rules, whether they are admitted exceptions to the rules or simply exceptions (e.g. simply self-serving examples) cannot erode the rules, but this does not appear to be the case at common law.

"The precise 'rule' in Rylands v. Fletcher has been steadily eroded by exceptions since its formulation in 1866. By the time the House of Lords, in Conway v. Rimmer, effectively laid to rest an earlier rule, initially understood to be of absolute character, that a certificate from a Minister that production of a document would be contrary to the public interest was sufficient to withhold it from a court, the authority of that rule had been greatly shaken by both judicial and extra-judicial criticism." [1]

Detmold has suggested to me[2] that similarities in the structure of common law and moral rules may arise from the notion of precedent - building, whether individually or collectively, our own compendium of cases with some residuary rule which we bring to confront particular situations, the rule having (perhaps) the elasticity to accommodate conditions as yet uncontemplated.

But there is nothing necessarily high-minded about precedent. Consider A who commits an irrational act of murder, and discovers that it will bring him, with little extra application on his part, considerable remuneration. Subsequent police investigation discloses that detection is almost impossible. A then embraces a life of crime, using the first murder as his precedent; to the police, correspondingly, A's precedent is a master criminal's modus operandi for a series of bizarre crimes.

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(1) J.M. Eekelaar 'Principles Of Revolutionary Legality' in Oxford Essays in Jurisprudence, ed. A.W.B. Simpson, Oxford 1973, p. 33.

(2) In discussion with me, October 1984.

I suggest that the notion of precedent does nothing to affirm that common law rules are similar to moral rules in containing exceptions which are part of the rule and indistinguishable from deserving cases. Exceptions to common law rules appear to remain precisely that: exclusions from the rule and not subject to their ambit. Exceptions (of either kind) to moral rules have no possibility of eroding them; they do not constitute anomalies as is the behaviour of the planet Mercury to Newton's Law of Gravitation; they cannot weaken moral rules as they have the potential to weaken tendency statements such as statistical or other scientific laws.

For this reason it is suggested that moral rules are unique in that there is no distinction between exceptions which are part of the rule and deserving cases. This is, therefore, a sufficient condition for something's being a moral rule.

Part 10 : How Moral Rules Work.

Margolis[1] remarks that although 'Lying is wrong' is obviously a tautology few would subscribe to it without qualification. How can they understand the rule and without contradiction fail to assent to it? What is the implication of demurring? Margolis argues that the outcome will affect other familiar precepts such as 'Poverty is evil', 'War is wrong', 'Suicide is wrong' and 'Sexual Perversity is wrong'

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(1) J. Margolis, "Values And Conduct" Oxford University Press, 1971.

but here he is clearly wrong since the other precepts are not clearly tautologous without the injection of certain theological or sociological assumptions. However it will affect "all meta-moral theories that rely on the admission of moral rules that mediate between particular acts and overriding justificatory principles."[1]

Margolis argues that if people disagree about 'Lying is wrong' they cannot be viewing the rule in the same sense. If one claims that 'Lying is wrong' cannot be upset as a moral rule then this is presumably drawing attention to the fact that the rule is a tautology: "Saying in a morally reprehensible way what one believes to be false is morally reprehensible." On the other hand if one claims that it is not true that lying is always wrong this is presumably drawing attention to the fact that not all cases you might consider cases of lying are properly so called. Or, that although genuine cases of lying are morally wrong in so far as they are cases of lying, the adjudged conduct cannot be judged in a morally appropriate way solely in terms of lying although lying is a consideration in these cases. Clearly this "demurrer applies to... promises, debts, and all similar categories."[2] Margolis has included 'murder' among these categories but clearly this is incorrect since the concept is so well defined as to differentiate it, at least in principle, from accident, self-defence, mercy killing, armed service and the like, in such a way that what is adjudged to be 'murder' is always wrong.

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(1) J. Margolis, p. 166.

(2) Ibid. p. 167.

He suggests that there are three distinct elements to be sorted out: the import of the tautological rule; the grounds for judging whether this or that is, properly, a case of lying; and the grounds for judging whether this or that act of lying is, properly, morally wrong. Since one may acknowledge that the rule 'lying is wrong' is tautologous and "still admit the eligibility of the latter two issues, it must be the case that the rule is not intimately connected with arguments supporting particular moral judgments."[1]

I suggest this is confusing as it stands; it would be clearer if 'justificatory principle' were substituted for 'moral rule' so that the justificatory principle reads 'Lying is wrong' and the moral rule (say) 'Lying unnecessarily is wrong'.

Margolis claims that with the moral rule "we normally do not apply verdict-like predicates like 'wrong' to any action solely on the strength of such fractional categories as lying, contract-breaking, cheating, murder or promise-breaking."[2] I repeat here my previous objection to the inclusion of 'murder', particularly as Margolis continues, "it is... illuminating to note that we do apply legal predicates in this fractional way; but then, precisely, legal considerations, like prudential and medical considerations, are not, as such, occupied with overriding values, but are concerned rather with certain technical goods".[3] But 'murder' is nothing if not a legal 'good'.

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(1) Margolis, Ibid. p.167.

(2) Ibid. p. 167.

(3) Ibid. p. 167.

The matter seems rather more complicated than Margolis suggests. It might be said that both medicine and the law deal with overriding considerations in technical ways.

'A lie is a lie but it may sometimes be justified' points to the subsuming of some cases of lying under one or more comprehensive rules, "themselves open to dispute, reform, rejection....".[1] However wrong, then, lying may be under some particular rule it may not be judged as really wrong or wholly wrong when all relevant moral considerations are admitted. 'Lying is wrong' is incapable of being disputed but it is empty and even superfluous as far as any particular moral issue is concerned. We need to know the criteria by which to judge an action to be a case of lying and the justification for regarding it as morally reprehensible or blameworthy; this is where, I suggest, our moral notions about the 'worthiness' of the circumstances come in.

It is certainly true that these notions are subject to change. The intuitionist McCloskey assures us that "we discover general truths about goods and obligations by direct insight, by rational apprehension of them. These truths are self-evident in the sense that they may be directly apprehended by reason and their truth discovered without proof. We may and do make mistakes but our knowledge, where we have it, is based on direct insight. It is general truths such as 'Pleasure is good', 'Elimination of suffering is obligatory'.... which are self- evident, not our absolute duties in concrete moral situations".[3]

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(1) Margolis, p. 168.

(2) H.J. McCloskey, Meta-Ethics & Normative Ethics, The Hague, Nijhoff, 1969.

(3) Ibid. p. 136.

But while the foregoing 'general truths' may have been self evident to McCloskey in 1969 it would, I believe, be false to maintain that these were 'self evident' to academics in 1869.

Margolis draws attention to the role the tautological rule (I have earlier indicated my preference for 'principle') may play in rhetorically reinforcing the relevance of particular criteria and such justification, and in drawing attention to an obligation to adhere to such criteria. But these are, as he suggests, subsidiary roles.

Rules like 'lying is wrong' demand explication but no justification, since they are tautologies; as such they are vacuous and the question of justification arises "respecting whatever may be taken to be the positive content of the rule."[1] Non-tautological rules, on the other hand, demand justification and in certain cases this may be difficult to provide in ways which may fairly count as proof or confirmation.

Consider, now, that someone has lied; in doing so he has acted wrongly. But the question arises as to whether it was really wrong for him to have lied under the nominated circumstances. He might claim for example that lying is wrong except to save a life. Margolis regards this as a formulation of "A more comprehensive rule than "lying is wrong" (or, conceivably, a fuller version of the rule intended)."[2] I suggest that he is mistaken: 'lying is wrong' is the justificatory principle, 'lying unnecessarily is wrong' is the moral rule and

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(1) Margolis, p. 169.

(2) Ibid. p. 169.

'lying is wrong except to save a life' is, in fact, an appeal for specified conduct to be subsumed under one of the exceptions recognized (by our moral notions) to the moral rule 'lying unnecessarily is wrong'. As Margolis remarks, what he regards as the 'intermediary rule' (to me a 'recognised exception') 'Lying is wrong except to save life' not only requires justification (we need to know the exact circumstances) but also may be open to exception. This sounds far fetched but then it may be the case that an eccentric has lied (presumably a lie of sufficient importance to warrant the enquiry and justification) to save the life of some creature (reptile, wild life, as we wish) which everyone, or nearly everyone else, regards as unworthy of being preserved. Certainly the rules (or the exceptions as I would have it) require justification and are, if valid, conditionally valid until we have laid bare the particular facts of the case.

Those who accept justificatory tautologous principles as exclusionary reasons for actions are usually moral absolutists (hermits in benign circumstances are another possibility) and the difficulties they may face when faced with conflicting justificatory principles are well depicted in Rachel's 'On Moral Absolutism',[1] particularly in his discussion of P.T. Geach. It does appear that a bush walking absolutist (or perhaps a certain kind of Buddhist) who accepts the justificatory principle 'killing is wrong' in a literal sense may expiate the consequences

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(1) James Rachels, 'On Moral Absolutism' AJP Vol. 48, No.3, December 1970, pp. 338-353.

of this unintelligent choice when attacked by a poisonous snake, when a strong stick and a modicum of resolution may have saved him. Moral absolutists in general though, are invariably more prudentially minded and 'killing is wrong' is usually taken to mean 'killing (human beings) is wrong'. It is logical, though not inevitable, that such a justificatory principle should be extended to the unborn; a moral absolutist who accepts the extension of this justificatory principle would be placed in an uneviable position should his wife become pregnant as the result of rape. The standard rejoiner to this is that such incidents are most unlikely to occur.

Geach [1] believes that God has the power to prevent people being put in situations when they are forced to decide between two acts, both unacceptable to a moral absolutist:

> "....If God is rational, he does not command the impossible; if God governs all events by his providence, he can see to it that circumstances in which a man is inculpably faced by a choice between forbidden acts do not occur. Of course such circumstances.... are consistently describable; but God's providence could ensure that they do not in fact arise...." 2

But then a moral absolutist <u>has</u> to have some card up his sleeve.

But the moral notions of most people accept that moral rules <u>do</u> mediate between justificatory principles and particular acts by incorporating exceptions that recognise the exigencies of human existence; there <u>are</u> occasions when it is not conventionally considered <u>wrong</u> to lie, cheat, steal or kill,

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(1) P.T. Geach, God and the Soul, London 1969.

(2) Ibid. p. 28 (quoted Rachels p. 349).

the justificatory principles notwithstanding. These notions have some limited legal sanction as well, going beyond the exceptions conventionally made for bona fide cases of mercy killing, self-defence and the like. In 'Principles of Revolutionary Legality'[1] Eekelaar comments,

> "The question.... arises whether it is possible to conceive of principles according to which prima facie illegal acts may be sought to be justified. It appears that such principles do exist and can be applied even to override the enacted law of an effective legal system. One (example) is drawn from the principles of sentencing offenders. In the vast majority of cases in which a court finds a mitigating factor it cannot be said that the presence of that factor justifies the offence (in the same way as, for example, self-defence). In some cases, however, it may come near to doing so, as where a penniless person who steals food for his family is given an absolute discharge." 2

Our ordinary moral notions also accept that much social life would be manifestly unpleasant were we unable to resort to 'white lies' which are, nevertheless, lies. Few would consider it heinous for a man to compliment his wife wearing a new dress even though it be far from his own personal choice.

Appeals to have actions subsumed under admitted exceptions to moral rules are generally likely to succeed where it can be shown that it was necessary or desirable to have performed the prima facie morally reprehensible act, where the exception sought is not merely in one's own favour, and in certain cases, where the exemption is not being sought inconsistently. But each case will require its own particular assessment.

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(1) J.M. Eekelaar, 'Principles of Revolutionary Legality', in Oxford Essays In Jurisprudence, 2nd Series.ed. A.W.B. Simpson, Oxford, 1973.

(2) Ibid. p. 38.

Part 11: Summary.

I have claimed that moral rules have certain distinctive features viz:

(1) they are perhaps best, if oddly, described as conditional a priori statements. However expressed e.g. 'Lying's wrong!', they can always be shown to be vulnerable to counter-example, but not all statements which might be construed as 'moral principles' are analytic and can be so correlated. 'One ought to do the greatest good' would surely be regarded as a moral principle but it would seem odd, as I have already suggested, to say 'One ought generally to do the greatest good'. The point here is : what is the greatest good e.g. what looks to be the immediate greatest good as against a 'greatest good' in the long run.

(II) due to their partial analytic content it is clear that there is no one person or body of persons who can be said to have the authority to change them. They are, however, subject to change or modification as a result of their conditional status; firstly, by a possible extension e.g. in the case of 'killing' to cover classes of people or species not perhaps previously comprehended, and secondly by the possibility of additional exceptions being included under any particular rule.

(III) they cannot be eroded or effectively modified by exceptions, which may the fate of other kinds of rules. Exceptions to them do not constitute anomalies.

(IV) there is no distinction in them between exceptions which are part of any particular rule, and deserving cases. There is nothing to a rule having an exception but this is a different matter entirely. I have claimed this feature to be a sufficient condition of something being a moral rule. All other grounds tested proved, with one exception, universalizability, to be only necessary conditions, at best.

(V) they mediate between justificatory (analytic) principles and particular acts, thus taking account of the exigencies of the world. The analytic component does not appear to do any work, but can justify clear cut cases and assist in hard cases by reminding us of, in Mill's words,"the manner in which it will be least perilous to act".

But moral rules, whatever their utility, and however they may be used as a suppressed major premiss in a piece of moral reasoning, neither exhaust that moral process or evaluation. Other possibilities exist.

Part 12 : Moral Motivation

In commenting on Kant's arguments against the possibility of theocentric ethics Williams[1] characterises Kant's attitude as being that "nothing motivated by prudential considerations can be genuinely moral action; genuinely moral action must be motivated by the consideration that it is morally right and by no other consideration at all."[2] He points out that two questions about morality and motivation are raised by this argument. Firstly, whether motivation is either moral or prudential, these options being exhaustive, and secondly whether a policy or outlook may not be moral and at the same time prudential, in other words whether the distinction is exclusive. Certainly some distinction must be drawn, but where? The selfish man who gives money to famine relief does so rightly, even if his motive was for his own reputation and not the relief of famine. But this is better than some purely selfish action, for famine may be relieved. We may not morally approve of the agent (while approving of the act) while not withholding some approval of him. Here Williams makes a crucial point:

> "...if we insist that to act morally is essentially to act from a moral motivation we may well be tempted to add to that the innocuous-looking proposition that all that can matter from a moral point of view is that people should act morally, and then conclude(rightly, from those premises) that from the moral point of view any two situations of self-interested motivation are indistinguishable, and it must be impossible from the moral point of view to prefer one to the other." 3

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(1) Bernard Williams, Morality, Penguin Books, 1972.

(2) Ibid. p. 79.

(3) Ibid. p. 81.

What is the point then of withholding moral approval of the self-interested donor to charity? With what motivations are his to be contrasted? Principle: doing it because one thinks one ought to: that is one. Williams suggest that some, like Hume, "have emphasized the contrast with doing something because one cares disinterestedly about the situation which one's actions are supposed to alter or cares about the other people involved".[1] Williams contrasts Kant's notion of acting on principle with Humes' more psychologically plausible emphasis on sympathy and feelings for other people's situations, and suggests that "it introduces a similarity between the sorts of reasons one has for doing things for others, and the sorts of reasons one has for doing them for oneself".[2] To care about another's pain is an extension of caring about one's own; the second is a necessary condition of the first. There is certainly nothing implausible in suggesting that a person who is concerned about others may not be reasonably concerned about himself. Williams suggests that to Kant this is a problem "Since to act with regard to one's own interests, in a straightforward way, is to act from a kind of motive which has nothing to do with morality at all and is indeed alien to it".[2] Kant is therefore obliged to introduce an "absurd apparatus" [3] of duties to oneself, recognition of which licenses one to do for moral reasons some of the things one would be disposed to do in any case. The decisive point in all this is that an exhaustive disjunction betw-

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(1) Williams, Ibid. pp. 81-82.
(2) Ibid., p. 82.
(3) Ibid. p. 83.
(4) Ibid. p. 83.

een moral and prudential reasons for acting leaves unexplained the "motive" of those who do things for others, to their own disadvantage, however slight, out of love, respect, admiration, or just because they are kin. Their motive is not 'moral' in any strict sense, neither is it prudential, nor even inclinational.

And there are other dimensions of appraisal; it would be a mistake to confuse the rightness of an action and the merit of performing it. We generally tend to hold that there is more merit in an action or that more praise is deserved when it is done in the face of strong disinclination, as in giving aid to an enemy when our inclination is to deny it. And a good action is, so often, one that suits the particular circumstances, having therefore a degree of uniqueness about it. No sense of formal consistency by itself will, of itself, make an action 'good' in any complete sense. "What gives moral value to an action is often the spirit in which the action is done as much as the actual action itself. Speaking the truth in a spirit of enmity or malice is certainly morally inferior to what St. Paul calls speaking the truth in love".[1] And again there are acts of supererogation which may combine both moral and aesthetic elements which are difficult to isolate.

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(1) William Lillie, An Introduction to Ethics, London, University Paperbacks, Methuen, 1966, p. 130.

CHAPTER 2

Part 1 : Warnock On Rules In General.

What is it, Warnock asks, for a rule to 'exist', for there to be a rule? Some persons and institutions have a fairly clear authority to make rules; and in such cases rules 'exist', provided of course, that they have not been subsequently abrogated or - perhaps, a less clear matter - allowed by desuetude to become a dead letter.

Now there may be, for example, rules of golf made by uncontested authority which nevertheless are seldom, or perhaps never, complied with - a great many, probably, of which many golfers are unaware - but some also which ordinary players take the view that they need not comply with. In this sense, then, one may 'accept' a rule - that is, admit that it is a rule and even that there ought to be such a rule - and yet think, consistently and reasonably, that one need not comply with it.

Warnock allows that it would be restrictive and unrealistic to hold that that only is a rule which is properly made by some authoritative rule-making body or person. We must admit, it seems, that there are rules which no rule-maker has ever made; and it is a separate question what the 'existence' of these consists in.

A 'made' rule has an existence which is largely independent of what people in general either think or do. If properly made,then the rule 'exists',whether people know there is such a rule, and do not comply with it, or even do not think

of their behaviour as either complying with or contravening that rule,. But what of 'unmade' rules?

The existence of such rules might be presupposed in descriptions of and in critical attitudes towards certain behaviour; in such cases to admit the 'existence' of such rules would be to accept the description and critical attitudes which presuppose them.

Is the wearing of black ties with dinner jackets a rule? No, argues Warnock: non-compliance does not evoke the right critical attitude. The wearing of, say, a red tie would be regarded as unusual rather than incorrect dressing. He admits that the boundaries are a bit hazy, but "it does seem reasonable to suggest that certain behaviour is not to be regarded as in breach of a rule if it simply is, and is simply regarded as, unusual....".[1] If it is thought there is a rule then there must be some likelihood of adverse criticism of such behaviour as would constitute (assuming no special justification) a breach of the rule. Thus we know what it is for a rule to exist.

Is one then, complying with a rule if one 'regularly' acts in a certain manner with, in addition, the thought that people should so act? If I never go out without an umbrella (in England!) and perhaps think that others ought to do the same, am I complying with a rule? No - in taking the umbrella I am simply doing something which I think is a good thing to always do, and if I criticize those who don't, I will merely mention

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(1) Warnock, G.J. 'The Object of Morality', Methuen & Co. Ltd., 1973, p. 45.

what I think is the very good reason without doing anything that looks like complying with a 'rule'.

If I, ignorant of the rules of Cricket, see that there is criticism if not exactly six balls are bowled from one end and then six from another; and if I see that when a fast bowler is replaced by a slow bowler, some players previously placed near the bowler are not moved further away there is also criticism, I will be right in assuming that in the first case the players are following a rule and wrong in the second. The 'moral', according to Warnock, is that there is no apparent need to make a rule if there is reason to anticipate that people are going to act as if the rule, if superfluously made, would prescribe that they should do; there will be no need to make a rule requiring that to be done which people see good reason for doing anyway. If people regularly act in a certain way because they think there is always a good reason to do so, then it will be inappropriate to suggest that they do so in compliance with a rule.

One might object here that "there will be no need to make a rule requiring that to be done which people see good reason for doing anyway"[1] is not entirely satisfactory. For example, a dress rule in force in a Club's dining room may be instituted to ensure that everyone, including visitors, must dress in a certain way e.g. wear jackets and ties during the colder months of the year. It may well be that for occupational

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(1) Warnock, p. 46.

reasons all the male members wear collars and ties at that time of the year anyway, but the purpose of the rule is to assist in ensuring the preservation of the character of the institution.

What is it to follow a rule? Warnock tells us that

> "... a person is acting in compliance with a rule and hence 'there is' that rule, not if he merely supposes, or it is supposed, that there is good reason regularly so to act, but rather if he supposes that he (or one) is to act in that way, whether or not in every case there is, there and then, a good reason to do so... . In complying with the rule here and now, he is not merely doing what he thinks, in the present case, there is good reason to do. Indeed to hold that there is, and to be disposed to appeal to, a rule seems typically to involve the inclination as it were, to look away from the merits, if any, of the particular case...."[1]

One might interpret this as suggesting that a reason for acting in such and such a way is that the rule so prescribes, and in the absence of other reasons one would still so act; this is not however, to imply that one would obey the rule whatever the consequences.

The intuitive appeal of Warnock's notion of what it is to follow a rule may not be as strong as he thinks. Even in the case of rules which purport to have no discretionary element e.g. safety regulations, the force of any particular rule may depend on peer observance, management attitudes, inconvenience and time involved in taking on and off prescribed equipment, impediments in working with such equipment, the perceived risk in ignoring the rule e.g. the historical incidence of accidents and their consequences - hospitalisation and lack of compensation -

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(1) Warnock, pp. 46 - 47.

and the imminent presence of the appropriate inspection authorities.

Again, a discretionary element may be introduced for personal reasons. A company rule may prescribe that security officers shall demand of all employees the production of an identifying pass when entering certain buildings on the company's premises. Technically the managing director is an employee of the company but whether he is required to show his pass may depend on his personal disposition; it may not be politic to demand such identification.

