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Legal Positivism and the Objectivity of Law\*

1. *Introduction*

In this article, I maintain that legal positivism leaves some room for the idea of objectivity in the determination of the law, though not as much as one might think. More specifically, I maintain that on a legal positivist analysis we can attain legal objectivity at the level of the sources of law, though not at the level of interpretation and application of the law. The reason, I argue, is (i) that the identification of the legal raw material at the level of the sources of law is a purely factual matter, whereas the interpretation and application of this raw material often involves moral reasoning; and (ii) that reasoning about factual matters can be, and usually is, objective, whereas it seems that moral reasoning cannot be. This means, *inter alia*, that I reject the notion – entertained by Joseph Raz, among others – that the so-called strong social thesis applies to the level of interpretation and application of the law as well as to the level of the sources of law.

I begin by introducing the idea of legal objectivity, suggesting that it should be of interest to anyone who believes that the judge has a duty to judge in accordance with the law (Section 2). I then briefly consider the issues of linguistic indeterminacy and legal contradictions and explain why I do not discuss those threats to legal objectivity in this article (Section 3). Having done that, I introduce the theory of legal positivism, giving special consideration to the distinction between the level of the sources of law and the level of interpretation and application of the law (Section 4). I proceed to argue, first, that as a contingent matter of fact moral reasoning is often involved at the latter level because ranking the interpretive arguments as well as determining the *ratio decidendi* of a case often

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involve moral reasoning (Sections 5-6), and, second, that it seems that moral reasoning cannot be objective (Section 7). I conclude the article with a comment on Andrei Marmor's analysis of the problem of legal positivism and the objectivity of law (Section 8) and the significance of objectivity at the level of the sources of law (Section 9).

## 2. *The Idea of Legal Objectivity*

The question of legal objectivity should be of interest to anyone who believes that the judge has, in virtue of his office, a *duty to judge in accordance with the law*, that is, to apply existing law rather than create new law. The reason is of course that this understanding of the judicial role, which depends ultimately on the *separation of powers doctrine*, presupposes that the existing law is an objective matter – were it not, judges would in effect be creating new and not applying already existing law.

Andrei Marmor makes a useful distinction between three types of objectivity in general.<sup>1</sup> On his analysis, a statement, S, is *metaphysically* objective if, and only if, S is true or false depending on whether or not it correctly describes reality; S is *semantically* objective if, and only if, S is intended to be about an object in the world; and S is *discourse* objective if, and only if, it is possible to ascribe a truth-value to S. We shall be concerned with metaphysical objectivity in this article, since it is the most interesting type of objectivity as well as the type of objectivity that most people have in mind when they think of objectivity. Marmor elaborates on the import of this type of objectivity as follows:

The metaphysical objectivity-subjectivity dichotomy must be defined in terms of the relations between types of statement and the existence of the appropriate categories of objects. A given type of statements is objective in the metaphysical sense if, and only if, there exist objects of the kind purportedly described by that type of statements; and a class of statements is subjective if no such objects exist in the world. Thus, a given statement is objectively true in the metaphysical sense if, and only if, there exists an object in the world with the properties attributed to it by the statement in question; and it is objectively false if the object it purports to describe does not have the properties attributed to it by the statement. A statement cannot be objectively either true or false, however, if there are no objects of the kind purportedly described by the statement in question.<sup>2</sup>

Now it is tempting to assume that metaphysical objectivity presupposes the existence of a mind-independent reality, or, if you will, that the doctrine of *realism* is true.<sup>3</sup> But that is not so. For a statement about a person's legal position can be true or false despite the fact that the existence and content of the law is to a

<sup>1</sup> Andrei Marmor, *Positive Law and Objective Values* 112-24 (2001).

<sup>2</sup> *Id.* at 116.