Rules are about drawing boundaries, and should, residually, aim at having some "all or nothing" character to them, but there are, after all, different sorts of rules. Some will exclude consideration of any particular case:

> "Some rules of chess, and similar rules of other games, are neither mandatory norms nor power-confering or permissive norms. I am referring to rules determining the number of players, the essential properties of the chess board and the number of pieces etc. Such rules are not norms. They do not have any normative force because they do not in themselves guide behaviour; they do, however, guide behaviour indirectly. They have an indirect normative force because they are logically related to the other rules of the games which are norms. They partly determine the interpretation and application of these norms and for this reason they are regarded as rules of the game." 1

There is, then, in these sorts of rules no discretionary element: there are no particular cases whose merits we might be inclined to ignore. And the number of such rules is considerable. But what of rules the application of which necessitates the consideration of particular cases? Was that ball

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(1) Joseph Raz, Practical Reasons And Norms, London, Hutchinson University Library, 1975, p. 117.

wide? Was the batsman out? Was that a no-ball? Again, the number of such rules is considerable.

Even legal rules that must surely aim at some "all or nothing" character require consideration as to whether particular cases fall under them, and sometimes contain a considerable discretionary element. In some instances citizens are required to exercise considerable discretion: under the Road Traffic Act of South Australia I may, if my vehicle is appropriately placed at certain intersections, exercise my right of way, which other drivers are obliged to grant me. But it will depend on the circumstances of each particular case whether that right of way is granted to me. If I insist on exercising it and help to precipitate a collision then I can be charged with failing to exercise due care under Section 45 of the Act, whose provisions override any rights I may acquire through any other section of the legislation. If, then, I follow the rule but disregard the circumstances of any particular case I will be at fault.

In the examples that illustrate this notion of following a rule, Warnock confuses good manners with protocol. It is doubtful if the failure to allow a lady to precede one through a door will evoke sufficient critical response for the lapse to attract 'the right critical attitude'. However, failure to wear one's medals above the left breat pocket of one's tunic will (or at least should) evoke the right critical response since, as Warnock himself suggests, "that is where medals are to be worn".[1]

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(1) Warnock, p. 47.

Warnock is then concerned to explain how the 'existence' of an unmade rule is related to compliance with that rule. If no appropriate rule-following behaviour ever occurs with an unmade rule, could one reasonably hold that the rule exists? The appropriate behaviour could occur, but what would identify any behaviour as rule breaking? The attitudes of people towards that behaviour. What people? Enough people or, perhaps, in some cases, the right people?

If then I wear a red tie with a dinner jacket to a private dinner party, the invitation to which was endorsed "dress: black tie" and no one comments adversely (perhaps they are afraid to offend me because I have attained some celebrity) then an "unmade" rule remains unbroken. If I do the same thing but I am merely a teenage nephew of the host, or the friend of a friend and,say, the host (surely as 'right' an appropriate person as one could wish) comments adversely, then an "unmade" rule has been broken.

Warnock asks "are rules essentially susceptible of deliberate change?" and replies, "I believe they are".[1]

'Made' rules seem to present no problem. The authority of some person, or institution,to make rules seems inseparable from, indeed to include the authority to amend or rescind, qualify or supplement them. But what of 'unmade' rules? Since such a rule does not owe its existence to the act of any specific individual or institution, it is not clear by whose deliberate decision such a rule could be changed.

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(1) Warnock, p. 49.

But this is only a practical difficulty: if such a rule owes its existence simply to being "accepted" or recognized" (not necessarily complied with in practice) by enough people, or the right people, then it seems possible in principle, though perhaps not always in practice, for the rule to be changed by general agreement among these people.

> "That a rule is not made by anyone's deliberate act does not imply that it cannot in that way be changed."[1]

What is meant here by "essentially susceptible of deliberate change?" The rules of arithmetic are not rules susceptible of change, so his proposal seems defeated at the outset; but this would be an inadequate response because Warnock is considering "man made rules", even in the case of "unmade rules" that are not "made by anyone's deliberate act". Clearly Warnock does not mean the "logical possibility" of changing a rule, which is merely to view the argument from one remove and is vacuous. Can he mean that it is empirically possible to change a rule? This tells us little about what a rule is, since the empirical possibility of changing a rule is, surely, merely a matter of the consistency of such an occurrence with the laws of nature. There seems no reason why such an occurrence is inconsistent with, for example, the laws of mechanics, but how can such an apparently remote point elucidate what a rule is, or the force of "essentially"?

I shall assume, therefore, that it is a much narrower sense of "possibility" that Warnock intends: to change a rule means (something like): that a rule be changed by a society that adheres to it is consistent with all the relevant facts about that

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(1) Warnock, p. 50.

society. Let us call that historical possibility and suppose Warnock to be saying that it is clearly historically possible to change a rule.

Before considering Warnock's assumption that "the authority of some person or some body or institution to make rules seems inseparable from, indeed to include the authority to amend or rescind, qualify or supplement them"[1] we must consider what degrees of difficulty may be occasioned in changing rules.

Let us consider an example of "Man - codified" rules that have remained unchanged for eight centuries. The Shulchan Aruch,[2] the moral and technical code which is the basis of the Orthodox Jewish Law, stem from centuries of unwritten tradition but were edited and published in the twelfth century AD. Since their publication they have been considered The Authority on Orthodox Jewish Law and there has never existed any administrative 'machinery' for their alteration, nor has this ever been contemplated. What may be called 'liberal' as opposed to Orthodox Judaism, is the result of congregations of Jews who have refused to regard them as binding. Based on and regarded as "proven by" the Bible, the Shulchan Aruch are not, however, recorded in the Bible as God's will and are not, therefore susceptible to the argument that they are the product of a divine law giver.

The Shulchan Aruch has never been altered, rescinded or portions of it deleted; it is regarded as unalterable,

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(1) Warnock, p. 49.

(2) I am indebted to Rabbi Jeffrey A. Kahn of the Temple Shalom, Liberal Jewish Congregation of SA Inc. for assistance in this matter.

accepted as an integral and essential part of Orthodox Jewish life, and has survived seven centuries of exigencies.

If we regard as a "first" degree of difficulty rules that, say, merely require a majority of people to effect their change, then we might regard the Shulchan Aruch as a "second" degree of difficulty: its adherents have no desire to change the laws, have exhibited no such desire for a period of time which might be regarded as "social probability", and in any event there is no "machinery" to effect such a change. This is not however, to deny the possibility that Orthodox Jews might somehow be induced to convene a Sanhedrin to effect changes.

Let us take the Constitutions of the States of Western Australia and Tasmania as examples of a "third" degree of difficulty. Under the provisions of the Constitution of Western Australia the Legislative Council retains the right to "refuse supply" and, unlike the federal Senate, it cannot be forced into double dissolution if it denies the money to the Government. Under the State's constitution it is impossible to resolve a dispute between the Upper and Lower Houses; the Legislative Council can use its blocking vote for as long as it likes. The Council can reject any proposal put to it, and the Government can do nothing. Indeed, under the State's Constitution the only parliamentary reform that must go to referendum is a reduction in the number of parlamentarians. Even here the Legislative Council has the final say in whether a referendum is held. It may be noted that the State of Tasmania has also no formal machinery for resolving a deadlock in the legislature.

The only possibility of effecting change to possible situations of deadlock appears to be in altering the political composition of the Upper Houses in these states. In both these states then there is no formal machinery for resolving deadlocks between the two houses, and how the (absence of such) rules in these cases is "essentially susceptible of change" is a matter which is surely Warnock's onus to resolve.

Let us now consider the force of Warnock's assumption that in case of 'made' rules, "the authority of some person or some body or institution to make rules seems inseparable from, indeed to include the authority to amend or rescind, qualify or supplement them".[1] Here, he appears to have ignored the problems associated with changes to, and the interpretation of, written constitutions.

Warnock's insouciance no doubt reflects the insularity of the British, whose constitution is unwritten and whose laws are made by a Parliament which enjoys today substantially the power attributed to it by Blackstone in the eighteenth century: "It can in short do everything that is not naturally impossible". Parliament is sovereign in the British Constitutions in the legal sense that it can make or unmake any laws and no body or court has power to set aside or override its legislation. It can overrule the decisions of the Courts and protect guilty persons from legal punishment by Act of Indemnity. Even the House of Lords sitting as a court of appeal cannot override the provisions of Acts of Parliament. Neither is there any body which can dispute sovereignity with Parliament.

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(1) Warnock, p. 49.

But these powers are enjoyed neither, for example, by the Australian Parliament or the United States Congress. Although these legislative bodies have power to make rules on a vast range of subjects they do not have the power to make any rule they choose on every such subject.[1] Thus we see that the most important responsibility of the United States Supreme Court is to interpret the Constitution of the United States. In discharging that responsibility the Court may find it necessary to nullify Statutes or even Acts of Congress as violative of the Constitution.

The basic theory on which the American practice of judicial review is based may be summarised as follows: the written Constitution is a superior law, subject to change only by an extraordinary legislative process involving both Congress and the States, and, as such, superior to common and statutory law. The powers of the several departments of government are limited by the terms of the Constitution. The judges are expected to enforce the provisions of the Constitution as the higher law and to refuse to give effect to any legislative act or executive order in conflict therewith. Thus, for example, Federal tax statutes have occasionally been held to conflict with constitutional guarantees. A federal tax on persons engaged in the illegal business of gambling was held by the Court in 1968 to compel self-incrimination, and in 1971 the same conclusion was reached as to the marijuana transfer tax act which required that the names of all persons paying the tax be turned over to law enforcement agencies.

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(1) The United States Constitutional System is further complicated by the President's power to initiate legislation, which Congress may well accept.

Ironically, judicial review is not mentioned in the Constitution itself. The immediate source of the doctrine is a decision of Chief Justice John Marshall in 1803,[1] although Alexander Hamilton in No. 78 of The Federalist[2] had argued strongly in favour of judicial review, an argument from which Marshall borrowed. A not dissimilar notion of judicial review is implicit in the Australian Constitution.

It is not difficult to assemble reminders about the "covenant" - like notion engendered by written constitutions or the difficulties associated with their alteration. Thus on the proposal for a constitutional amendment to require a balanced budget, the New Yorker remarked,

> ".... whatever current opinion may be, future opinion on the question is almost certain to change.... . By contrast to this changeable goal of economic policy, the Constitution of the United States is the fundamental political agreement among Americans - an agreement that binds together not only living citizens but also past and future generations. And a constitutional amendment, by altering that agreement, is the single most solemn political action that one generation can take".[3]

The nearly ten year (unsuccessful) campaign (the period required for the amendment to be considered by the State legislatures) to have an Equal Rights Amendment added to the United States Constitution serves to illustrate this point.

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(1) In the case of Marbury v. Madison. I. Cranch, 137 (1803)

(2) The Federalist, ed. Henry Cabot Lodge, London, T. Fisher Unwin, 1888, pp. 482-491.

(3) The New Yorker, August 2, 1982, p. 25.

Section 128 of the Australian Constitution[1] specifies the sole manner in which it may be altered, and this requires, that, "if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent". This is certainly an impediment to change.

Other countries have far greater difficulty: in discussing the question of extradition of IRA terrorists from the Irish Republic (in 1979) Blackwood's Magazine remarked,

> ".... the Irish Republic has a written constitution, and Irish Judges, far from sympathetic to terrorism, invariably find that extradition for politically motivated crimes is unconstitutional. To change the written constitution, even on such minor matters as adoption law and university representation in the Senate, requires a referendum".[2]

In his assumptions about the authority of rule-making bodies Warnock has apparently taken as paradigmatic bodies that have sovereign authority. In the case of countries with written constitutions, as we have seen, the authority to legislate is subject to judicial review and is in some cases recommendatory only i.e. the Parliament may agree to legislate subject to approval by referendum. I do not deny that bodies bound by written constitutions, whether they be parliaments, social or sporting clubs or the like have considerable legislative powers, but to assert that this power is usually sovereign is mistaken, and for that reason Warnock's assumption is dubious

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(1) 63 & 64 Victoria, Chapter 12, a British Act of Parliament.

(2) Blackwood's Magazine, Volume 326, November 1979, p. 445.

because it suggests that this power may be exercised without any "outside" approval.

It is clear from the foregoing that Warnock's assumptions about the authority of rule-making bodies is suspect, and his belief that man made rules are "essentially susceptible of deliberate change" is to be viewed with suspicion.

And what of "unmade rules"? Here Warnock is on firmer grounds, and for reasons which are explored in my consideration of R.G. Frey's counter examples against Warnock's claims about the essential characteristic of rules.

Part 2 : Warnock On Moral Rules.

Warnock's discussion of rules is intended as a preliminary to his discussion of Rule Utilitarianism. Are there moral rules? If there are not, then he will have shown that "the Rule-Utilitarian theory of morality cannot possibly be correct".[1]

Warnock's attempt to show the inadequacy of rule-utilitarianism by legislating against the existence of moral rules is a curious enterprise, since his own moral "dispositions"[2] would likely be unworkable without something analogous. Surely it would have been sufficient to show, as Margolis,[3] among others, has done, that act-and-rule utilitarianism cannot be sharply distinguished.

He contends that in some sense there are made moral rules: there are cases in which people have or are assumed to have, authority over other people of a sort that extends to concern for their moral well being; and one way in which such an authority may be exercised is in the making of rules on matters of morality; in short, moral rules. Suitable candidates for moral authority are popes, teachers and parents. Warnock suggests that, by analogy, one might be said to make moral rules for oneself: though I have no authority over the conduct of others, it seems that I could always 'make it a rule' for myself that I am not to do this or that; and sometimes such a rule would be a moral rule.

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(1) Warnock, p. 50.

(2) Warnock, pp. 86-87.

(3) Margolis, J. Values and Conduct, Oxford University Press, 1971, pp. 161 - 66.

Warnock maintains that moral rules in this sense are of no great importance; if they are, this is purely accidental or at any rate contingent. A man who has moral views and tries to live up to them does not necessarily make rules for himself in seeking to do so.

> "... I may abstain from seeing, say, pornographic films, not because I have 'made it a rule' to keep away from such things, but merely because I regularly judge it to be morally wrong not to do so. I do not need, as it were, to make a rule, if I am anyway going to see, and to be duly moved by, moral reasons for doing what the rule would enjoin me to do."[1]

Under what circumstances, then, would one make a moral rule for oneself? Only in cases where the flesh is weak? An immoral or amoral person is hardly likely to make moral rules, and if avoiding temptation is the criterion might such rules be not as much prudential as moral? Warnock leaves the matter unresolved.

It is true that people have the capacity to indulge in private moral legislation and perhaps do so not infrequently. We might call such legislation 'moral regimens', complementary to the physical regimens people choose: "Montgomery has several rules for keeping himself on the razor-edge of fitness. For one thing, he told me, he refuses absolutely to do any work after dinner.... . He said that two other basic rules govern his behaviour. First, never worry. Second, never bother with details....".[2]

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(1) Warnock, p. 51.

(2) John Gunther, Flight Into Danger, Sydney, Angus and Robertson, 1942, p. 192.

Warnock suggests that the moral rules "made" by authority are "non-fundamental" because behind such rules, as behind any, must be reasons for their existence. If there is a 'made' moral rule proscribing, say contraception, then it is the practice of contraception that is morally wrong, and the "fundamental question is then as to the merits of the judgment".[1] The question of moral right or wrong cannot stop at any made rule since the further question in this case - as to the merits of the rule - is itself a question about moral right or wrong.

The 'moral rules' of which Warnock writes are at variance with the 'moral rules' distinguished in Chapter 1 on several grounds. Firstly, Warnock's 'moral rules' are man made whereas, as we have seen, no one is authorised to make moral rules. Secondly, and complementary to their man made character, they can come into, and go out of, existence, at clearly identifiable times; various Protestant sects have had, for a time, prohibitions about dancing on the ground that it encouraged contact between young people in their formative years which could lead to all sorts of 'sinful' behaviour. Thirdly, such rules must have an all or nothing character about them or hypocrisy will result; the minister's daughter is as bound as any of his young parishioners. I propose to call the 'non-fundamental' moral rules suggested by Warnock, moral rulings.

Warnock's suggestion that moral 'rules' made by authority are non-fundamental because behind them, as behind any rules, must be reasons for their existence, is in anticipation of

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(1) Warnock, p. 52.

an argument for the 'dispensability' of moral rules.

Warnock asks whether the existence of a rule makes the practice of contraception morally wrong or whether the rule rather proscribes the practice because it is antecendently and independently taken to be wrong. If one asks whether a law makes speeding illegal or rather proscribes what is anyway taken to be illegal, the reply would be that if there wasn't a law speeding might be objectionable but not illegal, so that it is the rule that makes it illegal. Does then the moral rule against contraception make it morally wrong?

This is an unfortunate example for Warnock to choose since it is by no means apparent to anyone who does not accept Roman Catholic doctrine that contraception is morally wrong. Warnock's suggestion that, in the matter of contraception, the question of moral right or wrong cannot stop at the rule itself since the further question as to the merits of the rule itself is, itself, a question about right or wrong, contrasts with moral judgments which are applications of moral rules. In the latter case it is not a question as to the correctness of the rule, but as to whether the judgment has correctly comprehended the normal operation of the rule and the full extent of the exceptions comprehended under it.

Boyce Gibson's observations seem accurately to capture the unique nature of moral rules :

> "... we have to learn what we ought to do,using and respecting precedent... in the discernment of our moral duty in our own particular cases. That is the specifically moral attitude..... . It is flexible and exploratory... directed to

> particular situations and not to typical situations.... moral discernment is something which grows in scope and subtlety and is not the application of a law which leaves no room for growth of any kind".1

Considering the notion that moral rules are analogous to legal rules, Warnock suggests that "this seems to make the question whether X is morally wrong wholly a matter of the way people think about X".[2] But, he says, surely this is unpalatable: one might be inclined to insist that the use, say, of torture just is morally wrong. It seems paradoxical to suggest that the wrongness in general of some way of behaving could consist solely in people's viewing it in a certain manner.

If we consider that being morally wrong is not to be compared with being illegal but rather with being objectionable, then we can say that just as speeding is objectionable because it is dangerous, whether or not the law proscribes it, so the use of torture just is morally wrong whether people regard it as a breach of a rule or not.

Warnock reaches what seems to be the correct conclusion, that torture is morally wrong, but he has laid down no foundation from which such a view might be derived, other than people's moral feelings. Torture may be morally repugnant, but is it ever acceptable? What are the limits of moral acceptability in any particular case? If one is to justify torture, apart from a purely "operational" sense, the appeal is for the inclusion of one's conduct in one of the exceptions that might be admitted to a moral rule: most people would be

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(1) Boyce Gibson, 'Reason in Practice', AJP, Vol. 45, No. 1, May 1967, pp. 11-12.
(2) Warnock, p. 58.

surely willing to admit that torturing a terrorist for information is morally preferable to doing nothing to discover where he has hidden the bomb that may destroy a city and many of its inhabitants.

The difficulty, in Warnock's view, is that we have lost a possibly attractive assimilation of morality to law and made this sort of talk of moral rules look "empty and redundant".[1] This is because moral rules "do not... figure in the conceptual role of elucidating what it is for something to be morally wrong".[2] They do not, in other words, alter the behavioural status of that which is deemed to fall under their purview. Because a moral rule is not accompanied by any appartus of detection and deterrence, there is nothing to deter or deflect a person from an immoral practice (Warnock sticks with contraception) that is not already present in the appreciation, if he has it, that the practice is morally wrong. Critical attitudes towards his conduct need not be evoked by breach of the moral rule, the conduct itself will do just as well. In a legal matter there is a difference between thinking that a species of conduct is objectionable and that it is contrary to a law; if in a moral matter it is uncertain whether certain conduct is wrong, what difference could there be in supposing that it is contrary to a moral rule?

Moral rules, on this showing, appear to be superfluous.

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(1) Warnock, p. 58.
(2) Ibid. p. 59.

Warnock ignores the fact that employing moral rules requires people to articulate not merely moral feelings but arguments for and against the inclusion of behaviour either under the relevant rules or the admitted exceptions comprehended under that rule. It is not denied that some of these arguments may be "consequentialist" in character, but this does not necessarily violate the integrity of the particular rule.

What is it, Warnock asks, to have a moral view? Perhaps to hold a moral view just is to recognise a rule. If I accept as a rule 'never do X', I must have some reason for accepting it as a moral rule. What could that reason be but the view that to do X is actually morally wrong? But to hold that view cannot be to accept that rule; to hold the view is to have a reason for accepting the rule. But why accept the rule? If I hold and act on the view itself what is there for the rule to do?

Warnock argues that the only reason for accepting as a rule 'never do X' is the view that to do X is morally wrong and if I accept the view why bother to hold the rule? But what, one may ask, is the content of this formal rule? If it is a personal moral rule then indeed Warnock himself has argued that it is unnecessary. But let us assume that Warnock is referring to commonly accepted moral rules e.g. 'killing is generally wrong'. I may hold that this is a moral view without the slightest reflection about its ramifications as a rule. Then one day I am forced to take another human life, perhaps in self defence. When justifying my action, I will, albeit un-

wittingly, appeal to a recognised exception comprehended under the rule 'killing other people is wrong'. I will, in other words, be employing the rule.

The 'dispensability' of a moral rule may be appropriate in the case of personal 'moral rules', a subject which, as we have seen, Warnock treats superficially and ambiguously. But it would obtuse to argue that because people have moral views there is nothing for 'moral rules' to do. The value of moral rules lies in the fact that they provide standards, the justification for behaviour constituting departures from which has to be provided by appealing to the recognised exceptions comprehended under the rules - showing that such and such a behaviour falls within the class of exceptions so comprehended - or by arguing for the adoption of an exception not previously comprehended. Conversely it is possible to criticise behaviour by appealing to a moral rule, the importance of which is generally apprehended.

Surely Warnock's own moral "dispositions", e.g. non-deception,[1] will only work by the adoption of some rules analogous in their operation. To adopt a principle of "non-deception" is to say (something like) "Deception is wrong" and this may indeed bear shades of meaning and nuances beyond mere untruth and misrepresentation; but how are we to draw the boundaries and codify the test cases without some argument and exploration of our intuitions in this matter? How are we to reach public agreement on what constitutes deception and non-deception?

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(1) Warnock, pp. 86-87.

As R.E. Ewin[1] observes

> "A rule generally requiring me to be just still leaves questions about who or what has claims to just treatment. A question such as 'Does this man have a claim to just treatment from me (given that he has, in the past, shown no signs of considering justice in his relations with me or anybody else) is, I take it, obviously a moral question...." 2

Warnock continues with cricket: if I think that the captain of a fielding side should use his faster bowlers in the beginning and act and advise accordingly, there is no need to talk about a rule. It is not a rule of cricket that fast bowlers should open and it is not a personal rule - I do it, like the umbrella carrier, for what I consider to be good reasons. There is nothing here that calls for description or explanation; my views and actions are sufficiently accounted for by the reasons I can provide when the issue arises. No doubt there are occasions where I could be persuaded to agree that opening with fast bowlers might not be the most appropriate thing to do.

What would be different if a rule were involved? He invites us to consider an actual rule of cricket - that six balls, no less and no more, are to be delivered from each end in turn. The rule is unambiguous and umpires enforce it, not because on all occasions it seems best to do so, but because the rule specifies it is to be done.

> "What the rule does, in fact, is to exclude from practical consideration the particular merits of particular cases, by specifying in advance what is to be done, whatever the circumstances of particular cases may be." 3

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(1) R.E. Ewin, Co-operation And Human Values, Sussex, The Harvester Press, 1982.

(2) Ewin, p. 29.

(3) Warnock, p. 65.

True enough, but if this was the intention of every rule of the game, it would be unplayable. There are, it is true, rules that fall into Warnock's convenient category - how many balls in an over, how many men in a side, appropriate clothing etc. But what of the matters that cannot be anticipated in advance? Will the umpires allow an appeal against the light? Does some particular piece of play constitute l.b.w. or not? This must depend on the circumstances of each particular case.

But Warnock wants to use this example to exempt morality from the sphere of rules. He admits that it can be shown empirically that some people do follow moral rules, but should, i.e. does this have to, occur? His notion of following a rule reappears:

> "... to follow a rule... is... as it were to turn away from consideration of the particular merits of particular cases; and it does not appear that, in the sphere in which moral judgment is exercised, there is any particular consideration to justify doing so". 1

Shortly after he says,

> "In the sphere of moral judgment... there is no special need, as in the case of public legal or political institutions, for uniformity and predictability of operation". 2

We should notice in this context the position of the moral absolutist e.g. one who believes that lying is always wrong, whatever the circumstances. The moral absolutist appears to have insuperable difficulties in conflict cases i.e. if it is absolutely wrong to do A in any circumstances and also wrong to

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(1) Warnock, p. 66.

(2) Ibid. pp. 66-67.

do B in any circumstances and he is faced with the choice between doing A and B, when he must do something, and there are no other alternatives open. For this and other reasons [1] I reject moral absolutism as untenable and contrary to most people's moral notions.

Let us look at the "requirement" of uniformity and predictability. A Minister of the Crown may, for instance, take action under a statutory rule that permits the making of ex gratia payments, the qualificatory wording perhaps being no more than, "where the Minister considers it appropriate the Minister may..." and there could be some subsidiary regulation limiting the amount to be paid to any one individual in any financial year; indeed limiting the amount to be paid to any particular class of persons in any one year. Now following a rule such as the above may consist of supplying values to X (class of person) and Y (payment) as the particular circumstances are thought to warrant, having regard to precedent, political sensitivities, etc. etc.

How can (and why should) this be assimilated to some simpler bureaucratic model which involves following a rule by applying it willy-nilly to those who infringe some portion of some Act, where no exceptions or excuses are comprehended under the relevant section?

The second example provides the "uniformity and predictability of operation" which Warnock appears to regard as a "special need" in public legal or political institutions,

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(1) Cf. "On Moral Absolutism", James Rachels, AJP Vol 48, No.3, Dec. 1970, pp. 338-353.

and conforms to his notion of following a rule; but the exercise of judgment in public,legal,or political institutions is not invariably restricted by the requirement to provide uniformity and predictability of operation. It is clear that in many such 'institutional' cases the notion of turning away "from consideration of the particular merits of particular cases" is absurd, because it is that on which many such institutional actions turn.

Warnock is unwilling to give status[1] to a rule that does not fit the institutional or statute law model which he regards as paradigmatic, and we have seen reasons to doubt whether his arguments against the 'moral rules' established in Chapter 1 are as conclusive as he supposes. I suggest that Warnock's discussion of rules in general is defective in its account of what it is to follow a rule and his discussion of moral rules more seriously defective in dismissing the possibility that they may have a role in moral reasoning. Warnock rejects

> "the idea that the exercise of moral judgement essentially consists in the application of rules"[2]

but the rejection is more radical than that.

In the Introduction I claimed that there were two lacunae in Warnock's account of morality, namely how people acquire the 'good dispositions' without overt coercion and how these 'good dispositions' find practical social expression. His discussion of rules, both general and moral, has done nothing, I claim to

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(1) He is willing to admit the existence of unmade rules.

(2) Warnock, p. 93.

show how morality might play any significant rule in peoples' lives.

Part 2 : Frey's Critism of Warnock's Account.

Frey[1] begins his criticism of Warnock with the assertion that a moral rule enjoining promise-keeping, e.g.'One ought to keep promises', possesses many of the hallmarks of rules to be found in Warnock's discussion. Such a moral rule is

> "a standard by which many people guide and assess conduct. It is capable of being formulated, understood, taught, learned, acted upon, conformed to and violated. It can be used to regulate as well as to justify and criticise behaviour; it is capable of having sanctions for its violation attached to it; and it can provide a reason for action". 2

There are, he argues, other characteristics in respect of which, if alleged moral rules do not possess them, there is nevertheless no logical bar to their doing so. He suggests that Warnock treats items of the form 'One ought to keep promises' or 'Promises ought not to be broken' not as rules, but as general propositions, to be contrasted with, e.g. a rule of Zoos of the form 'The animals are not to be fed'. Frey suggests that if the central cases of rules take the 'are to' and 'are not to' forms there is no reason why alleged moral rules cannot be similarly

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(1) R.G. Frey, "Moral Rules", Philosophical Quarterly, April 1976, Vol. 26, No. 103, pp. 149-156.

(2) Ibid.pp. 149-150.

rendered. There is, it is true, no book of moral rules in the way there is, say a book of library rules; if there is a doubt whether X is a library rule this can easily be ascertained by consulting the library rules; but this is not possible in the case of moral rules. However, he asserts,

> "I can see no reason in principle .... why alleged rules could not be written down; it is not as if, e.g. being unwritten is a sine qua non of being moral in the first place. Rather it seems merely a contingent matter, if true at all, that moral rules have not been written down or written down in the form of books of rules". 1

There is an initial difficulty here occasioned by the fact that philosophers often mean different things when using the term 'moral rule'. 'Promises are to be kept' is not rendered in the conditional form e.g. 'promises should generally be kept' or 'promises should not be broken unnecessarily'. If 'promises are to be kept' is not meant to be elliptical, then it and other moral principles could be written down, but the result is not going to be very morally illuminating.

For the sake of convenience I will assume Frey is talking about 'moral rules' in the sense in which I have used it.

Writing down "Borrowers are responsible for the replacement costs of lost books and the repair costs of damaged books" is not the same as writing down "Promises are to be kept"; the rules are of a different kind, and for a reason to which Baier[2] has drawn attention. While it may be true that some lib-

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(1) R.G. Frey, p. 150.

(2) see pp. 40 - 46.

rary officials are empowered, e.g. by regulation, to make exceptions to the library rule in 'morally deserving cases, e.g. where books are borrowed in another's name without their knowledge, or in cases of theft, flood, fire etc., these exceptions are not implied in the rule itself. Moral rules like 'Promises are to be kept' are inexhaustiable as to their possible exceptions, which are implied within the rules themselves.

This is not however, to disagree with Frey's notion of the essential attributes of a rule. Clearly both the rules he posits viz. 'Promises are to be kept' and 'The animals are not to be fed' can be used to regulate as well as justify and criticize behaviour, are capable of having sanctions for their violation attached to them and can provide a reason for action. However, 'Promises are to be kept' would provide greater difficulties in interpretation if written down than 'The animals are not to be fed' which is surely elliptical for 'The animals are not to be fed by other than authorized personnel'. Frey's "in principle" seems vacuous because 'Promises are to be kept' (or in the conditional form I have adopted for moral rules','Promises should generally be kept' does not comprehend the recognised exceptions to the rule which more precisely delimit its range of application. In print, 'Promises are to be kept' is unilluminating, which 'The animals are not to be fed' is not. There may be occasions when the animals have to be fed by other than authorized personnel e.g. if the Zoo employees go on strike, but this is not an exceptional case comprehended under the displayed rule 'The animals are not to be fed'.

Frey recognizes that moral rules differ from institutional rules in that there is no person or body whose pronouncements are authoritative, but this is because of a general problem of deciding what it is that makes something moral in character. He maintains, however, that it is the business of everyone, or of all moral agents, to know the rules and enforce them; sometimes, like the rules of solitaire, against themselves.

What does Frey understand to be Warnock's candidate for the essential characterstic of central cases of rules?

> "The answer gleaned from chapter 4 and 5 is that the essential characteristic for something to be a rule is that it is capable of being altered, rescinded or of being unmade; more generally, that it should be capable of being deliberately changed". 1

Warnock, he argues, is not the first to employ the fact that moral rules do not appear to admit of deliberate change, but he appears to be alone in making their (apparent to Frey) immunity to deliberate change the ground for excluding them from the class of rules.

Frey considers it important not to confuse the "negative" feature of being altered or rescinded or of being unmade with some "positive" counterpart, such as being promulgated or being made. Being promulgated suggests, to him, formal enactment by an individual or body in authority, acting appropriately, under rules "and not all the central cases of rules have been brought into being in this way".[2]

Any common law system, he argues, recognises a source of legal rules besides that which takes the form of enact-

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(1) Frey, p. 151.

(2) Ibid. p. 151.

ment by some law making body like Parliament.

> "Certainly, such rules could be enacted; the point is that they need not be, in order to have the status of legal rules". 1

Whether such common law rules could be enacted is open to question. A.W.B. Simpson[2] has argued that

> "it is a feature of the common law system that there is no way of settling the correct text or formulation of the rules, so that it is inherently impossible to state so much as a single rule in what Pollock called 'any authentic form of words'". 3

If Simpson is correct, the difficulty of rendering common law rules in some authentic form of words i.e. in statutes, is one that Frey appears to have not fully explored.

If we stick, Frey argues, to the "negative" feature of being deliberately changed, will we find that the central cases are all cases of rules that admit of deliberate change? Unless, they are, immunity from deliberate change will not be decisive in excluding moral rules from the class of rules; whether they are is a matter of fact. Counter examples are now produced against Warnock's thesis that the central cases of rules all admit of deliberate change.

"There are", claims Frey, "cases of rules which have been promulgated or made but which cannot be altered or rescinded or unmade".[4] Monopoly is a suitable candidate; its rules have

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(1) Frey, p. 151.

(2) A.W.B. Simpson, "The Common Law And Legal Theory" p.84 Oxford Essays in Jurisprudence ed. A.W.B. Simpson, Oxford 1973, pp. 77-99.

(3) Simpson, p. 89.

(4) Frey, p. 151.

been made but independently of the fact that they have never undergone change, deliberate or otherwise, it seems unlikely that they can be altered or unmade because there is no rule specifying how the other rules may be changed and by whom.

This is an important consideration, because it raises the question of who is authorized to change the rules of Monopoly. Neither any single player or group of players. Frey informs us that the inventors of the game are dead and that there is no equivalent to the Lawn Tennis Association, so that the only likely candidate is the Manufacturer's patent on Monopoly sets. Frey invites us to imagine that the Manufacturer's patent on Monopoly has expired or been voluntarily relinquished but the firm continues to manufacture Monopoly sets. Now why should players of Monopoly regard a decision on its rules in future years by the Manufacturers of the game as authoritative? Certainly, he agrees, a decision by the Manufacturers in future years to alter the rules by, say a notice to this effect sent to all owners of Monopoly sets may prove "causally efficacious" in changing the rules, but there is a difference between a decision's proving be efficacious and that decision's actually changing the rules: the former measure is uncertain of success whereas the latter would effect the change at a stroke if the individual or body proposing the change had authority under the rules to do so.

Frey has chosen an unfortunate counter example because his arguments have no factual basis. We learn from Brady[1]

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(1) M. Brady, "The Monopoly Book", Pan (paper) London, 1980.

that there was a single inventor, Charles Darrow, who sold the game to Parker Brothers in either 1934 or 1935 in return for royalties, and that the company still retains the patent. One of the conditions of the sale was that the game (which Darrow had previously marketed both independently and through F.A.O. Schwarz) required, according to Parker Brothers, certain revisions which would refine it and clarify the rules.

> "Some of the staff were still concerned about the indefinite playing time, so they agreed to market the original version as long as Darrow permitted them to develop a variation of the game which could be played in less time. The shorter version was to be printed along with the general rules, to give the public an option." 1

Frey is incorrect in his claim that "there is no equivalent to the Lawn Tennis Association": as a result of various requests

> "the Monopoly Marathon Records Documentation was formed. Headquartered in the offices of Parker Brothers, Salem, Massachusetts, it accepts and adjudicates Monopoly Marathons in general established categories, and is open to suggestions because, inevitably, people think of yet another way in which Monopoly simply must be played". 2

Australia had a representative at the World Monopoly Championships held in Bermuda in 1980, where 18 national champions played for a $5000 silver trophy;[3] Presumably the Championships were held under rules regarded as authoritative.

Frey suggests that the question about who may change the rules may be seen more clearly in the teachings of Jesus in

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(1) Brady, pp. 19-20.

(2) Ibid. p. 26.

(3) The Australian, May 15th, 1980, p. 9.

the sermon on the Mount.

> "In a sense, these rules have been promulgated, certainly they have been made, but it would seem that they cannot be altered, rescinded or unmade. For their adherents will not accept alterations by ordinary persons as legitimate and alterations by divine persons do not appear to be in the offing." 1

To allow for the possibility that Christ might reappear and change the rules, Frey nominates another deceased moral leader like Schweitzer or Gandhi.

> "We know who is authorized to change the rules, but they are no longer in a position to do so."[2]

The question arises as to whether Christ can be said to have promulgated moral rules in any original sense,as suggested by Frey.

Fuller[3] suggests that:

> "...there is wide spread agreement that there was little original in Jesus's ethical teachings. he was steeped in the liberal, Pharisaic rabbinical tradition. Today, we can recognise how much of what he is alleged to have said, which is believed to be unique and original to Christian teaching, was anticipated in the writings of, say, Rabbi Hillel, 40 years earlier. As Edwyn Hoskyns and Francis Davey wrote nearly half a century ago, the attempt to discover in the teaching of Jesus some new teaching about ethics or morals has completely broken down. They explained: "Those modern Jewish scholars who have busied themselves with a comparison between the ethical teaching of Jesus and the ethical teaching of rabbis have given this judgment that there is no single moral aphorism recorded as spoken by Jesus which cannot be paralleled, and often verbally paralleled, in rabbinic literature." More and more Christian scholars, they claimed, were coming to agree with this conclusion." 4

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(1) Frey, p. 152.

(2) Ibid. p. 152.

(3) Peter Fuller, 'My Redeemer Liveth?' The Age Monthly Review, Vol. 3, Number 8, December 1983, pp. 14-16.

(4) Ibid. p. 16.

There is other evidence that could cause us to suspect that Jesus was not the 'original' moral teacher some claim him to be. Thus:

> "... The probability is, what we know as Jesus's sayings - the parables, the Sermon on the Mount and so on - come from a book, an anthology of the teachings of progressive rabbis, which some soldier put in his rucksack, brought home with him and sold to Mark."
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> "Is there any evidence for this, or is it just Scholars' folklore?" Goddard demanded.
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> "Hard evidence there obviously isn't after this passage of time; strong circumstantial evidence, yes. Experts first began to suspect the existence of the now missing anthology - the technical term for it is the 'Q' Gospel - over half a century ago. It's still the only plausible explanation available to us. It explains why, while Mark's own prose style was so rough and ungrammatical, the teachings of 'Jesus' contained in his Gospel are perfection. It explains how, when there is no existing reference to Jesus outside the Gospel of Mark until years after he had written it, he came into being through Mark as the Christians' Christ." 1

Such arguments will not, of course, be persuasive to those who, say, accept the Resurrection, and assert that the Sermon on the Mount bears analogy with the work of parliamentary draftsmen, whose work may be untouched by parliamentary discussion, but whose efforts do not become law until Royal assent has been received. The other words, it is Christ's imprimatur that makes them authentic moral teachings.

We may approach the matter another way, by a neo-Kantian argument. Harrison[2] argues that for the appeal of Christ

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(1) Martin Page, The Pilate Plot, New York, Coward, McCann & Geoghegan Inc., 1978, p. 80.

(2) Jonathan Harrison, Our Knowledge Of Right And Wrong, London, George Allen and Unwin, 1971.

to be a moral appeal

> "it must be presupposed that we have some standards of right and wrong already, by which Christ's behaviour can be morally assessed. For his precepts to commend themselves to us, we must have some insight into what is right and wrong which is independent of his testimony." 1

Harrison argues that, given that Christ's behaviour appeals to standards of morality we already possess and that many of his moral precepts commend themselves to the degree of moral enlightenment we possess at the moment, we may be willing to accept some other of his precepts simply on his authority, that is, on the authority of someone who has already given evidence of moral insight, and is good. But these precepts would supplement the knowledge of right and wrong we already have, rather than be the sole source of our having any knowledge of right and wrong. Hence, Harrison suggests, the view that we acquire all our knowledge of right and wrong, "all our knowledge of God's commands, upon the authority of some divine being, revealed in some divine book, must be rejected."[2]

Mitchell[3], in his criticism of Kant's notion of moral autonomy, suggests that the problem is general, and applies as much to Aristotle and his phronimos as to the Christian and Christ. Aristotle's recommendation is to copy the phronimos, the man of practical wisdom; but this presupposes that we can recognise a phronimos when we see one; this in turn presupposes that we already know the sort of thing the phronimos does and

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(1) Jonathan Harrison, p. 220.

(2) Ibid. p. 221.

(3) Basil Mitchell, Morality: Religious And Secular, Clarendon Press, Oxford, p. 148.

says; but if we know that, why do we need to copy the phronimos? He quotes Hare's point:

> "We have just to satisfy ourselves that a man is good before we can be sure that he is phronimos... i.e. we should have to make for ourselves the sort of moral judgments we thought we were going to get made for us by the phronimos." 1

Mitchell, however, regards this as paradoxical: it appears to prove the logical impossibility of a process with which we are all familiar - the process by which we all develop spiritually and in every other way by taking people we admire for models and imitating them. "We do seek the advice of wise men, as we should scarely do if we knew in advance what advice they would give".[2] There is some truth in this but surely it is a concession that we can recognise a wise man when we see one, and indeed Mitchell does concede this: "This process requires that one possess some incipient awareness[3] of what is worth imitating",[4] but, Mitchell argues, "it evidently does not require that one possess a full understanding of the virtues which the model possesses and which one hopes to acquire by imitating him."[5]

Mitchell later modifies this point:

> "It is, indeed, often misleading to talk, as I did earlier, about choosing a model for imitation; what more often happens is that the model, by its sheer impressiveness, demands our imitation and in doing so not merely develops, but radically revises, our previous notions about what is worth imitating.

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(1) Basil Mitchell, p. 148.

(2) Ibid. p. 148.

(3) Italics mine.

(4) Ibid. p. 148.

(5) Ibid. p. 148.

> If such acceptance is not to be uncritical fanatism it must be possible for us to justify it, although it is evidently not necessary, or possible, for us to justify it wholly in terms that were available to us before we encountered the new paradigm." 1

Granted Mitchell's point, he has conceded that

> "This process requires that one possesses some incipient awareness of what is worth imitating..."[2]

His counter to the Kantian moral autonomy argument would be more effective in this case w ere it clear that Christ's moral teachings were original.

I am prepared to accept Christ's promulgation of e.g. The Sermond on the Mount as a possible counter example to Warnock, though I regard it as evidentially unsatisfactory. I reject both Schweitzer and Gandhi as candidates because, whatever their personal attributes and the esteem with which they are held by some people, they are not, I think, regarded as moral legislators in the same way as Christ.

Turning to etiquette, Frey remarks that the 'rules' "have not been promulgated or made (in the narrow sense) and there is no person or body who can unmake them".[3] They change, he says, without any formal procedure, that is they do not include a rule specifying how any of the other rules may be changed and who is empowered to change them. It is largely fortuitous that the example of certain people is influential, but they have no authority. Now if by 'etiquette' Frey simply means "good manners" he is on safe ground, and Warnock would not be in disagreement. We note, in passing, however, that there are areas

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(1) Mitchell, p. 153.

(2) Ibid. p. 148.

(3) Frey, p. 153.

of life, albeit concerning a small number of people, where strict rules of protocol, some including what might be called etiquette, apply e.g. Court, diplomatic and vice-regal life. It is not clear whether their rules are in turn governed by some 'enabling rule', but that is not to say that there are not persons whose authority in making and unmaking rules is not regarded as authoritative.

Frey suggests that the rules of ordinary English grammar are analogous; there is no body which by its pronouncements can change them. Grammatical rules, which both describe linguistic practices and attempt to systematize and order them, are inherently corrigible. But can English be regarded as paradigmatic? One of the obvious difficulties for anyone, however authoritative, wanting to alter the English language, is that it is the language of different nationalities e.g. American as well as British. Again, English is peculiarly subject to rapid change in being the leading scientific and technological language in the world. But in 1948 considerable grammatical changes were introduced into the Dutch language with the object of deleting archaic forms, and this presented no difficulty. It cannot therefore be the case that <u>all</u> modern languages are incapable of being changed on the recommendation of authoritative bodies.