<sup>3</sup> For more on realism, see Michael Devitt, *Realism and Truth* Ch. 2 (2d. ed. 1997).

considerable degree dependent on conventions.<sup>4</sup> As Marmor puts it, "there is a truth of the matter about the rules of chess, the current conventions of fashion in Paris, and, I would certainly add, the legal speed limit in the state of Illinois . . . . In these, and countless other examples, we safely use the notions of truth and falsehood, despite the fact that it would make no sense to hold a realist position about such domains."<sup>5</sup>

### 3. *Linguistic Indeterminacy and Contradictions in the Law*

Some authors maintain that law is indeterminate because *linguistic meaning* is indeterminate.<sup>6</sup> If they are right, objectivity cannot be attained at either level of legal thinking. A problem with the invocation of linguistic indeterminacy, however, is that judges do not seem to agree that meaning is quite as indeterminate as the critics say it is. As Frederick Schauer notes in his essay on the interpretive techniques of the Justices of the American Supreme Court,

[t]he Justices have not been reading their Derrida. Indeed, despite lengthy importunings of legions of law professors, the Justices have been neglecting to read not only Derrida, but Foucault, Gadamer, Rorty, and Heidegger as well. Instead, as the statutory construction cases of the 1989 Term demonstrate, they have been spending their time reading (Noah) Webster, relying, both in fact and in articulated justification, on notions of plain meaning routinely derided in contemporary legal scholarship.<sup>7</sup>

Moreover, the existence of linguistic indeterminacy does not threaten legal positivism anymore than it threatens other theories of law. Rather, it threatens any theory of law that accepts that the existence of law presupposes the existence of a natural language – and don't all such theories do so?

Another source of legal indeterminacy is said to be the existence of *contradictions in the law*. Joseph Singer, for example, maintains that "legal doctrine" –

<sup>4</sup> When I speak of statements about a person's legal position, I have in mind what Eugenio Bulygin refers to as normative propositions. See Eugenio Bulygin, *Norms, normative propositions, and legal statements*, *Contemporary Philosophy. A New Survey*. Volume 3. Philosophy of Action 127 (Guttorm Fløistad ed., 1982). Such normative propositions must be carefully distinguished from legal norms, as it is easy to confuse the two. For more on this topic, see Ingemar Hedenius, *Om rätt och moral* 56-8 (2d. ed. 1963).

<sup>5</sup> Marmor, *Positive Law*, *supra* note 1, at 138.

<sup>6</sup> See, e.g., David Kairys, *Law and Politics*, 52 *The George Washington Law Review* 243 (1984); Gary Peller, *The Metaphysics of American Law*, 73 *California Law Review* 1152 (1985); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale Law Journal* 1 (1984).

<sup>7</sup> Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, *The Supreme Court Review* 231, 231 (1990).

under which heading he includes legal arguments as well as legal rules (norms) – is inconsistent, because (i) the arguments we use to decide among alternative legal rules will sometimes be accepted and sometimes rejected by the same person(s), because (ii) one legal rule may conflict with another, or because (iii) rules at different levels of generality may conflict.<sup>8</sup> But, as Jules Coleman and Brian Leiter have pointed out, such “contradictions” are no contradictions at all and do not generate indeterminacy.<sup>9</sup> And even if they did exist and did generate indeterminacy, they would not threaten legal positivism anymore than they would other theories of law.

For these reasons, I choose not to treat the problems of linguistic indeterminacy and contradictions in the law in this article.

#### 4. *Legal Positivism*<sup>10</sup>

Legal positivism is a *general* and *descriptive* theory about law of the type advanced by scholars like John Austin,<sup>11</sup> Hans Kelsen,<sup>12</sup> Alf Ross,<sup>13</sup> H. L. A. Hart,<sup>14</sup> Joseph Raz,<sup>15</sup> and Neil MacCormick & Ota Weinberger,<sup>16</sup> and not a theory telling the judge how he should decide hard cases or when civil disobedience is justified.<sup>17</sup> Underlying, though neither entailing nor entailed by, legal positivism is meta-ethical *noncognitivism*, according to which moral claims have no cognitive meaning.<sup>18</sup> Legal positivism thus conceived could perhaps be described as a meta-theory, a theory about theories of law, because it aims to lay down re-

<sup>8</sup> Singer, *The Player*, *supra* note 6, at 16-7.

<sup>9</sup> Jules Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 *University of Pennsylvania Law Review* 549, 572-4 (1993).

<sup>10</sup> The first four paragraphs in this section can be found more or less verbatim in Torben Spaak, *Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification*, 16:4 *Ratio Juris* 517 (2003).

<sup>11</sup> John Austin, *The Province of Jurisprudence Determined* (H. L. A. Hart ed., 1954).

<sup>12</sup> Hans Kelsen, *General Theory of Law and State* (Anders Wedberg trans., 1945); Hans Kelsen, *Reine Rechtslehre* (2d. ed. 1960).

<sup>13</sup> Alf Ross, *On Law and Justice* (1959).

<sup>14</sup> H. L. A. Hart, *The Concept of Law* (1961); H. L. A. Hart, *Essays on Bentham* (1982).

<sup>15</sup> Joseph Raz, *The Authority of Law* Ch. 3 (1979); Joseph Raz, *Law, Authority, and Morality*, 68 *The Monist* 295 (1985).

<sup>16</sup> Neil MacCormick & Ota Weinberger, *The Institutional Theory of Law* (1986).

<sup>17</sup> See also John Gardner, *Legal Positivism: 51/2 Myths*, 46 *American Journal of Jurisprudence* 199 (2001); Michael Hartney, *Dyzenhaus on Positivism and Judicial Obligation*, 7 *Ratio Juris* 44, 48-51 (1994).

<sup>18</sup> See Neil MacCormick, *Legal Reasoning and Legal Theory* (2d. ed., 1994); Kelsen, *GTLS*, *supra* note 12, at 13-14.

quirements that any adequate theory of law must meet.<sup>19</sup> Since legal positivists usually exclude from the study of law questions having to do with the law's moral value, they tend to describe law in terms of formal features, saying for example that it is a "specific social technique of a coercive order."<sup>20</sup>

Legal positivists accept three central theses. First, and most importantly, they accept the *social thesis*, which has it that *what is law and what is not is a matter of social fact*.<sup>21</sup> Hart's characterization of the rule of recognition may serve as an indirect characterization of the social thesis, which thesis occurs on a meta-level in relation to the rule of recognition:

The question whether a rule of recognition exists and what its content is, i.e., what the criteria of validity in any given legal system are, is regarded throughout this book as an empirical, though complex, question of fact. This is true even though it is also true that normally, when a lawyer operating within the system asserts that some particular rule is valid he does not *explicitly* state but *tacitly presupposes* the fact that the rule of recognition . . . exists as the accepted rule of recognition of the system. If challenged, what is thus presupposed but left unstated could be established by an appeal to the facts, i.e., to the actual practice of the courts and officials of the system when identifying the law which they are to apply.<sup>22</sup>

Second, legal positivists accept the *separation thesis*, which has it that there is no conceptual connection between law and morality.<sup>23</sup> John Austin's classic formulation of this thesis reads as follows:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation or disapprobation.<sup>24</sup>

Third, legal positivists accept the *existence thesis*, that is, they agree that the existence of law presupposes that it is effective.<sup>25</sup> The requirement that law be

<sup>19</sup> See Raz, AL, *supra* note 15, at 39.

<sup>20</sup> Kelsen, GTLS, *supra* note 12, at 19.

<sup>21</sup> See, e.g., Hart, CL, *supra* note 14, at 107; Hans Kelsen, *Was ist juristischer Positivismus*, 15/16 *Juristenzeitung* 465 (1965); Raz, AL, *supra* note 15, at Ch. 3; Jules Coleman, *The Practice of Principle* 67-73 (2001).