Let us review here the strength of the four counter examples Frey has posed to Warnock's assumption that rules are essentially subject to change. His first, Monopoly, is defective because he is factually incorrect; his second, Christ's moral teachings (and those of Schweitzer and Gandhi) I find unconvincing

on evidential grounds, though Christ's teachings might be regarded as a possible counter example; the third, etiquette, is one with which Warnock would not be in disagreement, particularly because there are parts of etiquette which are governed by rules and are therefore (in theory and in practice) subject to change. The fourth, language, is defective because Frey takes the changes which occur to the rules of English grammar as paradigmatic; there are, however, authoritative bodies that are(or have been) empowered to make pronouncements about the grammar of other languages.

Frey has thus assembled counter examples to Warnock's thesis that the central class of rules all admit of deliberate change. In order to challenge them, Frey argues, Warnock will have to say that the sets of rules in question do not fall among the central cases or that these rules do admit of deliberate change.

If Warnock wants to insist on narrowing the class of central cases down to rules which have been made in the narrow sense, and exclude the counter examples of etiquette and English grammar this may have, according to Frey, the effect of excluding "a good many legal rules that have their source in custom and tradition and not in any formal enactment by Parliament".[1]

What is involved here? Blackstone observed that,

> "....the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it". 2

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(1) Frey, p. 154.

(2) Quoted Simpson, p. 93.

Thus there is a contrast between the basis for the authority of statute and common law. Wills require two witnesses because the British Parliament provided so in the Wills Act of 1837; contracts require consideration "because as far back as anyone can remember this has been accepted as necessary".[1] In the first example the statute is both the only reason and a conclusive reason for saying this is the law. In the second, the common law rule enjoys the status it possesses not because of the circumstances of its origin but because of its continued reception.

Why cannot Warnock adopt the 'positivist'[2] approach to common law and insist that common law rules have been "made" in some sense? Even if he doesn't, viewed in the light of Frey's announced criterion for Warnock's central class of rules viz. that they be capable of deliberate change, then the argument would turn on what constitutes "deliberate change". Warnock has made it clear that, in his opinion,

> "That a rule is not made by anyone's deliberate act does not imply that it cannot in that way be changed". 3

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(1) Simpson, p. 93.

(2) Simpson argues that "both in its strong and weak forms positivism seems to present a defective scheme for understanding the nature of the common law" (p.84). The strong claim, that the common law consists of rules which owe their status as law to the fact that they have been laid down, runs into difficulties when one attempts to find a specific instance, in the sense that the production of an authority that this or that is not the law is not the same as the identification of acts of legislation. Weaker versions of positivism, Simpson argues, escape the difficulty involved in the claim that the rules of the common law are the product of judicial legislative acts; they share, however, with the stronger versions the claim that the law in general, including the common law, consists of a set of rules, a sort of Code, which satisfies tests of validity prescribed by other rules.

(3) Warnock, p. 50.

Simpson would be the last to deny that the common law is not subject to change. He comments that,

> "The reality of the matter is that well settled propositions of law - propositions with which very few would disagree - do suffer rejection.... Few in 1920 would have doubted that manufacturers of products were immune from the liability soon to be imposed upon them, or in 1950 that the House of Lords was bound by its own decisions. Who ever heard of family assets in 1900"? 1

Let us suppose, says Frey, that Warnock insists that despite appearances, the rules in each case of the counter examples do admit of deliberate change. Even if no formal procedures for changing the rules are specified, "why may not certain informal procedures nevertheless be used to confer the appropriate authority"?[2] There are three possibilities, only the last of which could be damaging to his counterexamples.

Firstly, if the authoritativeness of decisions to change the rules e.g. of ordinary English grammar, is a function of procedures, why may not one select an informal procedure and confer authority on oneself to change the rules? If every one is entitled to do so, surely that would be destructive of the rules of grammar that we have. And how could one confer authority on oneself? But, in a sense, people do confer authority on themselves and others to communicate as they please; it is simply a case of 'what the traffic will bear' in the sense of minimal intelligible communication.

Secondly, Frey suggests it does not seem that a group of people can confer authority upon themselves, which in turn renders unlikely the prospect of using an informally agreed

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(1) Simpson, p. 91.

(2) Frey, p. 154.

procedure to change the rules of English grammar. Why, however, cannot a group of chief sub-editors in a newspaper chain lay down rules of style to which both their assistants and the chain's journalists are obliged to conform? This might have the curious effect of 'freezing' certain grammatical usages and making them immune to change, at least in a limited sense.

Thirdly, Frey suggests, surely if the informally agreed procedures were subscribed to "by the class of English speakers" would they not be authorized to change the rules? This would hold also for etiquette:

> "if all members of a society agreed that gentlemen were henceforth to be seated at table before the ladies and that ladies were henceforth to hold doors for gentlemen, the respective rules would seem clearly to be changed".[1]

Frey is less certain of the outcome in the case of grammatical rules. He doubts, for example, whether the rule prescribing that a sentence contain a subject and a verb can be altered, even with everyone's agreement, so that sentences need no longer contain verbs. The fact that sentences do contain verbs may suggest that something in addition to and deeper than a rule is involved; even if this were true it does not follow that the ordinary rules of English grammar requiring sentences to have verbs could not be changed. All that follows, he argues, is that there may be reasons why this rule is a feature of our grammar and may prove unalterable in other languages.

Anything is logically possible (even the agreement among the whole class of English speakers to the deletion of verbs from sentences) but if Frey had placed the rules of English

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(1) Frey, p. 155.

grammar firmly in a central 'class' of rules by some independent criteria, his position would be strengthened.

Frey considers that the most important reply to be made to the thid possibility is to envisage the likelihood of a change to moral rules. He suggests that "if all members of a society, or if all moral agents in a society, agreed to changes in a particular moral rule, would it not be the case that the rule would be changed"?[1] Thus if most members of a society came to consider that the use of torture was advantageous, they could change their rule "One ought not to torture" to "One ought to torture". It is irrelevant, he argues, to talk of rules making acts right or wrong, and of the change of the torture rule now making acts of torture right, since such talk need form no part of the example if you are an act-utilitarian or any other kind of consequentialist.

One might take issue here with Frey's use of the term "moral rule". The following reply might be made: though it is possible to change the moral attitudes of the members of one's community, and to persuade them to impose penalties for actions at present unpenalized, to relax penalties already in force, or to hold up as morally necessary what was previously thought morally undesirable, it is not possible to change something from being right to being wrong or vice versa. But this is to miss the point; Frey is arguing that to accept a rule of the form "one ought not to X" is not necessarily to think that the rule makes X class of actions wrong, an attitude that is certainly compatible with act-utilitarianism. But surely Frey

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(1) Frey, p. 155.

is not suggesting that the society which changes its torture rule happens to be constituted of act-utilitarians. If they are consistent act-utilitarians then the enforceability of the changed torture rule appears problematical. If they are rule-utilitarians then they are likely to be faced with the difficulty raised by the Act-Utilitarian J.J.C. Smart:

> "...who would say that we ought to keep to a rule that is the most generally optimiftic, even though we knew that obeying it in this particular instance would have bad consequences"(?). 1

Margolis[2] and Williams[3] among others have raised the crucial problems faced by rule-utilitarianism, a recital of which here would take us beyond our purpose.

In summary, the members of Frey's would-be-torturing society are entitled to change their social legislation but they would be mistaken in the belief that, in so doing, they are altering a moral rule. This is analogous to remarks about promises made by Hart in 'The Concept Of Law'.[4] He says that,

> "it is logically possible that human beings might break all their promises: at first, perhaps with the sense that this was the wrong thing to do,and then with no sense. Then the rule which makes it obligatory to keep promises would cease to exist". 5

But, as Woozley points out, the rule would be ineffective while people were still making promises (which they

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(1) Smart, J.J.C., 'An Outline of a System of Utilitarian Ethics' in Utilitarian For and Against, Cambridge, 1973, p. 44.

(2) cf. Margolis, J. Values and Conduct, pp. 161-170 passim.

(3) cf. Williams, N. Morality, Pelican, 1973,pp.96-112 passim and 'A Critique of Utilitarianism', in Utilitarianism For and Against, pp. 77.150 passim.

(4) H.L.A. Hart, "The Concept of Law", Oxford, paper 1979.

(5) Quoted Woozley "The Existence of Rules" Nous, Vol. 1, March 1967, pp. 63-79, p. 71.

intended to break) and while other people were still taking them at face value; it would be ineffective when nobody put any trust in promises any more and no one would continue to make promises.

> "But the obligation to keep promises does not vanish or cease to be valid in circumstances in which nobody makes promises. It would still be true that, if anybody made a promise, he would be under an obligation to keep it. A conditional proposition does not become false if its conditional clause is not fulfilled".[1]

Frey gives another example: if all members of a society agree to give up the institution of private property, and although they previously had a moral rule prohibiting stealing, now they give it up.

But all this means is that the moral rule prohibiting stealing has gone into suspension; it is, and will always be wrong to steal, and the validity of Woozley's argument is unaffected. It is true that people's attitudes to actions can change, so that what was regarded by any community as immoral at one time and was punished by it in one way or another, is not necessarily regarded as immoral by it at another time. But what is regarded as immoral by a community is one thing, and what is really immoral is another. Though it is possible to change the moral attitudes of members of one's community and to persuade them, say, to relax penalties already in force it is not possible to change something from being right to being wrong, or vice versa. Frey suggests no possible way in which this might be done; quite naturally, since it is impossible.

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(1) Woozley, p. 71.

Frey concludes that either his counter-examples are valid against Warnock's thesis, in which case these are instances of rules which cannot be altered, or else moral rules can be deliberately changed, in which case they are no different from the rules of institutions.

But we have seen that his counter-examples either cannot be accepted without some reservation or are mistakes, and that moral rules cannot be "changed". The nearest Frey comes to providing an independent criterion for placing moral - and other - rules within the central class of rules is to suggest that, "some sort of treatment of rules in terms of family resemblances might be both possible and feasible".[1]

We shall see in chapter 3 that this suggestion is neither possible nor feasible.

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(1) Frey, p. 149.

CHAPTER 3

Part I : Wittgenstein's And Later Accounts Of Family Resemblances

In pursuance of Frey's suggestion that "some sort of treatment of rules"[1] in terms of family resemblances may yield a "central class of rules", I propose to show that either in a Wittgensteinian or later form the notion of a "family resemblance" is internally incoherent, is open to the same objections to which a resemblance theory of universals is susceptible, and is open to grave objections in terms of practical application.

The analysis will be concerned with the notion of "game", not only for the conventional reason that it is the concept most familiarly associated with family resemblance accounts (and the most frequently attacked), but also because it is, I suggest, an "easier" notion than "rule". With "rule" we have two additional problems not conventionally associated with "game": firstly, the ability to "inspect" a rule, since if we are to appeal, as we can, to ordinary usage and acknowledge the linguistic indeterminacy which, as we shall see, the family resemblists are determined to exploit, then we shall have to admit the existence of "private" rules (the existence of which is acknowledged by both Warnock and Frey); and secondly the difficulty of taking in rules which are incapable of precise formulation and subject to counter-example.

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(1) Frey, p. 149.

In view of the by now inseparable association of the family resemblance idea with Wittgenstein it is of perhaps more than antiquarian interest to note that it did not originate with him. William James developed a notion of "family likeness" without naming it, in Varieties of Religious Experience,[1] in connection with the concepts "religion", "religious sentiment" and "government". As Pitcher[2] has observed, we know that Wittgenstein read James, and it seems almost certain that James' lectures were the original source of the idea for Wittgenstein.

Wittgenstein expands his notion of a family resemblance in two important passages. The first is from The Blue Book:

> "This craving for generality is the resultant of a number of tendencies connected with particular philosophical confusions. There is
>
> '(a) The tendency to look for something common to all entities which we commonly subsume under a general term. We are inclined to think that there must be something common to all games, say, and that this common property is the justification for applying the general term 'game' to the various games; whereas the games form a family the members of which have family likenesses... The idea of a general concept being a common property of its particular instances connects up with other primitive, too simple, ideas of the structure of language....'
>
> '(b) There is a tendency rooted in our usual forms of expression, to think that a man who has learnt to understand a general term, say, the term 'leaf' has thereby come to possess a kind of general picture of a leaf, as opposed to pictures of particular leaves.... This again is connected with the idea that the meaning of a word is an image, or a thing correlated with the word.'" 3

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(1) James, William, Varieties of Religious Experience, New York, Longmans, 1911. pp. 26-28.

(2) Pitcher, George, The Philosophy of Wittgenstein, New York, Prentice-Hall, 1964, p. 218.

(3) The Blue and Brown Books, (Basil Blackwell,1958) pp. 17-18.

The second, more famous, passage is from The Philosopical Investigations where he examines the peculiar difficulties in finding properties which are common to all games and concludes:

> "And the result of this examination is: we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail." 1

> "67. I can think of no better expression to characterise these similarities than 'family resemblances'; for the various resemblances between the members of a family; build, features, colour of eyes, gait, temperament etc. etc. overlap and criss-cross in the same way. - And I shall say: 'games' form a family." 2

Wittgenstein makes no mention of what we are supposed to do with his idea, but it is clear that his remarks are meant as a refutation of the "realist" view that all entities subsumed under a general word have something in common in virtue of which they are so subsumed. As such, what he has to say is of importance for a theory of language and, in particular, for the problem of universals. Wittgenstein's use of the word "essences"[3] tends to support this view, despite the fact that he never uses the word "universal". Nonetheless his use of "general term" in the passage quoted from The Blue Book indicates that it could be replaced without change of meaning by "universal".

There are many difficulties in the interpretation of Wittgenstein's remarks often caused by his own use of metaphor.

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(1) Wittgenstein, L., Philosophical Investigations, Oxford, Basil Blackwell, 1953, Section 66, p. 32.

(2) Philosophical Investigations, Section 67, p. 32.

(3) Philosophical Investigations, Sections 65, 92 and 116.

For instance, the metaphor of "family resemblance" itself breaks down fairly easily because all the members of a (literal) family are, independetly of their physical resemblances, genetically related, which games are not. Thus what Wittgenstein ought to have said is not "family resemblance" but "resemblance like the physical resemblance between members of the same family". In Wittgenstein's defence it may be pointed out that after introducing the concept of family resemblance he rarely uses it in the Philosophical Investigations and that his thesis is not dependent upon the success of this metaphor. Nonetheless it is curious to see realism creeping into Wittgenstein's metaphor apparently unnoticed for it is of the essence of a (literal) family resemblance that all, but not only, those things exhibiting it should be members of the same (genetic) family. This common genetic link serves to make his view more plausible.

There is a further trivial mistake in Wittgenstein's formulation. He says, "you will not see something that is common to all [games]".[1] But it is quite clear that we will: all games, for instance, are activities, all take place at a certain time, all begin and all end and so on. Surely what Wittgenstein ought to have said is "you will not see something common to all games in virtue of which they are called 'games'" or, in other words, there are necessary conditions for a thing's being a game, but these conditions are not also sufficient.

Taken literally, Wittgenstein's account is already in serious trouble. Keith Campbell,[2] however, saves the concept by

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(1) Philosophical Investigations, Section 66, p. 31.

(2) "Family Resemblance Predicates", American Philosophical Quarterly, July 1965, Vol. 2, No. 3, pp. 238-244.

giving it a precision that it lacks in Wittgenstein's formulation. It is clear that in justifying the application of a certain predicate we often refer to other predicates. Thus, for example, if we were justifying the application of the predicate "deciduous" to a tree, we might do it by referring to the predicates "leaves" and "shedding". Thus there is a hierarchy of predicates and those above are justified by those below, which are called "basic predicates" by Campbell. The choice of basic predicates is to some extent arbitrary (in the above case we might be further asked to justify the use of "leaves" and "shedding" in terms of other predicates). In reality it will depend quite loosely on the interests of the speakers and the context in which they speak. Campbell now states Wittgenstein's doctrine as follows:

> "There are some proper predicates which have a reference class (i.e. the class of individuals to which a predicate F applies) such that:
>
> (I) There is no one basic predicate which applies to every member.
>
> (II) Basic predicates do, however, apply to every member of various 'overlapping and criss-crossing' subclasses of the reference class.
>
> (III) The predicate applies to the whole reference class in virtue of the applicability of the basic predicates to its sub-classes." 1

It will be necessary to revise this formulation. In particular requirement (I) is unsatisfactory as it has been shown above that all games do have things in common - despite Wittgenstein's denial. Campbell goes on to make (II) more explicit. To do this one finds representative (paradigm) members of the reference class of the predicate F, say a, b, c, d and lists their

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(1) Campbell, p. 241.

basic predicates. To indicate that a predicate (designated by a capital letter) applies to an individual (designed by a small letter) I shall put the predicate in pointed brackets after the small letter. Thus a <N> means "the predicate N applies to the individual a". Thus, if we list the basic predicates of our four paradigm members of the reference class we get (for example):

a $<N_I, N_2 \ldots N_n, M_a, \ldots M_d>$ b $<N_I, \ldots . N_n, M_f, \ldots M_I>$

c $<N_I, \ldots N_n, M_c, \ldots M_g>$ d $<N_I, \ldots N_n, M_k, \ldots . M_p>$

The predicates $N_I \ldots N_n$ are necessary characteristics of all members of the reference class (as, for example, "being an activity" is a necessary characteristic of being a game) and therefore apply to all the individuals. The predicates $M_a, \ldots M_p$ are not necessary characteristics of F-hood but Campbell calls them "marks of F-hood". In the description of the reference class of the predicate F, therefore, we have $(N_I \ldots N_n)$ $(M_a, \ldots M_d)$ $(M_f, \ldots M_I)$ $(M_c, \ldots M_g)$ $(M_k \ldots M_p)$. The class of necessary characteristics Campbell calls the N-set of F's reference class; and the marks of F-hood he calls the M-set.

Now Campbell re-formulates the definition of a family resemblance predicate somewhat as follows:[1] A predicate F is a family resemblance predicate if and only if:

(I) The M-set is not null, otherwise necessary and sufficient conditions could be found for the application of F to all members of the reference class.

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(1) I have altered his formulation slightly.

(II) The bracketed sub-sets of the M-set are not independent of one another - they must contain members common to many other subsets.

(III) No two logically independent marks are present in every bracketed sub-set in which either occurs. This is the condition for criss-crossing. (No M-predicate is necessary, so the name is common to all).

(IV) All bracketed sets are of a certain minimum size.

(V) All bracketed sets are of approximately equal size.

(VI) Each mark occurs in a certain minimum number (not less than two) of the bracketed sets. This is the condition for over-lapping. (This is not entirely satisfactory because a perfectly respectable game might have a unique property. For example, Volleyball is conventionally attributed to the invention of Mr. William G. Morgan of Holyoke, Massachusetts in 1895.)[1] Thus "invented by Morgan in 1895" will occur only in the bracketed set of Volleyball.
This objection might be overcome by replacing "each mark occurs" by "almost every mark occurs". This seems to be satisfactory, although it introduces a new arbitrary element and one wonders how well it would cope with very peculiar games).

The last three requirements are necessary to ensure that the reference class is sufficiently closely knit. I am not sure

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(1) c.f. Jessie H. Bancroft, Games, New York, Macmillan, 1939.

of the necessity of (V), only of its desirability if (IV) and (VI) are to be satisfied easily. In these final three requirements and also in (II) there is an indeterminate element that cannot be legislated away for all cases. This, Wittgenstein might regard as an advantage, because it takes into account the indeterminacy of certain natural concepts, and allows us to make the boundaries of a concept as exact or as vague as we wish. "Am I inexact when I do not give our distance from the sun to the nearest foot? No single ideal of exactness has been laid down."[1] If the arbitrariness of these four requirements could be removed for individual predicates then their reference classes will be precisely defined and we be able to find which things are members and which are not. In as far as we are unable to devise a rational method of precisely determining these four conditions they will introduce an arbitrary element into the definition, and hence into the reference class. If this difficulty of arbitrariness can be overcome we will have an exact decision procedure for the application of a predicate to an object. For an object to a member of the reference class of a predicate F it must have all the necessary characteristics of F-hood and its M-set must satisfy the conditions given above.

It is appropriate to make some comments about Campbell's second criterion, namely that the bracketed sub-sets of the M-set must contain members common to many other sub-sets. This condition was apparently introduced to try to exclude disjunctive predicates; for, if a predicate F does not satisfy

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(1) Philosophical Investigations, Section 88, p. 42.

this condition then it is possible that F is a disjunctive predicate. But as it stands this condition is not sufficient to ensure the exclusion of all disjunctive predicates. For example, the bracketed sub-sets belonging to two horses and two horse-hair sofas may contain many predicates in common, in which case the disjunctive predicate "horse or horse-hair sofa" will be applicable. Tightening the condition will not give us absolute certainty that all disjunctive predicates have been excluded. Even strengthening it so that it requires that each bracketed sub-set of the M-set should have members common to all but one of the other sub-sets, provides no logical guarantee that all disjunctive predicates will be excluded. If it be strengthened further so that a member of one sub-set be common to all the sub-sets, then the member so treated will join the N-set, and if this procedure is generalised for all members of all sub-sets (there would seem no reason for stopping this process once it began) then the predicate F ceases to be a family resemblance predicate (i.e. its M-set becomes null).

Why this attitude to disjunctive predicates? A finitely long disjunction, each disjunct of which is a predicate, is itself, from the point of view of formal logic, a predicate. Why may not such a disjunctive predicate be also a family resemblance predicate?

Wittgenstein writes:

> "But if someone wished to say: 'There is something common to all these constructions (i.e. predicates) - namely the disjunction of all their common properties' - I should reply: Now you are only playing with words." 1

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(1) Philosophical Investigations, Section 67, p. 32.