<sup>22</sup> Hart, CL, *supra* note 14, at 245.

<sup>23</sup> See, e.g., H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harvard Law Review* 593 (1958); David Lyons, *Moral Aspects of Legal Theory* Ch. 4 (1993); Coleman, *Practice*, *supra* note 21, at 151-2. However, Coleman emphasizes that we cannot usefully characterize legal positivism in terms of the separation thesis (Coleman calls it the separability thesis), as he believes no one rejects it. See *id.* at 152. But it seems to me that Joseph Raz rejects it. See Raz, AL, *supra* note 15, at 38-9.

<sup>24</sup> Austin, PJD, *supra* note 11, at 184.

<sup>25</sup> Hart CL, *supra* note 14, at 113-4; Kelsen, RR, *supra* note 12, at 215-21; Joseph Raz, *The Concept of a Legal System* Ch. 9 (2d. ed., 1980). See also Robert Alexy, *Begriff und Geltung des Rechts* 31-4 (1992). The term 'the existence thesis' is my own. As far as I

effective is usually understood to mean that the citizens must, on the whole, obey the law. As Kelsen explains, "[a] legal order is considered valid if its norms are by and large effective, i.e., if they are in fact obeyed and applied."<sup>26</sup>

Now it is a well-known fact that legal scholars disagree about the correct interpretation of the social thesis. Whereas *exclusive* legal positivists argue that factual criteria, and only factual criteria, may be used in the determination of the law, *inclusive* legal positivists maintain that moral criteria may – but need not – be used. W. J. Waluchow, who introduced the labels 'exclusive' and 'inclusive' legal positivism, describes the situation as follows:

Philosophers like Jules Coleman, John Mackie, and David Lyons have suggested that among the conceivable connections between law and morality that a positivist might accept is that the identification of a rule as *valid* within a legal system, as well as the discernment of the rule's *content* and how it bears on a legal case, can depend on moral factors. On this view, which we have called *inclusive legal positivism*, moral values and principles count among the possible grounds that a legal system might accept for determining the existence and content of valid laws. /.../ Despite a noticeable trend among positivists toward accepting that law and morality can be connected as inclusive positivism suggests, there are clear exceptions. Joseph Raz . . . advocates *exclusive legal positivism*, the view that the *existence* of a valid legal rule is solely a function of whether it has the appropriate source in legislation, judicial decision, or social custom, matters of pure social fact, of pedigree, which can be established independently of moral factors. In addition, the *content* of a legal rule can be determined, Raz believes, by establishing facts about human beings (e.g., their legislative actions and intentions) that can be ascertained without the use of moral arguments.<sup>27</sup>

If Waluchow is right, and I believe he is, both exclusive and inclusive legal positivists take the social thesis to apply to the level of the interpretation and application of law (the *content* of law) as well as to the level of the sources of law (the *existence* of law).<sup>28</sup> But I believe that at least exclusive legal positivists are mistaken in this regard. For only if we take the social thesis to apply *solely* to the level of the sources of law, does exclusive legal positivism offer an adequate description of legal reality. The reason is that whereas identifying the legal raw material with the help of the sources of law is a purely factual matter,<sup>29</sup> interpreting

know, it has not been used by Kelsen, Hart, et al.

<sup>26</sup> Kelsen, RR, *supra* note 12, at 219. (Translated into the English by Robert Carroll).

<sup>27</sup> W. J. Waluchow, *Inclusive Legal Positivism* 81-2 (1994). (Emphasis added and footnotes omitted).

<sup>28</sup> This is certainly true of Joseph Raz. See Raz, AL, *supra* note 15, at 47-8. The distinction between these two levels of legal thinking can be found, *inter alia*, in the works of Alf Ross. See, e.g., Alf Ross, *On Law and Justice* Chs. 3-4 (1958).

<sup>29</sup> To be sure, some legal systems include constitutional provisions that lay down moral criteria of validity. For example, the Fourteenth Amendment to the United States Constitution provides, *inter alia*, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." But I believe such provisions are best understood as

and applying that raw material often involves moral reasoning.

Let us now consider just how the interpretation and application of law involves moral reasoning. I treat statutory interpretation in Section 5 and case law analysis in Section 6.

### 5. *Ranking the Interpretive Arguments*<sup>30</sup>

The primary task of judges is to decide cases, not to expound the law. The natural starting-point, in keeping with the separation of powers doctrine, is that the judge has, in virtue of his office, a duty to judge in accordance with the law, that is, to apply existing law rather than to create new law. Accordingly, deciding a case involves (i) finding and clarifying the law, (ii) determining the facts, and (iii) applying the law to the facts. Assuming that law is a system of norms,<sup>31</sup> we may view legal decision-making as a matter of *applying legal norms to facts*.<sup>32</sup> On this analysis, *sylogistic reasoning* plays an important role in legal reasoning. A *practical syllogism* consists of a major, normative premise (a general legal norm, such as an interpreted statute), a minor descriptive premise (which states the facts), and a normative conclusion (the judgment). The following is what a legal example might look like:

(MaP) Anyone who has earned more than \$2, 000 last year must pay a 95 % income tax.

(MiP) Fritz earned more than \$2, 000 last year.

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(C) Fritz must pay a 95 % income tax.

Now, justifying the choice of the major premise of the practical syllogism is a major problem in the theory of legal reasoning, and it involves finding and interpreting, or, some-times, constructing a legal norm. The judge *finds* the legal raw material in the *sources of law*, such as legislation, precedent, and custom. Having found a pertinent statutory provision, he must determine whether the provision applies to the facts of the case. He begins by clarifying the *meaning* of

conferring on judges the legal power to create new law using their discretion to do so. See, e.g., Joseph Raz, *Dworkin: A New Link in the Chain*, 74 California Law Review 1103, 1115 (1986).

<sup>30</sup> Parts of this section can be found, more or less verbatim, in Torben Spaak, *Legal Positivism, Anti-Realism, and the Interpretation of Statutes*, Logic, Law, Morality 127, 128-35 (Kristen Segerberg & Rysiek Sliwinski eds., 2003).

<sup>31</sup> I think of norms as the meanings of prescriptive sentences. I do not, however, assume that norms thus conceived are necessarily warranted or assertable.

<sup>32</sup> See MacCormick, LRLT, *supra* note 18, at x.

the provision, which often involves dealing with problems of *vagueness* or *ambiguity*. Having done that, he decides whether to *apply* the provision in accordance with its meaning. For a provision whose meaning is perfectly clear may yield an absurd or morally unacceptable result; or it may conflict with other provisions in the relevant area of the law, or with the intent of the legislature as expressed in the documented legislative history, or with the purpose of the statute; or there may be two or more applicable provisions yielding incompatible results, etc. If the judge is unable to find a pertinent provision, he might have to *construct* a legal norm to decide the case.

Now it is clear that the judge needs guidance, while at the same time being constrained, in his efforts to justify the choice of the major premise of the legal syllogism – if the judge were not so constrained, he would be in a position to impose his own values and preferences on the parties, thus *creating new law* rather than applying existing law. This is where the so-called legal method, especially the *interpretive arguments* come into the picture. I distinguish four main types of interpretive argument: (i) textual arguments, (ii) systemic arguments, (iii) intentionalist arguments, and (iv) teleological arguments. Each type of interpretive argument emphasizes *one factor that is relevant to the interpretation of statutes*: the literal meaning of the statutory text, consistency and coherence in the legal system, legislative intent, and statutory purpose, respectively.