This does not seem a very good reply, but it is easy to see the sort of possibility Wittgenstein is worried about. For given any class with a finite number of members it is always logically possible to construct a disjunctive predicate which is both common and peculiar to all members of the class. This is achieved because each member of the class must possess some predicate not possessed by any other member. The disjunction of such predicates, itself a predicate, will be common to every member of the class. It is perhaps significant that Wittgenstein does scant justice to this possibility when he puts it into the mouth of his critic in the passage quoted above. As Wittgenstein formulates it, what is common to the members of the class is the 'disjunction of all their common properties', but if they have common properties then they have something common without the necessity for introducing disjunctions. The real difficulty is neatly veiled in Wittgenstein's formulation.

This is, I suggest, the first major difficulty of the family resemblance doctrine. On the one hand, if disjunctive predicates are permitted then a realist account is always possible. On the other, there seems to be no intuitive way of excluding disjunctive predicates, except by Wittgensteinian fiat, and this cannot be accepted as a sufficient ground for excluding them; any views may be made logically watertight by ruling counter-examples out of order.

A problem now arises as to what predicates are family resemblance predicates. According to Bambrough[1] all predicates are

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(1) "Universals and Family Resemblance", in PAS 1960-61, Vol. LXI, pp. 207-222.

family resemblance predicates. Certainly there seems to be textual evidence in Wittgenstein which gives support to this, although Wittgenstein, in his insistence on avoiding past generalizations, was too wary to generalise about this. But the range of concepts to which Wittgenstein would apply his doctrine, and which he adduces in support, is very wide. In the Philosophical Investigations[1] he applies it to "language" (65), "game" (66), "number" (68), "pace" (69), "plant" (70), "colours" (72), "leaf" (73), the concepts of ethics and aesthetics (77), "knowing (78), and to "red", "dark" and "sweet" i.e. those predicates most likely to be regarded as basic - (87). In Zettel [2] he makes further references to the subject and includes further examples: the concept of a living being (326), "A heap of sand" (392), psychological concepts (472, 474-476). His reference to "red", "dark", "sweet", "knowing" etc. indicates that he intended it to cope with more than just sortal universals which might otherwise have been expected to form a fairly intuitive demarcation line between family resemblance universals and other universals. Clearly Wittgenstein thought his doctrine had a very wide applicability and it seems vain to attempt to find a feature common to all his examples of family resemblance predicates.

One piece of textual evidence against Bambrough's extreme view occurs in the Remarks On The Foundations Of Mathematics,[3] where Wittgenstein is talking about the way in which

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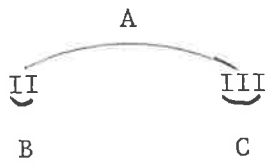
(1) The references are, of course, to sections of the Investigations.

(2) Zettel, etc.ed.G.E.M. Anscombe and G.H. von Wright, Oxford, Basil Blackwell, 1967).

(3) Remarks On The Foundations Of Mathematics, ed. G.H. von Wright, R. Rhees, and G.E.M. Anscombe, Oxford, Basil Blackwell,1956).

five is made up out of two and three (Remarks, I, 64) and he goes on, soon afterwards:

> "'But you can see - there can't be any doubt, that a group like A consists essentially of one like B and one like C.' - I too say -



> i.e. this is how I too express myself - that the group drawn there consists of the two smaller ones; but I don't know whether every group which I should call the same in kind (or form) as the first will necessarily be composed of two groups of the same kind as the smaller ones. - But I believe that it will probably always be so (perhaps experience taught me this), and that is why I am willing to accept the rule: I will say that a group is of the form A if and only if it can be split up into two groups like B and C." 1

It seems reasonable to assume that, as Wittgenstein was earlier on the same page talking about the number five and as the group A that he drew is a group of five vertical lines, that he is talking about integers in this passage. It also seems clear that in this case he was saying that there are necessary and sufficient conditions for a group to be of the form A (even if these conditions are laid down by convention.) The passage just quoted apparently contradicts the passage on numbers in the Philosophical Investigations where he seems almost to adopt a nominalist view:

> "Why do we call something a 'number'? Well, perhaps because it has a - direct - relationship with several things that have hitherto been called number; and this can be said to give it an indirect relationship to other things we call the same name". 2

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(1) Remarks, 2, 67.

(2) Philosophical Investigations, p. 33, Sec. 67.

The contradiction is avoided, however, if, in the Investigations, Wittgenstein is asking a different question about numbers, namely, "What do cardinal numbers, rational numbers, real numbers, negative numbers, transfinite numbers, irrational numbers etc. have in common?" The passage in the Remarks does, nonetheless, give the impression that Wittgenstein held that at least one concept was not amenable to a family resemblance analysis.

A consideration of Mundle's[1] observations on the words to which, in his view, Wittgenstein's notion of a 'family resemblance' is applicable, will make clear Wittgenstein's apparent confusion as to what a rule is supposed to do. Mundle suggests that the notion seems to be intended to apply not merely to a small number of words, to "slippery customers"[2] like 'game' but to descriptive words in general. "...the application of a word is not everywhere bounded by rules" (84).[3] Mundle claims that although Wittgenstein denies that there is anything common to games in the sense in which he uses "games", he is inconsistent, because the use to which he puts his comparison between languages and games involves the assumption that games are alike in that they are played and that they involve following rules. It is in these two respects that Wittgenstein assimilates games and the uses of language. Accordingly, he speaks of any language use as playing a language game, which, as we sometimes use words for serious purposes, seems singularly inappropriate. The feature

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(1) Mundle, C.W.K., A Critique Of Linguistic Philosophy, Oxford, Clarendon Press, 1970, pp. 191-194.

(2) Ibid., p. 191.

(3) Philosophical Investigations, p. 39.

of his comparison which receives most emphasis is that both games and language involve following rules. But, though we are frequently invited to compare the so-called rules of language with games-rules, his remarks are uninformative.

Wittgenstein argues the language-rules and games-rules are alike in not legislating in advance for all contingencies. A parallel is drawn between the fact that no boundary has been drawn for the application of the word "game" and the fact that there are no rules "for how high one throws the ball in tennis, or how hard; ... yet tennis is a game for all that and has rules too."[1] As Mundle remarks, "It would be pointless, because unenforceable, to make rules about this, or about how much tennis players may perspire."[2]

Wittgenstein does not seem to have considered that games-rules are framed with the chief purpose of trying to legislate in advance for all contingencies which could give rise to dissension. In practice a games-rule can be revised to try to avoid arbitrariness or ambiguity,

> "The rules of Charades are not imprecise because they prescribe only that each team shall play-act each successive syllable of the word-to-be-guessed, and thus leave endless scope for antics and exhibitionism-leaving scope for this is the purpose of this game."3

The game Wittgenstein refers to most often in trying to throw light on language is Chess; but the rules of Chess are fixed, and specify precisely all of the kinds of moves which are forbidden. In all respects they are unlike the rules of language.

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(1) Philosophical Investigations, p. 33.

(2) A Critique Of Linguistic Philosophy, p. 193.

(3) Ibid., p. 193.

Wittgenstein's comparison between language-rules and games-rules is seriously misleading because it leads him to speak as if language-rules are all prescriptive. Thus, in a passage where he is assimilating language-rules and the rules of Chess he says: "following a rule is analogus to obeying an order",[1].

As Mundle observes,

> "Games rules are indeed prescriptive: a player who breaks the rules, even if the game be solitaire, is not playing the game, in both the literal and the metaphorical sense of 'playing the game'". 2

But, by contrast, the purpose of grammatical rules - grammar - is mainly to clarify meaning. John Simon[3] gives an apposite example: suppose it is argued that""We was at the ball game last night" and "Mary had five card" are two clear and logical attempts to simplify the language. The rationale is that, in the first case, the speaker has decided that the distinction between 'was' and 'were' is insignificant and has chosen 'was', no matter if the subject is singular or plural. In the second case the speaker drops the 's' from 'cards' because the five already indicates more than one." However as Simon remarks,

> "Five does indicate plurality, but the final s confirms it. After all, the speaker may have said 'a fine card' or 'a five card', and it is the final s that ensures that we have not misheard him. So too, we may be uncertain whether we heard, say he or we until the were dispels our doubt concerning who was at the ball game."[4]

Apart from the concepts of mathematics there also appear to be words used in ordinary speech whose meaning can be analysed without

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(1) Philosophical Investigations, Section 206, p. 82.

(2) Mundle, p. 194.

(3) Simon, John, Paradigms Lost, London, Chatto and Windus, 1981, p. 147.

(4) Ibid. p. 147.

resort to family resemblances. For example, the word "brother" is equivalent by definition to "male sibling". Bambrough seeks to deny that this sort of definition is informative because, he argues, to say that "brother" is the same as "male sibling" is to say nothing more than saying that"a brother is a brother".[1]

Bambrough's argument is unconvincing on two grounds. Firstly, his claim is that all words require a family resemblance analysis. But why does "brother" require a family resemblance analysis? Surely it would be absurd, in elucidating the term "brother", to try and think of similarities between brothers and then claim that these similarities overlap and criss-cross, whilst ignoring the (obvious) fact that every brother has maleness and siblinghood in common.

Bambrough accepts that "brother" can be defined in terms of necessary and sufficient conditions but denies that it can be "ultimately explained in such terms."[2] But that we have solved the problem of the general term "brother" is one thing; that we are now faced with the problems of the general terms "male" and "sibling" is quite another. After all, there are independent tests for maleness and siblinghood and when both are satisfied then the predicate "brother" may be applied to the individual for whom they are satisfied. If there are problems about these tests (as there clearly are about the chromosome sex test, for example) then they are not the same as the problem about brothers.

Secondly, I cannot see how Wittgenstein's family resemblance concept obviates the difficulty of 'ultimately ex-

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(1) Universals and Family Resemblance, p. 215.

(2) Ibid. p. 215.

plaining' terms. All dictionaries define words in terms of other words (unless they are illustrated dictionaries which have problems of their own) and thus are either circular, regressive or incomplete; no "realist" would deny this. But this problem would apply equally to a dictionary of family resemblance "definitions". Wittgenstein analyses "games" in terms of other activities (each of which will require further analysis) and family resemblance (which will require an analysis of its own). The point may be expressed in terms of Campbell's formulation of the family resemblance concept by saying that every family resemblance analysis is an analysis in terms of basic predicates. An account (if any) of these basic predicates will not, ex hypothesi, be in terms of family resemblances. As Wittgenstein noted: "Explanations come to an end somewhere"[1] - family resemblances can't circumvent this.

Let us, for the sake of pursuing the argument, imagine a three-fold division of concepts. Firstly, there are those, like the concepts of mathematics(but including some everyday terms like "brother" which don't belong to mathematics), which are capable of rigorous analysis in terms of necessary and sufficient conditions. Secondly, there are words apparently more likely to be amenable to family resemblance analysis than to rigorous analysis. This group consists of many of the less clearly defined concepts in use in ordinary language, including most of those that Wittgenstein chooses for his examples.

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(1) Philosophical Investigations, Section 1, p. 3.

Finally, there is a group of basic predicates which cannot be analysed further within the given context. The words used in a particular linguistic context are explained by reference to these predicates and any account of them would either be circular or would have to take place in a different context. These basic predicates are the primitive terms of the language system and I don't see how Wittgenstein, or anyone else, can avoid them.

What is now the problem is how far Wittgenstein's interpretation gives an adequate account of how the general words in the second category get their meaning. Aaron[1] has questioned how far Wittgenstein's theory is a new theory of universals, and how far it is merely a restatement of the traditional resemblance theory. It seems that the only variant of the resemblance theory that is definitely incompatible with Wittgenstein's theory is that a universal is applied to a number of objects because each resembles the others in the possession, as it were, of a common feature or features. Wittgenstein's theory does not seem to be necessarily distinct from other types of resemblance theory, and it would need to be shown that his account avoids the difficulties into which resemblance theory runs. There are two main general objections to resemblance theory and it may be useful to begin our consideration of the adequacy of Wittgenstein's account by considering at length how far these objections might apply to family resemblances.

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(1) R.I. Aaron, "Wittgenstein's Theory of Universals, Mind, 1965, pp. 249-251. Vol. LXXIV.

Part 2: Difficulties With The Family Resemblance Account.

The first of the two arguments against resemblance theory is the infinite regress argument. Wittgenstein would say that boxing and patience have a family resemblance to each other, likewise have boxing and chess. But in doing so he has used the universal "family resemblance" and of this he has to give an account. What is the family resemblance between instances of family resemblance? Thus an infinite regress may be developed. This objection could be raised against any account of universals - whether resemblance theory or not - which claimed that all universals were explicable in the one way. It would thus apply to Bambrough's doctrine that all universals (including the universal family resemblance) were capable of a family resemblance account. It need not apply to Campbell's formulation of the doctrine because he gives an account of the universal family resemblance in terms of necessary and sufficient conditions and not by a further, second-order, family resemblance. Wittgenstein's own account is susceptible to a related difficulty. In the analysis like that of the concept "game" we must, according to Wittgenstein, employ the concept "family resemblance". If, then, we ask for an analysis of the concept "family resemblance" and we seek an answer in Wittgenstein's writings, we find an informal analysis given in terms of the concept "game". Thus Wittgenstein avoids infinite regress, though at the cost of a circularity. In fairness to Wittgenstein we must point out that he is not compelled to elucidate "family resemblance" in terms of "game". But if he is to maintain the style of his philosophy he would probably

do so in terms of some other concept that was amenable to family resemblance analysis - thus the problem is merely transferred.

Bambrough makes the same mistake more obviously. "The simple truth" he writes, "is that what games have in common is that they are games".[1] A simple truth, but how profoundly unhelpful! Where Bambrough's account fails most obviously is in attempting to satisfy one requirement of any satisfactory theory of universals: namely, that it must be able to give an account of why predicates are applied to some objects and not others. A theory of universals which fails on this account can scarcely be regarded as satisfactory. Bambrough gives a sort of account of why the predicate "game" is applied to certain activities: he says that it's because they are games. In view of the fact that he charged all analytic accounts (e.g. that the predicate "brother" could be applied to x because x was male and a sibling of y) as mere word swapping - changing one puzzle for another - I confess to failure in knowing how he would defend his own position, which swaps one puzzle for the same one. "Brother" = "male sibling" might not be very informative, but "game" = "game" is even less so.

There is little evidence that Wittgenstein would have accepted Bambrough's interpretation, and it seems to contradict one interpretation of the family resemblance concept that is found in Wittgenstein's writings. If Wittgenstein is trying to show that it is impossible to give an account of what it is to be a game - i.e. not trying to solve the problem of universals but

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(1) Universals And Family Resemblance, p. 217.

to deny that it has a solution and to dismiss it as a pseudo-problem - then his analysis might be compatible with Bambrough's. But Wittgenstein says (speaking of languages) that "it is because of its relationship, or these relationships (of family resemblance) that we call them all 'language'."[1]

Pompa[2] distinguishes three possible meanings of the phrase "because of" in this passage. The first is the traditional view that the existence of the relationships is a sufficient condition for the application of the predicate. The second is that it is in view of the fact that there are these relationships that, for historical, psychological or etymological reasons, we come to apply the same word to all. The third is that the family resemblance relationship merely indicates that there are similarities between the members of the reference class of the predicate. Only the first interpretation would make family resemblances into a theory of universals and so it has been presupposed until now. However, if family resemblances are not meant to constitute a theory of universals, then they cannot refute realism, and this would be the case on either the second or the third interpretation. The reason is that all the members of the reference class could have both some common "essence" and overlapping similarities; or they could have a common "essence" but it could still be due to the fact of the similarities that we were brought (for historical, psychological or etymological reasons) to use the same predicate to apply to all of them. Moreover, the second and third inter-

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(1) Philosophical Investigations, Section 65, my italics.

(2) "Family Resemblance", Philosophical Quarterly, 1967, Vol.17, No. 66, pp. 63-69.

pretations are scarcely of philosophic interest. Thus it would seem that what Wittgenstein meant in Section 65 of the Investigations was that family resemblances are to give an account of why a given predicate has a certain reference class and not another: to give conditions for the application of the predicate. It can scarcely be claimed that Bambrough's account does this.

On the other hand, some textual evidence can be found which seems to support the historical, psychological,etymological interpretation of "because of". For example, Wittgenstein says: "In such a difficulty (of finding definitions)always ask yourself: How did we learn the meaning of this word....? From what sort of examples? In what language games?"[1] Also, his injunction to "look and see" whether all games have a common property[2] indicates that he conceives the process as an empirical one. If this interpretation is taken literally then his task seems to be more like one in the psychology of learning than in philosophy. On the other hand, he could be saying merely that asking how we learn the meaning of a word could be an aid in its conceptual analysis, even though it did not provide the answers to our conceptual problems on its own. Except on this last interpretation, however, his remarks will not be sufficient, either to refute realism or to establish a theory of universals.

So far there have been two arguments against Bambrough's position; the first arose out of my honest confusion at what he said; the second is a textual one, namely that his theory is not Wittgenstein's theory. There is a third argument advanced by Campbell in "Family Resemblance Predicates", and this seems

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(1) Philosophical Investigations, Section 77, p. 36.

(2) Ibid. Section 66. p. 31.

fatal. According to Bambrough,games have being a game in common and nothing else; or, put more generally, all members of the reference class of a predicate F have F-hood in common and nothing else. Campbell's argument is based upon the fact about the American Constitution that all Congressmen are either Senators or Members of the House of Representatives. According to Bambrough: (I) all Senators have Senatorhood in common and nothing else. and (II) all congressmen have Congressmanhood in common and nothing else. Now, either Senators do not have Congressmanhood in common (which is false in virtue of the American Constitution); or they do have Congressmanhood in common(which contradicts the first of Bambrough's assertions); or being a Congressman is not something different from being a Senator (which is also false in virtue of the American Constitution). Clearly, they do have congressmanhood in common and Bambrough is wrong.

The second of the two arguments against resemblance theory to be considered is that some non-games might resemble some games more than other games do. Richman[1] calls this the "Problem of Wide-open Texture". The problem can be made more radical if it is claimed that any two things have some common properties. To use an example given by Pompa[2], street-fighting resembles boxing more than boxing resembles chess, yet boxing and chess are both games whilst street-fighting is not. There are two possible replies open to a Wittgensteinian at this point: the first involves counting, and the second weighting, the basic predicates. First, the Wittgensteinian could reply that boxing

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(1) "Something Common", Journal of Philosophy, December 1962, pp. 821-830, p. 829.

(2) Pompa, p. 66.

has more resemblances to chess than it has to street-fighting. Put more formally,this means that there is a definite number, P of basic predicates,which are applicable to all games and street-fighting. A resemblance exists between two activities if some basic predicate is applicable to both. Thus street-fighting will share a certain proportion of the P basic predicates with boxing (Say S/P) and chess will also share a proportion of the basic predicates with boxing (Say C/P). If the Wittgensteinian is adopting this mode of reply he will mean that the proportion (C/P) will be greater than the proportion S/P.

This answer is open to several objections. The idea of listing the basic predicates applicable to all games and street-fighting is very artificial, not to mention extremely difficult and lengthy. For example, is "having rules" one basic predicate, or is it as many as there are rules? Moreover, there are further problems. Do we just list the necessary basic predicates of all games? Or, do we list any basic predicate that can be applied to any game whatsoever ? In this case our list is going to be even longer and more tedious to compile than we expected. Furthermore, do we list the basic predicates of each individual game (e.g. each football match, boxing match, game of croquet etc.) or just the basic predicates of each type of game (e.g. football, boxing, croquet etc.)? In the first case we have to embark on a detailed and completely comprehensive description of every football match ever played - not to mention boxing, croquet and all the others. In the second case, realism reappears - not, admittedly, immediately, in our account of "game", but in the very next stage

of our analysis, in the account we give of "football", "boxing" etc.; for we shall need to know the common and peculiar properties of these activities for inclusion in our analysis of "game". Thus either the family resemblance account of "game" becomes absurdly complex or it degenerates rather quickly into realism.

The second objection applies even if questions like these can be answered and the details of the analysis filled out. It is that in order to work out the number of basic predicates P applicable to all games and street-fighting, we have to know what all the games are - and this includes knowing whether chess, street-fighting or boxing is a game. In other words, the Wittgensteinian must assume an answer to our question in order to be able to work out an answer to it. On this interpretation we have to know what all games are in order to be able to decide whether a given activity is a game or not. However, it is not strictly necessary to bring all games into it, for we can select a sub-class of paradigm games so that P will be the number of basic predicates applicable to all paradigm games and street-fighting. The use of the paradigm case brings problems of its own; questions of choosing the paradigms will be important and could vitally affect the outcome and, in addition, there is no reason to believe that the adoption of this approach would leave the class of games anything like it is at present - which Wittgenstein apparently wants.

A less problematic approach would be to ask whether boxing should be classified with street-fighting or with chess by

comparing the number of basic predicates common to boxing and street-fighting with the number of basic predicates common to boxing and chess. But this leaves unanswered the question we started with: "Are street-fighting and chess games?" "All we can say is that if boxing is a game then (assuming we get the numerical preponderance we want) chess is, whilst street-fighting is not. We have proved that chess and boxing "go together" whilst street-fighting doesn't go with either of them. Even so the result might be misleading because we might be inquiring whether the predicate "involves the use of physical force" is applicable to boxing, street-fighting or chess, and in this case it would be fallacious to say that boxing and chess "go together". Finally, it seems almost certain, in the given example, that on almost any adoption of basic predicates,it will be found that boxing does have more in common with street-fighting than with chess. A set of basic predicates for which this wasn't the case would seem very artificially contrived.

Bambrough, in his discussion of the "Churchill face", makes this interpretation even more difficult. Because "high-cheek bones" is not a single feature but a continuum of infinitely many features, he concludes that,"we see that there could in principle be an infinite number of Churchill faces which had no feature in common. In fact it becomes clear that there is a good sense in which no two members of the Churchill family need have any feature in common in order for all the members of the Churchill family to have the Churchill face".[1] Thus any Churchill - even Sir Winston,

(1) Universals And Family Resemblance, p. 215.

whom one might take as the paradigmatic Churchill - will have 0 per cent of Churchill features: but so has a horse. This would seem to be a reductio ad absurdum of Wittgenstein's theory. However we propound the family resemblance concept it will conflict with this extravagant suggestion. Wittgenstein's own words are contradicted because the resemblances no longer "overlap and criss-cross". Campbell's formal specification is violated because his second, fourth and sixth criteria are not satisfied. Even Bambrough's own formulation will not do. He supposes that there are five objects a, b, c, d, e to each of which four of the five predicates A, B, C, D, E apply in the following way: a <BCDE> ; b <ACDE> ; c <ABDE> ; d <ABCE> ; e <ABCD> . "Here", says Bambrough, "we can already see how natural and how proper it might be to apply the same word to a number of objects between which there is no common feature".[1] The naturalness and propriety of this is solely due to the fact that each object has four of the five properties. In the case of the Churchill face quoted above, the situation may be schematized as follows: a <ABCD> ; b <EFGH> ; c <IJKL> ; d <MNOP> ; e <QRST> . In this case it seems both unnatural and improper to apply the same predicate to a, b, c, d, e; although all would be well if we introduced a predicate Z = "Member of the Churchill family" which would apply to all the individuals - but that's realism.

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(1) Universals And Family Resemblance, p. 215.

It might be thought that I have been unfair to Bambrough in schematizing his views about the Churchill face; what he meant was that each of the predicates A, B, C, D, E, denoted an infinite continuum of features and each was susceptible to a family resemblance analysis itself. Thus the predicate A is composed of a family of more basic predicates $A_1, A_2, A_3, A_4, \ldots$; the predicate B of B_1, B_2, B_3, B_4 ... and so on. Then the Churchill face relation will become: a $\langle B_1\ C_1\ D_1\ E_1 \rangle$; b $\langle A_2\ C_2\ D_2\ E_2 \rangle$; c $\langle A_3\ B_3\ D_3\ E_3 \rangle$; d $\langle A_4\ B_4\ C_4\ E_4 \rangle$; e $\langle A_5\ B_5\ C_5\ D_5 \rangle$. Whichever interpretation we take, however, will not remove Bambrough's difficulty, for ex hypothesi , A_1, B_1, C_1, etc. differ from A_2, B_2, and C_2 etc.

But this reply to the first criticism of resemblance theory is not the only possible reply to the problem of wide-open texture open to a Wittgensteinian. Indeed, in fairness, it must be admitted that there is no textual evidence that Wittgenstein would make this reply; there is no textual evidence that he considered the problem at all. He could say that counting properties was not part of the answer because some properties were more important than others. This seems, superficially, a more satisfactory answer than the first. In the instance suggested by Pompa, the Wittgensteinian might claim that boxing and chess should be excluded from amongst the games because both were primarily non-serious, whilst street-fighting was serious and non-seriousness is more central to the concept of a "game" than, for instance, "involving physical force against an opponent" which link boxing and

street-fighting. This example would, however, be singularly unfortunate because there is textual evidence to suggest that Wittgenstein regarded chess as serious.[1] But, the point can be seen even though the details are in dispute. However, the difficulties occasioned by such details as the one just mentioned will cumulatively be very great. What this view requires is some method of first enumerating and then weighting characteristics; in other words a calculus. If it were perfected, however, it would bring us back dangerously close to realism, for the sort of information about games that it would pre-suppose would be statements like: "The property of non-seriousness is central to the concept of 'game'," and "The property of involving physical force against an opponent is peripheral to the concept of 'game'". Once we have decided what is central and what peripheral to a concept, there is a strong inclination to regard what is central as constituting necessary and sufficient conditions for the concept. The more we reduce the weight of the central features the less likely it is that the boundaries of the family-resemblance concept "game" will coincide with those of the ordinary concept "game". On the other hand, the more we increase the weight of the central features, the closer our position comes to realism. Furthermore, there will be a strong possibility, as we develop the common language calculus, that we will have to assume the answers to the questions we wish to investigate with the calculus's help. There is thus a danger of circularity and realism on the one hand, or a radical revision of the predicate on the other.

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(1) "Are games all 'amusing' (unterhaltend)? Compare chess with noughts and crosses." Philosophical Investigations, Section 66.

Pompa makes a further attack on family resemblances similar in direction to the Problem of Wide-Open Texture, but differing from it. Wittgenstein says that games are characterised by the fact that they have a certain (unspecified) number of properties designated by the predicates A, B, C, D, E,...etc. Thus the statement "a is a game" is equivalent to the disjunction "a <A v B v C v D v ....> ". But the number of disjuncts is huge and so the statement "a is a game" is so indeterminate that it can convey practically no information. To say "a is a card game" is no better because the disjunction is now "a <A v B v C v D v ...> and a <A> ". But if we now apply the family resemblance concept of "cards" - as on many interpretations we must - we must replace the predicate "A" by a further disjunction. In fact, to say "A is a card game" is to open more possibilities than to say "a is a game". The curious fact is that, although Wittgenstein was trying to give an account of predicates as they're used, he has here ended up with a conclusion which goes against common usage, for we would ordinarily agree that to say "a is a card game" is to be more specific than to say "a is a game". It is difficult to see how a family resemblance account could avoid being thus reduced to a disjunction. Clearly Wittgenstein did not intend it to be taken as such, but given, for example, a family resemblance analysis of "game",it is not immediately clear how he can then block the formation of a simple disjunction of the basic predicates of "game" (perhaps with some conditions added - depending upon the subtlety of the analysis).

Once the disjunction is in (with all but the most stringent conditions) it is possible that the family resemblance predicate may tend to lose its information content. Another possibility would be to use the heavily weighted central features to divide the reference class of the predicate so that those members which exhibited all the central features fell into one group (central cases), and all those which exhibited only some (or perhaps even none) of the central features fell into another (peripheral cases). Thus a theory of meaning mid-way between realism and family resemblance theory would result. It remains to be shown how the inclusion of the peripheral cases in the reference class of the predicate in this way would avoid the other difficulties of a family resemblance account.

I suggest that the reason why "game" is such a persuasive example for the Wittgensteinian is that its content is so limited. Tell someone who hasn't heard of it before that pelota is a game and his sum total of knowledge is not likely to be much increased. Certainly some possibilities will be excluded: he'll know it's not an animal; that's it's an activity (presumably a human activity); that it has spatio-temporal extension etc. But these exclusions all result from the N-set of the predicate; the M-set excludes nothing.

The advantage of family resemblance theory claimed by supporters is that it does justice to ordinary usage. This claim does not look plausible when the family resemblance treatment is applied to a predicate like "brother"; yet for "game"

it does perhaps have a certain plausibility. We have , however, seen the very great difficulty the family resemblance theorist has in dealing with the predicate "game" in such a way as to include all and only games. The more he tightens his restrictions on the M-set the more his doctrine begins to look like realism. The only way in which he can guarantee the exclusion of all non-games is by realism - by reducing the M-set to nothing. To leave the M-set in seems to bring the problem of 'Wide-Open Texture' down on the theory.

The difficulty which we have in providing necessary and sufficient conditions for the attribution of the predicate "game" is the reason why "game" is such a persuasive example for the family resemblance theorist to use. Are we in equal difficulties with "rule"? Raz has reminded us that, "... a rule is a reason for action".[1] But while this may be a necessary condition of something's being a rule, it cannot be regarded as a sufficient condition; orders, threats or even advice may provide a sufficient condition for action. Clearly compliance is neither a necessary nor sufficient condition of something's being a rule. Peoples' response to a rule will be determined by a number of factors,e.g. how far the rule harmonises or conflicts with their interests; how easy or how difficult breaches of the rule are to detect; how efficient the enforcers of the rule are; indeed how concerned they are to enforce the rule.

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(1) Raz, Joseph, Practical Reason And Norms, Hutchinson, London, 1975, p. 56.

I suggested earlier that 'rule' was a more difficult customer than 'game'; and if the family resemblance theory cannot account satisfactorily for 'game', how can it do so for 'rule'? We should be faced again, for example,with the problem of "wide open texture" (i.e. the possibility that we may find examples of some non-rules that resemble some rules more closely than some rules resemble each other). For all the reasons discussed earlier, I see no prospect of a family resemblance analysis yielding the characteristics of a central class of rules.

C H A P T E R 4.

Part 1 : Moral Rules And Legal Rules.

I have argued that moral rules can be distinguished from other rules by one sufficient condition; that Warnock is mistaken in his supposition that there are no moral rules, and that his criteria are inadequate to distinguish them from moral rulings; and that Frey's counter-examples are unlikely to refute Warnock's arguments. And I have argued further that Frey is mistaken in supposing that a family resemblance notion of 'rules' could be formulated.

In conclusion I argue that the apparent similarities between legal and moral rules suggested by Hart[1] are sufficient for these to be regarded as a 'central case' of rules but that certain more ambitious attempts to link law and morality by other than purely contingent factors are likely to be unsuccessful.

We might usefully begin an attempt to find similarities between moral and legal rules by considering MacCormick's[2] attempt to distinguish rules of obligation from other rules, since both moral and legal rules are clearly rules of obligation. Hart asserts that

> "Rules are conceived and spoken of as imposing obligations when the general demand for uniformity is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great."[3]

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(1) Hart, p. 168.

(2) D.N.MacCormick, "Legal Obligation and the Imperative Fallacy" in Oxford Essays in Jurisprudence, Second Series, pp.100-129.

(3) Quoted MacCormick, p. 119.

MacCormick argues that this is neither a necessary nor a sufficient criterion.

The parable of the good Samaritan plainly implies that the Samaritan had an obligation to assist the Jew, and the use of 'obligation' in this context is neither self-contradictory nor a linguistically improper use of the word. But since we know that there were very strong social pressures against co-operation between Jews and Samaritans, Hart's criterion is not a necessary test of obligation. On the other hand MacCormick argues, there is strong social pressure in an Oxford common room that men should wear trousers, not shorts or skirts, yet clearly it would be wrong to speak of a don having a 'duty' to wear trousers. There is simply a rule about the socially acceptable manner of dress. So Hart's criterion is not sufficient either.

To MacCormick, Hart's criterion is deficient because it is, in Hart's terms specified in terms of the 'external point of view' i.e. it provides a test for distinguishing obligations from other rule governed acts from the point of view of the social observer. This might be a useful rule of thumb for distinguishing those social rules regarded by society as imposing obligations from other rules, but even at this level it would not be, as the hypothetical case of the transvestite don illustrates, wholly satisfactory. MacCormick argues that to discover the significance of the word 'obligation' we must look at it from the 'internal' point of view: what special force is there, therefore, in the judgment that a particular act is a duty from the point of

view of the person who makes the judgment ?

This will become clear if we examine the type of case Hart uses to demonstrate that not all cases of breach of rules are cases of breach of duty. Should a small boy say to his mother, 'Honestly I were at school today,'[1] when in fact he has played truant, he has in one sentence, MacCormick suggests, two wrongs for the price of one. But the rule against lying is one under which duties arise, whereas no duty arises under the rule that 'I was' is the correct form of the first person indicative of the past tense of the verb 'to be'. Wherein lies the difference? It is merely question begging in MacCormick's view,to say that one rule is 'moral' and the other 'grammatical'.

A distinction emerges when we examine the language we use for criticism in both cases. In the one, the boy is criticised by saying that he 'has done wrong' or 'acted wrongfully' or 'committed a wrong'; in the other, we say that he has 'spoken incorrectly', 'expressed himself wrongly', 'declined the verb wrongly', and so on. Again it would be question begging, suggests MacCormick, to say that one class of criticism is 'more serious' than the other. However strong we may be as grammarians we do not regard ungrammatical expressions as 'wrongs', and, conversely, no contradiction appears to exist between adopting a lenient attitude to 'white lies' and 'little fibs' of which most, if not all of us, are guilty, while continuing to regard them as genuine misdeeds. The difference, MacCormick suggests, is one of <u>kind</u>, not of <u>degree</u>.

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(1) MacCormick, p. 120.

This difference can be illustrated by contrasting two generalised examples: 'Doing X is doing wrong' and 'doing X in manner M is doing wrongly'. In the first example the criticism is of what someone did, in the second, it is of how someone did or attempted to do something, leaving open the question of whether doing X in these circumstances is open to criticism in itself. Let us, MacCormick suggests, call the former substantive criticism, the latter, procedural criticism, and assume that if such different types of criticism are properly used in applying different socially recognised rules to human conduct, then it follows that the rules themselves must be of different types. Surely the difference is one of function; some rules function as substantive guides to conduct, guiding us as to what ought or ought not to be done, while others act as procedural guides, laying down in what manner this or that ought to be done. There is an ambiguity in this distinction: is 'getting rich ought not be done by stealing' an example of substantive or procedural criticism?

What does MacCormick mean by procedural rules? Table manners for example; it may be easier to eat peas with a spoon than a fork but it is regarded as 'wrong' to do so,'wrong' because there is a "conventional standard stipulating how to eat peas in the company of others."[1] Again, language: there is nothing in the nature of the words 'I were' as against 'I was' which makes the latter more desirable as a mode of self expression; there is a conventional rule under which 'I was' is the correct formulation of that mood and tense of the verb.

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(1) MacCormick, p. 121.

This is a less happy example because grammatical usage has an authority that transcends the purely conventional; one of the reasons for demanding 'grammatical' usage is clarity if we hear, to employ the example given in Chapter 3, "we was at the ball game last night", we may be uncertain whether we heard, say, he or we until the were dispels our doubt as to who was at the ball game. Again, the use of "Mary had five card" can hardly be called a logical attempt to simplify the English language. Five does indeed indicate plurality but the final s confirms it. After all, the speaker may have said "a fine card" or "a five card" and it is the final s that ensures that we have not misheard him.

MacCormick gives other examples: the 'right' way to move a bishop at chess is diagonally, the correct way for a car driver to indicate his desire to turn right is to do so with the 'right' indicator or failing that, to extend his right arm, and to do otherwise is to act incorrectly.

The common element in all these rules is "that they establish a standard mode of performing some activity which is at least sometimes permissible in itself". (But is growing rich by stealing an activity sometimes permissible in itself?) MacCormick suggests that such rules exhibit a similarity with 'instrumental norms' which specify what one must or ought to do to achieve some purpose: 'to keep one's car radiator from freezing one ought to drain it or put in anti-freeze'. But, he argues,

> "whereas in this type of case the appropriateness of the procedure is determined by its efficacy in producing the desired result, the appropriateness determined by 'procedural rules' is essentially conventional." 1

Substantive rules of conduct on the other hand are conceived of as indicating permissible and impermissible forms of behaviour, not merely as indicating steps to be taken to achieve some goal or other,

> "though the effects of the behaviour prescribed or proscribed may be relevant to the justification of the rule". 2

I suggest this last point is important, since procedural and substantive rules may be interactive in the sense that procedural rules may clearly modify substantive ones. The efficacy or conventional appropriateness of certain kinds of organ transplants or in vitro fertilisation, for example, may well determine notions of what are permissible or impermissible forms of behaviour.

MacCormick concludes this delineation by arguing that the nature of these substantive rules may be clearly understood by considering how their maintenance has to be justified, should justification be demanded. Demanding money with menaces is not only conventionally regarded as an inappropriate procedure for obtaining money from others, but is regarded as both undesirable in itself and in the consequences that would result from its toleration. The justification for having a rule against it is not solely in terms of the need for some convention about

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(1) MacCormick, p. 123.

(2) Ibid. p. 123.

valid modes for transferring money, but rather in terms of "the conceived evil nature of the proscribed behaviour".[1]

If people regard some deviant behaviour as being undesirable in the sense of deserving blame and non-toleration rather than simply the withholding of praise, then they regard the substantive guidance of the rule to be about minimal standards of acceptable behaviour. To MacCormick it is this feature which constitutes the particular type of rule of which the people who themselves accept and endorse it are accustomed to speak in terms of 'duties' and 'obligations' imposed by the rule. This feature is shared by some rules of law, some social rules of positive morality and some personal standards of individual morality.

The qualification of 'some', clearly indicates that MacCormick's notion is inadequate to separate all legal and moral rules from other sorts of rules.

Two further criteria mentioned by Hart for identifying duty-imposing rules, in addition to the one criticised earlier, require, in MacCormick's view, some modification. To Hart's criterion that such rules are considered essential to the preservation of highly prized or essential features of social life, MacCormick points out that the maintenance of a common language is surely a highly important feature of social life, yet Hart himself has suggested that the rules of language impose no obligations. The point is, rather, that "sharing standards for the suppression and discouragement of undesirable forms of conduct is one essential prerequisite of social life, but not a unique one".[2]

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(1) MacCormick, p. 123.

(2) Ibid. p. 125.

To the further criterion that conformity with such rules may sometimes conflict with individuals' desires, MacCormick replies that conforming with the procedural rules may have the same effect, "as for example if a testator should wish to make some secret provision for an illegitimate child without the publicity which a will involves".[1] The contrast rather is between the applicability of procedural rules (normally depending on an agent's choosing to pursue some optional or permissible activity influenced by some procedural standard), and substantive rules, which apply "willy-nilly'.

Hart suggested that moral and legal rules of obligation have "certain striking similarities, enough to show that their common vocabulary is no accident".[2] These "striking similarities" are

(a) "They are alike in that are conceived as binding independently of the consent of the individual bound and are supported by serious social pressures for conformity."

(b) "Compliance with both legal and moral obligations is regarded not as a matter of praise but as a minimum contribution to social life to be taken as a matter of course."

(c) "...both laws and morals include rules governing the behaviour of individuals in situations constantly recurring throughout life rather than special activities or occasions, and though both may include much that is peculiar to the real or fancied needs of a particular society, both make demands which must obviously be satisfied by any group of human beings who are to succeed in living together."[3]

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(1) MacCormick, p. 125.

(2) Hart, p. 168.

(3) Ibid. p. 168 (I have slightly altered Hart's formulation)

Three questions arise: are these "similarities" shared by other rules to the extent that the "similarities" are no longer striking, are the differences between legal and moral rules sufficient to outweigh their alleged similarities, and are these criteria obviously required for "any group of human beings who are to succeed in living together"? If the first two questions can be answered in the negative and the third in the affirmative, we may have a central case of rules.

Before these questions can be pursued it will be appropriate to consider what Hart calls,

> "four cardinal related features which collectively serve to distinguish morality not only from legal rules but from other forms of social rule". 1

The first of Hart's cardinal features is importance. The importance attached to moral standards may be manifested in several ways: they are maintained against the drive of strong passions which they restrict, and at the cost of sacrificing considerable personal interest; they are supported by serious forms of social pressure exerted not only to obtain conformity in individual cases but to ensure that they are taught or communicated throughout society; it is generally recognised that their rejection or non-observance would create social chaos. In contrast, rules of manners, dress,and deportment occupy a lesser place in the scale of importance.

We have seen reason to question the importance Hart places on social pressures, but this aside, none of these 'attributes' serve to distinguish moral from legal rules in any significant way. While not all legal rules are regarded with the same

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(1) Hart, p. 169.

importance by the community, both legal and moral rules are generally supported by varying degrees of social pressure. Clearly some legal rules mitigate against individual passions and interests, can be said to be communicated throughout society, and their abandonment is generally thought to be a prerequisite for social chaos.

The second feature is immunity to deliberate change and here we found Hart (Chapter 1) in some difficulties.

The third feature is the voluntary character of moral offences. Hart maintains that if a person whose action, judged ab extra, has offended against a moral rule but who succeeds in showing that he did this unintentionally and in spite of every precaution that it was possible for him to take, he is excused from moral responsibility. This is clearly an inadequate account of the grounds on which one can be excused from moral responsibility, (e.g. one's behaviour may be held to fall under an exception comprehended under a moral rule and thus the same effect may be achieved), but Hart wants to draw a comparison with exemptions from legal blame.

He allows that in any developed legal system "the same is true up to a point; for the general requirement of mens rea is an element in criminal responsibility designed to secure that those who offend without carelessness, unwittingly, or in conditions in which they lacked the bodily or mental capacity to conform to the law, should be excused".[1]

Nevertheless, he points out, admission of such excuses in all legal systems is qualified in many different ways. The real or alleged difficulties of proving psychological facts

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(1) Hart, p. 173.

may lead a legal system to refuse to investigate mental states or capacities of individuals and instead require 'objective tests', whereby an individual charged with an offence is taken to have the capacity for control or ability to take precautions that a normal or 'reasonable' man would have. Some legal systems may refuse to take account of 'volitional' as distinct from 'cognitive' disabilities, thereby confining the range of excuses to lack of intention or defects of knowledge. Again, a legal system may, for certain types of offences, impose 'strict liability' and make responsibility independent of mens rea altogether, with the minimum proviso that the accused possesses normal muscular control.

Hart's last remark reinforces my observation that the broad content of many legal rules (and the consequences of their violation) are communicated to a community at large.

Hart's final feature, the form of moral pressure, concerns the particular pressure which may be exerted for moral lapses. With morality the characteristic pressure "consists in appeals to the respect for the rules, as things important in themselves, which is presumed to be shared by those addressed" [1] This is presumably in contrast with the more overt pressure usually occasioned by lapses from legal rules.

What can be said of Hart's cardinal features? The first is an inconclusive difference. Hart is clearly mistaken in some ways as to the second, and we have previously argued that moral rules are, in some respects, not immune to change.

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(1) Hart, p. 175.

The third shares, on Hart's own admission, some features in common with legal rules. The fourth is more persuasive, but a contrast cannot be invariably drawn: the penalty for some minor traffic offence or other small infringement of legal rules may require one to be the recipient of an appeal to a rule (with, no doubt, in some cases, an injunction not to repeat the offence.)

Might Hart's similarities not be shared by other rules? It might be argued that, e.g. the rules of a school boarding house fulfil similarities (a) and (b) but surely they fail to fulfil (c) since that provides that the rules "govern the behaviour of individuals in situations constantly recurring throughout life....".

Similarity (c) may be satisfied by strict ritual observances e.g. the dietary laws practised by orthodox Jews, but (a) assumes that such a person is bound by the rules independently of his individual consent, and this does not seem correct. Prisoners and draftees into the armed services appear to satisfy (a) and (b) but as to (c), are they always to be prisoners or draftees?; could their occupations be regarded as "special activities"? and this similarity in addition suggests a voluntary characteristic: "... demands which must obviously be satisfied by any group of people who are to succeed (italics mine) in living together". The only possible candidates appear to be members of religious orders who, having passed a novitiate stage, agree to be bound by rules binding independely of their individual consent. But an initial agreement is required, and this is not what Hart means: we are born into a society where the rules are

already conceived as binding, and no choice is involved.