The problem is that there is little agreement among lawyers on how to *rank* the interpretive arguments.<sup>33</sup> One might, however, approach this problem by ranking the *morally relevant values* underlying the respective interpretive arguments.<sup>34</sup> As I see it, the values in question are the following. *Textualism* advances *predictability*: if statutes and precedents are formulated in clear language and are applied accordingly, a person can fairly easily find out about his legal rights and duties and plan his life on that basis. The *systemic* approach promotes *consistency* and *coherence*.<sup>35</sup> The *intentionalist* approach has *democratic* underpinnings, as the laws give expression to the intent of the legislature (and therefore, we may assume, to the will of the citizens).<sup>36</sup> The *teleological* approach,

<sup>33</sup> See, e.g., Robert Alexy, *Theorie der juristischen Argumentation* 288 (2d. ed., 1992); Per Henrik Lindblom, *Lagtolkning eller rättslämpning? Kommentar till ett rättsfall* (NJA 1980 s 743), *Festskrift till Welamsson* 437, 437 (Olle Höglund, ed., 1988).

<sup>34</sup> This has been noted by Neil MacCormick. See Neil MacCormick, *Argumentation and Interpretation of Law*, 6 *Ratio Juris* 16, 28 (1993).

<sup>35</sup> Coherence is good because the citizens are more likely to find the law *intelligible* if it is coherent. And a person who finds the law intelligible is likely to find it more *predictable* than he otherwise would. He might also be more inclined to *accept* a decision that he understands and can predict. And since only a coherent set of norms can function as a means to an end, coherence in turn contributes to *efficiency*.

<sup>36</sup> This has been noted, *inter alia*, by William Eskridge and Philip Frickey. See William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42

finally, appeals to our sense of *rationality*. The idea is that the judge ought to treat the interpretation and application of a statute as a *means* to an *end*, which is exactly what instrumental rationality is about. Thus we might say that the teleological approach is conducive to *legislative efficiency*.

The chief difficulty with this approach is of course to *justify* the ranking one proposes to others whose views may differ from one's own. While it may be difficult enough to show that the conclusion (the proposed ranking) actually follows from the premise(s) (for example, that individual liberty is the most important moral-political value), it may be even more difficult to justify the premise or premises themselves to those who doubt their validity. For example, what can I say to someone who considers *equality* more important than liberty and therefore tends to consider democratic legitimacy and legislative efficiency more important than predictability?

Be that as it may, my aim in this section was to show that the interpretation and application of statutes often involves moral reasoning. As should be clear, the occurrence of moral considerations in this process is a contingent empirical fact – other ways of approaching the problem of ranking the interpretive arguments are not only conceivable, but are also put into practice in that a solution will sometimes be found by reference to a conventionally accepted priority rule in a particular field of law. Nevertheless, I believe the approach discussed in this Section is being used, albeit implicitly, in a goodly number of cases. Let us now proceed to consider the occurrence of moral considerations in case law analysis.

#### 6. *Determining the Ratio Decidendi of a Case*

Case law analysis raises problems both about the identification of the norm that the case stands for and about its normative force. Whereas common lawyers accept that decisions by the higher courts, especially the supreme court, have *binding* force, civil law lawyers, including Nordic lawyers, think of precedents as having *persuasive* force only: the lower courts ought to follow the precedent if the arguments adduced in support of the ruling are persuasive.<sup>37</sup> Now at least if one accepts that precedents have binding force, one must have some idea about what aspect(s) of a case one should take into account. For to accept as binding everything a court says in a decision would amount to conferring law-making power on the courts. And that would surely violate the separation of powers doctrine. Hence a distinction is made between the *ratio decidendi* (the part that is binding) and the *obiter dictum* (the part that is not binding).<sup>38</sup>

What, then, about the identification of the *ratio decidendi* of a case? Arthur

Stanford Law Review 321, 326 (1990).

<sup>37</sup> See, e.g., Stig Strömholm, *Rätt, rättskällor och rättstillämpning* Ch. 18 (5th ed. 1996).

<sup>38</sup> See Rupert Cross & J. W. Harris, *Precedent in English Law* Ch. 2 (4th. ed., 1991).