For the above reasons I conclude that the similarities suggested by Hart are not shared by other rules.

Are the differences between moral and legal rules sufficient to outweigh their similarities? There are obvious differences to which attention should be directed, e.g.:

(a) Moral rules are largely self-administered, there being no person or body of persons authorised to administer them, or any coercive apparatus to ensure compliance with them. But this does not seem to be a crucial difference, because there are those, particularly in some position of authority (e.g. parents) who can draw attention to moral lapses and exercise coercion to prevent their repetition. In addition, it could be argued that as the legal apparatus is not omnipotent, at least some legal rules e.g. speed restrictions, are largely self-administered, and some traffic regulations certainly contain discretionary elements.

(b) A distinction can be drawn between the justification of moral and legal rules. Moral validity is presumably established by argument, and the obvious way to show that a rule is morally binding or valid is to show that it is justified in particular circumstances. Validity and justification are, therefore, close. But as Raz points out, the law is different.

> "The legal validity of a rule is established not by arguments concerning its value and justification but rather by showing that it conforms to tests of validity laid down by some other rules of the system which can be called rules of recognition. These tests normally concern the way the rule was enacted or laid down by a judicial authority." 1

The determination of the legal validity of rules of recognition

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(1) Raz Joseph, The Authority Of Law, Oxford, Clarendon Press, 1979, p. 151.

is similar, but the validity of what he calls "ultimate rules of recognition" is a matter of social fact;

> "namely that those ultimate rules of recognition are binding which are actually practised and followed by the courts." 1

But attempts to justify the operation of moral rules must also be a matter of social fact since, for example, the range of exceptions comprehended under moral rules and therefore socially acceptable, will depend on the composition of a particular society. This does not contradict my argument in Chapter 2 that while a society may change its moral attitude it cannot change something from being right to being wrong, or vice versa. It merely recognises a conventional element in the operation of moral rules.

(c) Of the four primary functions of the law (and therefore of legal rules) suggested by Raz[2], viz. (a) preventing undesirable behaviour and securing desirable behaviour; (b) providing facilities for private arrangements between individuals (c) the provision of services and the redistribution of goods; and (d) settling unregulated disputes, the conventional association is obviously with (a). But surely it would be odd to suggest that moral considerations should not influence (b), (c) and (d).

(d) As Raz points out, there is a discretionary element in the application of moral rules which is greater than, and different to, the application of legal rules. In many legal systems,for example in all common law systems,there are courts with power

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(1) Raz, Joseph, p. 151.

(2) Ibid. pp. 169-175 (the secondary features have to do with the operation of the legal system itself).

not only to settle at their discretion unsettled cases but actually to overrule established precedent, in fact to repeal laws and replace them with rules which they judge to be better than the old ones. But this is not, he claims, an effective counter-example to his view that the law consists only rules which the courts are bound to follow. Courts in common law jurisdictions do not have this power with respect to binding common law rules.

> "They may change them... for being unjust, for iniquitous discrimination, for being out of step with the court's conception of the purpose of the body of laws to which they belong etc. But if the court finds that they are not the best rules because of some other reason, not included in the permissible list it is nevertheless bound to follow the rules... For this reason the purported counter example fails. All it shows is that in common law jurisdictions there are courts which are sometimes at liberty to repeal some valid laws. Since they are entitled to do so only for certain specific types of reasons and not whenever this is desirable all things considered, their liberty to use their power to repeal those laws is consistent with the fact that they are under an obligation to follow them." 1

This last sentence suggests a close parallel with peoples' obligation to follow moral rules, but there is a difference.

> "People have an obligation to keep their promises... but this does not mean that they ought to keep their promises come what may" 2 (italics mine).

But courts may be obliged to follow a rule "come what may". Raz suggests that

> "If a legal system consists of a set of laws which can be identified by a certain test then it is meaningful to ask of rules and principles whether they are legal rules and principles. Law has limits and that is why we can refer to legal systems and to legal rights and duties which are not necessarily moral rights and duties etc." 3

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(1) Raz, p. 115.
(2) Ibid., p. 114.
(3) Ibid., p. 115.

This is a point of difference, largely because there is a greater requirement for continuity and certainty in legal deliberations, springing from the obvious fact that the law is an institutionalised system. But we have seen a limited degree of similarity as well.

(e) Many legal rules concern matters of moral indifference e.g. how many witnesses are required for a will to be valid, or which side of the road drivers are obliged to adhere to; these are examples of what Singer calls "neutral norms". But I suggest we should find on balance that the majority of legal rules are not morally neutral, or are subsidiary to rules that could not be construed as morally neutral.

Clearly the differences enumerated (and they are not all clear cut) do not suggest that they are more important or fundamental than the similarities claimed by Hart.

I assume that the third question, whether legal and moral rules are required for people who are to succeed in living together may be answered in the affirmative. No society, whether democratic or authoritarian,can survive in a state of perpetual social unrest, and I therefore assume the correctness of Hart's minimum content of natural law[1] as a working basis for social relationships in any group of people one might accurately designate as a "society". A grisly example of the abandonment of a moral code is provided by the Ugandan tribe the IK, who did so because it mitigated against survival.[2] The IK, in a state of

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(1) Hart, pp. 189 - 195.

(2) In the 1950's the Ugandan government converted their hunting lands into a game reserve.

social disintegration,

> "have successfully abandoned useless appendages, those basic qualities such as family, co-operative sociality, belief, love, hope and so forth ....". 1

But surely no society, however limited personal freedoms may be, can effect social cohesion without these basic qualities.

Have we now a "central case" of rules?

There is, I suggest, an assumption underlying Hart's perceived similarities which would vitiate them as criteria for similarity in all societies where the legal system is successfully separated from prevailing moral codes i.e. in societies which we should conventionally regard as "advanced". Hart's assumption clearly is that no citizens, irrespective of their social and/or financial status are above the law. But such similarities will not hold well where departures from moral or legal obligations are sanctioned by political or financial influence, corruption, or membership of some influential party or social class.

Hart's similarities will require some amendment. We might say that in countries where all citizens are, at least in principle, subject to the full effect of the legal system, the following similarities between legal and moral rules obtain:

(a) they are binding independently of the consent of the individual bound and are, in general, supported by varying social pressures for conformity;

(b) compliance with both legal and moral rules is regarded not generally as a matter of praise but as a minimum contribution to social life to be taken as a matter of course;

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(1) C. Turnbull, The Mountain People, London, Pan 1974, pp. 238-9.

(c) both laws and morals include rules governing the behaviour of individuals in situations constantly recurring throughout life rather than special activities or occasions, and though both may include much that is peculiar to the real or fancied needs of a particular society, both make demands which must obviously be satisfied by any group of human beings who are to succeed in living together.

This claim for a 'central case' of rules recognises that there may be occasions where the law actually encourages immorality. This may be unintentional and result from the inherent contradictions of certain types of legal prescription, particularly those governing sexual relations, but the result is nevertheless unfortunate. Thus when the only recognised ground of divorce is adultery, an unhappy spouse may be driven to the act in order to qualify. Similarly the law encourages lapses from female virtue when seduction under promise of marriage is made a crime.

The most inexplicable confusion of moral values, however, is represented by the US Federal Mann Act, which makes it a felony to take a woman across a State line for immoral purposes. A man who with such a purpose in mind takes a woman from New York to Albany commits no crime. But a man who for the same purpose takes a woman across to New Jersey has violated the Federal law and made himself subject to ten years' imprisonment,

I will now consider other possible relationships between law and morality beyond the notion of a 'central case' of rules to see whether such relationships, if they exist, might reinforce it.

Part 2 : Lyons and Possible Necessary Connections Between Law And Morality.

I now consider what Lyons[1] suggests could be construed as "necessary" connections between law and morality. His first candidate is what Lyons calls the "standard of strict adherence", typified by Hart's suggestion that

> "to apply a law justly to different cases is simply to take seriously the assertion that what is to applied in different cases is the same general rule, without prejudice, interest or caprice". 2

As to the two general contexts in which questions of justice arise, judging the justice of laws and judging the justice of their application, Lyons is concerned here with the 'procedural' rather than the substantive: that part of justice that relates to the application of law to particular cases.

Hart rejects the notion that justice is simply conformity to the law since we can competently judge laws to be unjust and sometimes do so. In evaluating the law from the standpoint of 'justice' one is appealing to standards the law does not automatically respect, and quite clearly these standards must therefore be independent of the law. A law may be judged unjust e.g. because it discriminates between people in a morally unacceptable way, on the basis, say, of colour.

Hart, however, rejects this notion for the application of the law to particular cases; the law itself provides the proper basis for deciding which cases are to be treated alike

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(1) David Lyons, Ethics And The Rule Of Law, CUP, 1984.

(2) Lyons, p. 82.

or differently, and how they are to be treated. Harts' concept of procedural justice requires strict adherence to the law as far as possible, and has to it two parts. The first is the standard of strict adherence, the second is that this principle of justice "can be extracted from the concept of law".[1]

Lyons construes the standard of strict adherence as meaning that an official acts unjustly if he fails to deal with cases in the way the law prescribes. This has, however, to be qualified because justice concerns not only the administration of the law but the laws themselves. If a law is sufficiently unjust there may be strong moral reasons not to respect it; but deviations from the law must occur only in exceptional circumstances, and by the strongest considerations.

> "Furthermore, if the standard makes any difference to the evaluation of official conduct, it must be capable of overriding conflicting moral considerations." [2]

The notion of procedural justice draws on the important observation that injustice can be done not only by following the law but by applying it unfairly. Lyons' example is a black convicted for using a white wash room under a law which provides separate and inferior public facilities for blacks. As the law discriminates against a section of the community it is unjust, and the injustice may be compounded in this particular case by the black being treated with unusual severity. He thus appears to have two grounds of complaint: firstly, the injustice of being penalised under a discriminatory rule, secondly, the injustice of being singled out for specially bad treatment.

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(1) Lyons, p. 80.

(2) Ibid. p. 80.

On Hart's theory of procedural justice, construes Lyons, a conflict of moral principles is involved. If the unjust law is enforced, an injustice is done but, on the standard of strict adherence, if the law is not enforced an injustice is also done. It is possible that an official may be morally justified in failing to follow a law and, on Hart's view, this would presumably be the case if the injustice caused by following the law would be greater than that done by departing from it.

Lyons argues, successfully I think, that the standard of strict adherence is mistaken. Hart and others who embrace the standard certainly believe that a principle of justice is violated whenever officials fail to follow a law they are charged with administering, even allowing that the standard may sometimes be broken. "But no other conditions are laid down for the application of this principle".[1]

This goes, therefore, considerably beyond the idea that justice in the application of the law is somehow independent of justice in the laws themselves. Injustice may be done by following the law but also by applying it unfairly, but this does not mean that every deviation from the law by an official who is charged with administering it, is an injustice, the breach of a moral principle. What Hart seems to show is that following the law amounts to a way of treating cases in a regular or uniform manner.

> "But he does not show that treating cases in the way prescribed by the law is treating them in a way that is required, or even allowed, by a principle of justice, including a principle of procedural justice." 2

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(1) Lyons, p. 82.

(2) Ibid. p. 83.

So treating cases in a regular or uniform manner may be a necessary condition of justice, but it is not a sufficient condition of justice. It does not establish that any sort of justice is done.

But, says Lyons, there is another important aspect of Hart's theory of justice in the application of law to particular cases. We have assumed, so far, that the law is unproblematic and provides clear guidance for official decisions. But where the law is unclear, it appears that impartiality has a larger role to play. When the law is unclear it cannot simply be followed but must be "gone beyond". Impartiality here is not merely a negative constraint but a more substantial guide to judicial conduct. If courts render authoritative interpretations of the law but have the discretion to decide its meaning when it is unclear, then they do not merely apply the law but help to make it. Statutory legislation can be vague or ambiguous and in common law systems a judicial decision on a point of law is often framed to deal with specific circumstances and provides no more guidance than is necessary to settle the immediate issue. How are courts, then, to settle hard cases?

Lyons canvasses two general approaches, one by Hart, who emphasises the limits of the law, and the second by Dworkin. A second question will emerge, he suggests - when courts decide hard cases in the way they ought to be decided, can they be understood to be deciding them according to law?

In Hart's view the body of law amounts to a collection of rules most of which are valid because of the system's rules of recognition, whether this provides a satisfactory account

of the status of the common law is not a matter to be pursued in this context . Rules are general in that they concern classes of acts that may be performed by individuals who belong to specified classes of persons. Rules have a general character because they are to be applied to a wide range of situations that may differ in various ways. The meaning of a rule is determined by the terms used in legislation or in its standard formulation by the courts (although we may note Simpson's observation[1] that common law rules may have no settled form of words). General terms have a "core" of determinate meaning: standard usage applies a term uncontroversially to some cases and does not apply it to others. But there is a "penumbra" of uncertain meaning due to general terms being somewhat vague or "open textured". So rules, like terms, can be open-textured as well, some cases being decided by applying them but others cases not.

Courts may take into account the purpose of a rule to decide a case e.g. in deciding whether a skateboard is a 'vehicle' that should be prohibited from public parks. But purposes can be unclear. Judicial precedent may make existing legal rules more determinate but 'gaps' in the law can never be eliminated. How then should courts proceed in 'hard cases'? Hart suggests one answer in saying that laws should be applied "without prejudice, interest or caprice",[2] but clearly the judicial role will be more complex than this. Judges therefore "display characteristic judicial virtues... impartiality and neutrality in surveying the alternatives; consideration for the interest

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(1) Simpson, p. 88.

(2) Hart, quoted Lyons, p. 82.

of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision".[1] What role does this impartiality play? Hart seems to suggest that courts should decide hard cases in a morally responsible manner, by appealing to standards that are capable of determining what should be done. This suggests that where the guidance of the law has been exhausted,courts should decide such cases by appealing to moral principles.

Lyons suggests that this is "another possible necessary connection"between law and morality; that is, between law and those moral principles that judicial duty requires be used in deciding hard cases".[2] But he seems equivocal in this suggestion by then claiming that "our concept of the proper judicial role is unclear in precisely these cases" [3] and in questioning the assumption that hard cases cannot be decided on the basis of existing law. He suggests that his posited connection "may rest on false assumptions - about the logic of judicial reasoning and the limits of the law".[4]

But Lyons has no reason to be confused in this matter, since the application of "moral principles" in deciding hard cases is precisely the method employed by some judges in some cases. In fact the matter is more complex than Lyons suggests.

> "....when faced with new problems, or when devising new solutions to old ones, English judges have taken into account principles which cannot be said to be derived even from the authority of legal textbooks.

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(1) Hart, p. 158.

(2) Lyons, pp. 91-92.

(3) Ibid. p. 92.

(4) Ibid. p. 92.

> Lord Denning has proclaimed the emergence of a 'right to work' which may have an important impact on legal doctrine... Viscount Simonds.... has on one occasion appealed to 'abstract principles of justice' in deciding a novel point of international law and, on another, to 'contemporary ideas of justice or morality' when refusing to follow the rules laid down in the Court of Appeal that a tortfeasor is liable for all the direct consequences of his negligent act". 1

Eekelaar suggests that

> "It is not surprising that judges resort to authoritative sources outside their own immediate system in an area of law like private international law where local judicial authority is scant. The same is true of constitutional law.... in Burmah Oil Co. v. Lord Advocate, which concerned the question of whether a citizen has a right to compensation against a government which seizes his property in an emergency, careful attention was paid to the views of Scottish and European institutional writers, to decisions in the United States and to the work of the political theorist, Lohn Locke" 2 (italics mine)

Are these sources to be regarded as 'law' within a jurisdiction in the same sense as, for example, a local authority by-law? Well, they do distill normative propositions, and it seems unimportant whether they are considered 'legal', 'moral' or 'social'.

> "Their significance lies in the fact that they provide guidelines which are seen by courts as being relevant to the solution of the problem in hand.... it would... rash to conclude that the sources which have been considered cannot form the basis of a truly legal decision." 3

But Lyons is attracted to canvass a theory of hard cases first suggested by Dworkin[4] and later by MacCormick[5] which

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(1) Eekelaar, p. 35.

(2) Ibid. p. p. 36.

(3) Ibid. p. 37.

(4) Lyons, p. 95 and see p. 217 (Dworkin, Rights chaps. 2-4)

(5) Ibid. p. 95 and see p. 217 (N. MacCormick, Legal Reasoning and Legal Theory, Oxford, Clarendon Press, 1978)

emphasises the role of moral principles in adjudication and suggests another "necessary connection" between morality and law. Lyons summarises the theory as follows: legal reasoning, like other kinds of reasoning, can deal with legal matters of fact that are subject to discovery, even though hard and fast rules are not being applied. Sound legal arguments can take conflicting considerations into account and give them their due weight, in view of specific facts and relevant standards. But, suggests Lyons, a theory of hard cases, in making sense of actual practice, must explain how legal argument can go beyond the application of clear, specific rules and yet be grounded on established law.

The answer is that the various arguments applied to hard cases can best be understood as being regulated by the principle of fairness, that like cases be treated alike. Since, Lyons suggests,

> "it is claimed to make good sense of actual practice, which implies that law is discovered, not made, in hard cases, the theory may be understood to show how a moral principle (fairness) helps generate decisions that can be justified by existing law." 1

Courts will, therefore, in Lyons' view, make, for instance, reference to the legislature's intention, the history of particular legislation, and will interpret legislation on the regulative principle that it should be construed, if possible, as a reasonable means to achieve some reasonable ends.

Let us suppose, says Lyons, that a legislature enacts a law prohibiting any reference to racial and sexual discrimination in agencies, and a court must decide whether this out-

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(1) Lyons, p. 96.

laws or permits "affirmative action" programs which give preference in hiring to women and others, including groups that have suffered discrimination in the past. In his discussion of the matters which the court should take into account,Lyons suggests among other things that the decision "may be based on the actual history of the legislation, including arguments advanced for it."[1] (italics mine) As contemporary social standards are to be taken into account it seems difficult to justify the view that the law is here being discovered, rather than made.

Lyons detects a difficulty in this theory in that past legislative and judicial decisions can serve as a basis for decisions in hard cases "only if and when those past decisions are justifiable, and only within the limits of an argument from fairness".[2] If statutes are unjustifiable (e.g. segregation statutes) then cases cannot be decided by reference to principles or policies that are capable of justifying the statutes. For the theory assumes that past legislative and judicial decisions are justifiable, and it interprets those decisions in terms of standards that are capable of justifying them. Such cases may then be decided by the courts but cannot be grounded on existing law. This is because Lyons claims, "those decisions cannot be justified in the way the theory requires".[3]

There is, says Lyons, a further difficulty which applies to 'easy' cases that are decidable by the more or less mechanical application of rules. He supposes that a legal system

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(1) Lyons, p. 96.
(2) Ibid. p. 100.
(3) Ibid. p. 100.

discriminates against blacks, and to further ensure the stability of the system, it provides that a white man may claim damages from any black who publicly challenges his racial superiority. In any particular case that arises when there is sufficient evidence to justify a particular white man's claim for damages, then the decision that seems to be required is that the court should uphold the claim. We are to assume, as Lyons puts it, "that this law cannot be nullified on constitutional grounds".[1]

Lyons claims to see, on any facts so far cited, no reason why such a decision should be justified. Why not?

The courts making these rulings are, one gathers, not merely temporary retributive tribunals but established institutions in a country that would pass any test required for de jure recognition. If not incompetent on any legal ground, then the objection must rest on Lyon's dislike of racial discrimination and the injustices it engenders; but this is neither a necessary or sufficient ground for claiming that the facts (he supplied) do not require the decision in the white man's favour.

He allows that it may be argued that the decision that seems required by law is justifiable precisely because it is required by law. How does this affect the notion of justification? It is often claimed, he suggests, that judicial decisions can be justified when they are required by clear, specific rules generated by past legislative or judicial decisions. If law is morally fallible this assumes that following established rules is justifiable even when the rules themselves are not. But the practice of following established rules presupposes further values that are supposedly served, no matter how bad established rules may be. If a system is sufficiently unjust one may not be justified in following its established rules.

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(1) Lyons, p. 101.

This is where, Lyons suggests, the principle of fairness may be thought to operate. While fairness may not be the only value to be served, we may assume that judicial respect for established rules is required by the principle. Despite, therefore, the moral deficiencies of past legislative and judicial decisions and the rules they have generated, there seems also a good, though not perhaps conclusive, reason for following them.

But Lyons, considering the case he has proffered, sees no reason for fairness to require, or even allow, that established rules should be followed regardless of how bad they may be. He sees no plausibility in the idea that if the law permitting white men to claim damages from blacks for challenging their racial superiority has been applied uniformly in the past, then fairness might suggest that it be applied the same way in the future, on the ground that it amounts to treating like cases alike. He suggests that treating like cases alike makes a difference in some cases but not all. "Its plausibility varies inversely with the immorality of past decisions".[1]

Lyons then considers the suggestion that the justification of decisions required by established rules might still be salvaged by "relaxation" so that some kind of justification is always available for legislative and judicial decisions. He allows, that if a legislature passes segregation laws to prevent racial 'pollution' and

> "if arguments like this can count as 'justifying' such legislation, even when they are unsound, then 'justification' will be more generally available, although the notion of justification will then be interpreted in more or less arbitrary terms, based on, say, the values of those who wield power in the community". 2

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(1) Lyons, p. 102.
(2) Ibid., p. 103.

He concludes that the theory of hard cases can be interpreted according to the notion of justification used. The first notion of justification has moral significance and assumes that the arguments used in particular decisions rest ultimately on standards by which law can properly be judged. But the second notion of justification will rest ultimately on "unsound and arbitrary premises". If hard cases can be decided by reference to existing law then the decisions will generally reflect the merits and demerits of the law, and no significant connection between morality and law can therefore be established.

Lyons allows his dislike of racial discrimination to lead him into obvious difficulties. He finds "puzzling" Dworkin's suggestion that "law under such regimes as Nazi Germany and South Africa - law that one might think not sufficiently just to be taken as settled for reasons of fairness -"[1] generates genuine rights and obligations, which are capable of conflicting with rights and duties that are independent of the law.

He suggests that one possible explanation of Dworkin's claim is that he assumes justice and fairness are matters of degree. The more just a system the stronger considerations of fairness suggest respect for legal rights and duties. He observes that injustice in a system may be unevenly distributed and while some parts of the law may be unjust other parts may be completely defensible. He invites us to consider law in the United States prior to the passage of the Thirteenth Amendment which abolished

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(1) Lyons, p. 107.

chattel slavery.

> "While it seems reasonable to hold that laws enforcing slavery could not be justified, it can be assumed that this aspect of the law did not render all the rest unjustifiable." 1

But who would ever suppose that it did? Lyons asserts that

> "this will not show what Dworkin seems to imply - that all clearly established legal rights and duties are capable of conflicting with independent moral rights and duties. Laws enforcing slavery, for example, seem to generate rights and duties that are mostly legal, devoid of moral force". 2

One might be excused for thinking that in any kind of oppressive regime the clearly established legal rights and duties would be more likely, not less, to conflict with independent moral rights and duties. Lyons' last sentence is ambiguous: is he making a factual claim about existing chattel slavery e.g. in some Islamic countries, is it an "in principle" argument or, perhaps, a factual claim about the ante-bellum South? If the last, it seems false. The question is: do laws, say, in our society, generate rights and duties with respect to chattels (of any kind) that are merely legal,or is some moral dimension involved? It seems that the making, exchange, buying, advertising etc. of chattels gives rise to laws that have a moral dimension in respect of obligation, promising, warranty, and general good faith. Why not then in respect of the negro - a chattel - who was used for a variety of purposes including breeding?

If Lincoln is to be believed the role of slave trader generated moral tension in southern communities:

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(1) Lyons, p. 107.

(2) Ibid. p. 107.

> "You despise him(the slave dealer) utterly. You do not recognise him as a friend, or even as an honest man.... If you are obliged to deal with him, you try to get through the job without so much as touching him.... Now why is this? You do not so treat the man who deals in corn, cotton or tobacco?"[1]

One has only to consider the effects of the "underground railway" devised to enable runaway slaves to reach the northern states, and the repercussions of the Supreme Court decision of 1857 in the Dred Scott case to see that Lyons is surely mistaken in his suggestion that unfair laws are devoid of moral force. If his point is "in principle" then it has nothing to recommend it, because it is devoid of the factual content that would give it relevance.

What are we to make of Lyons' attempts to explore possible 'necessary' connections between the law and morality? He seems correct in rejecting Hart's notion of strict adherence but curiously abrupt in his oversimplification of, and dismissal without further discussion of, the possibility that moral principles may be employed in the resolution of hard cases. It is appropriate to point out here that the notion of 'hard cases' are conventionally thought of as agonising moral dilemmas requiring the attributes of Solomon for their resolution whereas, they are, by definition, first and foremost merely cases where there is no clear judicial precedent, or where the law is equivocal. This is not to say that, in e.g., cases of alleged euthanasia, purely moral judgements on persuasive facts may not be appropriately exercised.

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(1) Quoted R. Weaver, in The Ethics of Rhetoric, Chicago, Henry Requery Coy. 1953, p. 92.

The alleged "necessary connection" between the employment of moral principles and the resolution of hard cases is Lyons' most healthy candidate for such a "connection", since I contend that Dworkin is correct in his claim that even the laws of oppressive regimes may generate genuine rights and obligations which are capable of conflicting with rights and duties that are independent of the law. However, this connection between the employment of moral principles and the resolution of hard cases seems purely contingent.

I now consider a more ambitious claim, one that denies the separation "of law and morals".

Part 3 : Detmold And The Unity Of Law And Morality.

Detmold[1] is concerned with the refutation of the legal positivist thesis of the separation of law and morals, and claims that legal judgments can be shown to entail claims to their corresponding moral truths. Legal positivism holds,

> "that the logical character of judgments under rules is such that one can make it without being committed to that judgment in any ultimate moral sense. On this view nothing conclusive is done by our taking a rule: no moral question is importantly prejudiced. But the view is a false one". 2

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(1) M.J. Detmold, The Unity Of Law And Morality, London, Routledge and Kegan Paul, 1984.

(2) Detmold, pp. 21 - 22.

What is to be understood here by the term 'legal' positivism'? In its simplest form it involves two basic assumptions: firstly that all law is positive law in that all laws owe their status as such to the fact that they have been laid down and secondly, that the law exists as a set of rules, the rules being identical with and constituting the law.

> "Around these two basic assumptions cluster various ideas either derived from them or at least intimately associated with them. Thus, if all laws are laid down, all laws must have an author, for someone must have performed the act of positing the law. Secondly, there must be some test or criterion for identifying the lawmaker or lawmakers who have authority to lay down the law, or entitlement to do so,.... Thirdly, if law is by definition laid down, all law must originate in legislation, or in some law-creating act. Fourthly, law so conceived will appear as the product of acts of will, and the law which results as the will of the lawmaker. Fifthly, if laws owe their status to their having been laid down by the right author, it cannot be a necessary characteristic of law that it should have a particular content, for its content will depend upon the will of the lawmaker, who may be devil or angel or something in between - hence the separation of law and morals...." [1]

Disregarding the obvious difficulty legal positivism has in giving a coherent account of the common law,[2] we pass directly to Detmold's objections to the notion of the separation of law and morals.

"Rule Judgment", Detmold argues, "is not just legal judgment or chess judgment, but ultimate moral judgment".[3] This is because, for Detmold, moral judgment is "a conclusive judgment about life, liberty, property, and the like (matters

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(1) A.W.B. Simpson, "The Common Law And Legal Theory" in Oxford Essays in Jurisprudence, Oxford, 1973, second series, p. 82.

(2) c.f. A.W.B. Simpson, pp. 77-99.

(3) Detmold, p. 22.

of importance, certainly including all the matters of the law)...."[1]

The normal expression by legal positivists is to say that rules, including legal rules are provisional, or prima facie, and for any decision under a rule the "full moral question awaits separate answer."[2]

But how, for example, can a judge sentence a prisoner prima facie to be hanged? He is either to be hanged or not, since a legal sentence is surely conclusive, and "prima facie" suggests that no such conclusion has been reached. But, Detmold suggests, "the thesis of the separation of law and morals has it that legal judgment is in some sense prima facie judgment."[3] He quotes Raz's claim 'that the primary organs (courts) follow and apply the rules of recognition does not entail that they hold them to be morally justified"[4] and suggests that here the thesis is being applied in a widely accepted way.

Let us suppose that the judge in sentencing the prisoner is following and applying a rule of recognition which identifies a certain statute prescribing the death penalty. Could it be that the judge's following and applying the rule of recognition does not entail that he holds it to be morally justified?

This could only be true, Detmold claims, if the following were non-contradictory:

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(1) Detmold, p. 34.
(2) Ibid. p. 22.
(3) Ibid. p. 22.
(4) Ibid. p. 22 - 23.

"(A) The prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang." [1]

This can be formulated more specifically:

(AA) I ought to sentence the prisoner to hang, but it is not the case (morally) that I ought to sentence the prisoner to hang.

Detmold asserts that "if (A) is a contradiction (and I think it is) then the entailment which the thesis of the separation of law and morals rejects obtains".[2]

I suggest that (A) is not necessarily a contradiction, but before arguing for this we should be sure what the thesis of the separation of law from morals implies for Detmold.

It is important, he suggests, to distinguish two senses of the moral justification of a rule: firstly, a rule is morally justified if morally it ought to be followed, and secondly, if the making of the rule were at issue it would be morally justified to make the same rule. For Detmold the first is the practical sense of moral justification, the sense considered by his argument, and the second is more suited to "idle reflection".[3] He is uncertain which sense of moral justification Raz intends in the passage quoted. If he intends the second, which is devoid of philosophic interest, then he is right, "for the application of a rule does not entail that the rule is morally to be chosen were its making an issue".[4]

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(1) Detmold, p. 23.
(2) Ibid. p. 23,
(3) Ibid. p. 33.
(4) Ibid. p. 34.

This does not support the thesis of the separation of law and morals, but is merely an example of a more general thesis that rules are sometimes binding when they ought to be otherwise. This merely exposes one of the logical features of a rule, and applies to legal criticism of a legal rule as well as to moral criticism, as when, for example, a court follows a precedent case even when it would prefer on legal grounds to decide otherwise where there is no binding precedent.

So clearly the following case is a paradigm of the thesis that rules are sometimes binding when they ought to be otherwise: -

> "Judge Lazarus placed a woman on two years probation for the theft of $90,000 when he wanted to send her to jail, because the woman's male friend had been ordered to serve 180 hours of community service. He said he had no choice but to give probation because of the legal principle of parity in sentencing co-offenders. (Under the parity principle, people charged with the same offence receive similar sentences)." 1

Detmold would undoubtedly want to place the consequences of the Mann Act in the same category, since the peculiar confusion of moral values that result from its application is occasioned by the separation of powers under the US Federal system.

To return to (A). Independent of any particular moral code, I suggest that (A) is demonstrably non-contradictory. Before arguing to this effect let us follow Detmold's argument further.

Detmold argues that proponents of the thesis of the separation of law and morals have maintained that the first

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(1) Melbourne "Age", October 6th, 1984, p. 10.

part of (A) is a legal not a moral norm and has, therefore, only prima facie force. Clearly they are right in suggesting that the following is not contradictionary:

> "(B) Prima facie the prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang".[1]

But (B) must be rejected as a justification of a judge's sentence, as a prima facie sentence is not a sentence at all. It is irrational to say that we ought to do what we prima facie to do (we ought to sentence the prisoner if we prima facie ought to sentence the prisoner; and it is illogical if it equates what we prima facie ought to do to what we ought to do.

How else, he asks, might (A) be defended? Perhaps,

> "(C) According to the law the prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang." [2]

There are, says Detmold, three possible ways of interpreting the first part of (C). Firstly, it might be regarded as a description of the content of a given legal system:

> (C1) The fact is that according to the law of (a given community) the prisoner ought to hang, but it is not the case (morally) that the prisoner ought to hang.[3]

(C1) is not contradictory but it will not do as a justification of a judge's sentence, because the mere existence of a norm cannot by itself justify a practical decision.

Secondly, one might regard its first part as normative in the ordinary way with the addition of the words 'according to law'. Thus:

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(1) Detmold, p. 24,
(2) Ibid. p. 24.
(3) Ibid. p. 24.

(C2) The prisoner ought to hang according to the law, but it is not the case (morally) that the prisoner ought to hang...[1]

Detmold asks what can be made of the additional words "according to the law"? Either, he argues, these words qualify the norm in a normative way or they are redundant. They can do no more than qualify the norm normatively by making its force prima facie. C is thus reduced to B, and B has already been rejected as a justification of the sentence. If merely redundant, contradiction is plain.

I do not see that "C is thus reduced to B" and in any event, the sentence may not be morally justified.

If, says Detmold, we accept Raz's analysis of normative statements , then there is a third way of interpreting C. To Raz there is a normative statement which is neither an ordinary normative statement nor a statement of fact about someone's beliefs (neither (C2) nor (C1)), but which states what ought to be done from a particular point of view without endorsing that point of view.

> Thus Raz maintains that "... If I go with a vegetarian friend to a dinner party I may say to him 'You should not eat this dish. It contains meat.' Not being a vegetarian I do not believe that the fact that the dish contains meat is a reason for not eating it. I do not, therefore, believe that my friend has a reason to refrain from eating it, nor am I stating that he has. I am merely informing him what ought to be done from the point of view of the vegetarian. Of course, the very same sentence can be used by a fellow vegetarian to state what ought to be done. but this is not what I am saying, as my friend who understands the situation will know." [2]

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(1) Detmold, p. 24.

(2) Ibid. p. 25.

From this 'point of view' it is now possible to formulate:

> (C3) From the legal point of view the prisoner ought to hang, but it is not the case morally that the prisoner ought to hang.[1]

Detmold considers it a "difficult question" as to whether this is contradictory; if it is not then it confirms a certain form of the thesis of the separation of law and morals. But will the first part of (C3) justify sentence, for only then will it concern legal judgment and decision, and not mere armchair speculation? But statements from 'points of view' do not justify practical decisions. "No legal decision is justified by a statement from the legal point of view. Thus (C3) cannot justify a sentence."[2]

Whether (C3) is contradictory or not, I propose to show that (A) is not contradictory. In the 1930's my father was a district officer in the Sepik district of New Guinea, charged with, among other things, the prevention of head hunting and the apprehension and arrest, for sentencing, of its perpertrators. He remarked that the Sepik people were 'agin' the Government "for the very good reason that Government interfered with some of the customs which they wished to preserve, such as head-hunting and the settlement of arguments in their own way. They were determined to continue their own ways. I was determined to stop them....."

"I would sit down amongst the old men of the village and argue the Government's position and point out that Government's idea of law and order did not include either head-taking or war between neighbours.

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(1) Detmold, p. 25.
(2) Ibid. p. 26.

"It made no difference. Just as strongly the elders would point out, perfectly logically as far as they were concerned, that there was now an increasing number of young men in the village who had not taken their heads and therefore could not get married or take their place as adults in the community."[1]

Three villages went head-hunting in defiance of his warning and "on each occasion it took us at least two months of relentless pursuit through swamp and jungle before we rounded up those we wanted for the killings. In this we dared not fail for at least 30,000 were waiting for a sign of weakness."[2]

Each time after capture the accused were sent to Rabaul for trial before a judge operating under the Queensland criminal code, who did not have the discretion of taking native custom into account when deciding a case but only in understanding it. The convicted men were returned for execution within the District and the District Officer observed that, "Three times I took men back to the very spot where they had made their killings and hanged them with my own hands."[3]

Now what of the judge in Rabaul? He understands both that the Sepik natives have had the institution of head-hunting since time immemorial and that he is charged with condemning the perpetrators to death by hanging (the mandatory sentence) since they are clearly guilty. Why is it contradictory for the judge to be both cognisant of his duty: "the prisoner ought to hang" and aware that Australia was an 'occupying' power

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(1) Townsend, G.W.L., District Officer, Sydney, Pacific Publications, 1968, pp. 152-153.

(2) Ibid. p. 152.

(3) Ibid. p. 153.

in a country with different and varying moral attitudes: "it is not the case (morally) that the prisoner ought to hang?" Surely he cannot maintain in any particular head-hunting case:

> "(X) The prisoner ought to hang, and it is the case (morally) that the prisoner ought to hang."

because this is to (morally) convict under a moral code which the accused have never had any genuine opportunity to subscribe to. We may note by contrast, that the continual exposure of aboriginals to our moral code has culminated in a legal attitude where, to quote an account of a recent case,

> "Mr. Commissioner I.B. Burnett warned that traditional tribal punishments were criminal, could not be condoned and would not be tolerated... The Commissioner said the court would not order or impose traditional punishment which itself was unlawful, nor would it condone or tolerate actions which were unlawful but which were sought to be justified because they were traditional or tribal". 1

From an "European" point of view this attitude is now not unreasonable.

If Detmold maintains that (A) is contradictory then (X) cannot be. But what does (X) achieve? All it can guarantee is a connection between some legal system and some moral code. There seems no real discernible difference between:-

(I) A judge in 'our' system saying 'the prisoner ought to hang and it is the case (morally) that the prisoner ought to hang'.

and (II) Roland Freisler, President of the Nazi Peoples' Court screaming 'the prisoner (e.g. one of the Bomb Plot conspirators whom he tried) ought to

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(1) "The Advertiser" (Adelaide), April 13, 1985, p. 16.

> hang and it is the case (morally) that the prisoner ought to hang' (because he has broken his oath of allegiance to the Fuehrer etc. etc.)

Indeed, Detmold agreed with me[1] that (I) and (II) were "formally equivalent". (X) then in respect of any particular moral code, is trivially true.

Detmond observes that

> "A favourite case in legal philosophy is Nazi Germany: were the laws, so-called of the regime law but immoral, or not law at all?" 2

But surely (X) tends to favour the legal positivists; this cannot be Detmold's intention.

I am not alone in finding Detmold's argument unconvincing. Wood[3] argues that Detmold's admission that (C3) may not be contradictory is more than he can permit. Detmold, to Wood, sees the positivist as holding not just that (A) and (C3) are each perfectly consistent, but that the first part of these propositions justifies the second part. Certainly, argues Wood, the positivist is committed to showing that (A) and (C3) are consistent, but why suppose that he is not only committed to the moral soundness of the sentence but also "to its being justified by the norm presupposed by the first part of these propositions?"[4] The positivist affirms that no moral proposition can be established by any legal proposition or indeed any set of legal propositions, and therefore

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(2) Detmold, p. 37.
(1) discussion, October 1985.
(3) David Wood, in a review of The Unity of Law and Morality A.J.P. Vol. 63, No. 4, December 1985, pp. 562-564.
(4) Ibid. 563.

whether a prisoner ought morally to hang is not supported by its being the case that he ought legally to hang.

Is Detmold confusing the question of a judge's legal obligation with his moral responsibility? In terms of Detmold's example, suggests Wood, positivists like Hart who think that the law and morality are distinct sources of obligation and that the law genuinely obligates and not coerces, must steer a middle cause between two alternatives. The first is that "the judge merely mouths the relevant norm that requires him to impose the death penalty on the prisoner, acknowledging no commit ment to the norm at all. The second alternative is that the judge regards this norm as morally binding".[1] Detmold is bound to deny the middle course, claiming that the judge cannot be merely prima facie morally committed to the death penalty imposing norm because such commit ment would justify only a prima facie sentence, and that no sense can be made of this.

But, as Wood remarks,

> "Detmold here seems to just beg the question of whether a distinction can be drawn between a sentence's being genuine and its being morally justified. Why cannot the sentence still be genuine even if it is only prima facie morally justified?" 2

This is, I have argued, precisely the sort of sentence the judge in Rabaul was bound to make, genuine in every respect of formality and effect but only prima facie morally justified because of the cultural (as well as legal) hegemony Australia was determined to exercise.

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(1) Wood, p. 563.

(2) Ibid. pp. 563-4.

I contend that Detmold has failed to show that a sentence cannot be genuine and yet at the same time be only *prima facie* morally justified, and that his refutation of legal positivism collapses accordingly.

CONCLUSION.

I have argued that we can speak intelligibly of 'moral rules' and of moral and legal rules constituting a 'central case of rules' and, further, that there is a connection between the employment of moral principles and the resolution of 'hard cases', though this connection is purely contingent.

It is clear from the notion of a central case of rules advanced earlier, that moral and legal rules are essentially supportive of each other in the maintenance of social order, despite instances of morally neutral rules and the law's occasional and inadvertent encouragement of immorality. This notion is not weakened by the fact that repressive regimes pass, and maintain, laws that discriminate against minorities and result in, to a philosophically liberal point of view, unacceptable degrees of censorship, regulation of citizens' mobility, or intrusion into their private affairs. Why not?

The claim that 'an unjust law is no law at all' is, in Lyons' view, paradoxical, "for it seems to say that something which _is_ law (unjust law) is _not_ law."[1] He suggests that the paradox might be dissolved by the claim that, as the counterfeit dollar is not a real dollar, so

> "an unjust law is so much a perversion of the idea of law that it cannot be counted as law at all." 2

But this claim seems to be false.

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(1) Lyons, p. 62.

(2) Ibid., p. 62.

> "It seems difficult to deny that laws can intelligibly be judged good or bad, wise or foolish, just or unjust. If there _are_ moral standards by which laws may properly be judged, then it would seem that laws can _be_ good or bad, just or unjust." 1

A claim that'unjust laws are no laws at all' points up Lyons' observation that

> ".... it can be assumed that this aspect of the law (relating to Chattel Slavery) did not render all the rest unjustifiable." 2

This observation can, I suggest, be applied, with suitable alteration, to Nazi Germany.

There seems little evidence that the primary functions of the law suggested by Raz were not informed by moral considerations towards a majority of citizens in Germany to a considerable degree.[3] The implications are broader. Any claim, for instance, that _because_ Dr. Goebbels exercised strong control, including rigid censorship. over the German film industry, _no_ films of genuine artistic merit (apart from historical romances or musicals) were produced in Nazi Germany would be false.[4]

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(1) Lyons, pp. 62-63.

(2) See page 171

(3) The Nazis knew _just_ how far they could go. in 1940-41 they canvassed the introduction of euthanasia in mental hospitals and old people's homes, but this proposal was withdrawn when the German people reacted strongly against it.

(4) c.f. Hull, David Stewart, _Film In The Third Reich_, Berkeley, University of California Press, 1969.
See particularly his discussion of _Heiratsschwindler_ (The Marriage Swindler) pp. 122-123, and _Ich klage an!_ (I accuse!) pp. 200-203. There are, it is true, some sinister overtones concerning the second film (see pp. 201-2) but, "...there have been several Hollywood pictures along similar lines which stacked the deck far more in favour of euthanasia without anyone getting unduly excited..." (p. 201).

And it is with false claims that I have contended. That there *are* moral rules and that moral and legal rules are essentially linked in the maintenance of social order are modest, and, to some, obvious conclusions. But what is of significance are the casualties: claims that there are no moral rules or, if there are, they are of *no* importance in moral reasoning; that all rules *must* share one essential characteristic; and that law and morality *must* be inseparable. These claims, when 'run against the world', have proved to be *false*.

I have, throughout, been guided by Elton's injunction that,

> "research work of this journeyman kind deserves to be judged by the only tests it seeks to satisfy.... has it asked questions that are right and adequate in the context of the problem, has it found reasonable answers?"[1]

My answer is affirmative, though as to the answers perhaps like Alice's friend the Duchess, I should claim,

> "That's nothing to what I could say if I chose".

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(1) Elton, G.R., *The Practice Of History*, London, Collins, 1982, pp. 34-35.

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