Goodhart – who sets out to “give a guide to the method . . . most English courts follow when attempting to determine the *ratio decidendi* of a doubtful case” – maintains that the *ratio* of any given case is the legal norm that fits the material facts as viewed by the judge, and explains the decision.<sup>39</sup> If, for example, the material facts as viewed by the judge are A, B, and C, and the decision is X, the *ratio* becomes: If A, B, C, then X.

But Julius Stone has objected that the material fact(s) may be stated at different levels of generality, and that the Goodhart method does not provide a mechanism for determining the correct level of generality:

The crucial one [that is, difficulty with Goodhart’s method] arises . . . from the several alternative levels of statement of each ‘material fact’ of the precedent case, ranging from the full unique concreteness of that actual case, through a series of widening generalizations. In this series only the unique concreteness is firmly anchored to the precedent court’s view that a given fact A is “immaterial”; and *ex hypothesi* that level of unique concreteness can scarcely figure as a part of the binding *ratio* for other cases. By the same token the reach of the *ratio*, even after each material fact seen by the original court is identified, will vary with the level of generalization at which “the fact” is stated. How then is the “correct” level of statement of fact A to be ascertained by the later court?<sup>40</sup>

Stone considers as an example the well-known *Donoghue* case, in which a woman who consumed the contents of an opaque bottle of ginger beer suffered shock and severe gastro-enteritis as a result of having discovered the remains of a decomposed snail in the bottle.<sup>41</sup> Under the Goodhart method, should we describe the material fact as a snail, a rotten snail, an animal, a rotten animal, or perhaps as a poisonous object, etc.? What, in other words, is the correct level of generalization?

I suspect that Stone tacitly assumes the correctness of some sort of *meta-ethical relativism*, according to which a moral claim may be correct only in light of a given moral framework, though there is no one moral framework that is *the* correct moral framework.<sup>42</sup> If meta-ethical relativism thus conceived is correct, then it seems that there can be no right answer to the question of the correct *ratio decidendi* of a case under the Goodhart method.

But not everyone accepts Stone’s criticism. Neil MacCormick, for example,

<sup>39</sup> A. L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale Law Journal 161, 182 (1930). The description of Goodhart’s enterprise quoted above can be found in A. L. Goodhart, *The Ratio Decidendi of a Case*, 22 The Modern Law Review 117, 123-4 (1959).

<sup>40</sup> Julius Stone, *The Ratio of the Ratio Decidendi*, 22 The Modern Law Review 597, 605-6 (1959).

<sup>41</sup> *Donoghue v. Stevenson* [1932] A. C. 562.

<sup>42</sup> For an analysis and a defense of such a form of meta-ethical relativism, see Gilbert Harman, *Moral Relativism*, Gilbert Harman & Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* 3 (1996).

maintains that the possibility of judicial incompetence "should not blind us to the fact that judges are often capable of giving clear and crisp rulings, either explicit or unambiguously in their justifications; rulings, that is, on points of law."<sup>43</sup> MacCormick is in effect saying that finding the *ratio* is often easy, because it will often be obvious what is reasonable and what is not. But while that may be true, it does not solve the problem that Stone pointed to.

My conclusion is that case law analysis often involves moral reasoning. While there are other ways of determining the *ratio decidendi* of a case, and while in many legal systems the determination of the *ratio decidendi* is not considered to be a central problem of legal reasoning at all, this does not change the fact that moral considerations tend to be relevant in case law analysis.

#### 7. *Doubts About Moral Objectivity*<sup>44</sup>

I have argued in Sections 5-6 that statutory interpretation and case law analysis often involve moral reasoning, and I said in Section 1 that it seems that moral reasoning cannot be objective. I now intend to say a few words in defense of this latter claim.

I explained in Section 2 that I operate with a metaphysical conception of *legal* objectivity, which does not presuppose the existence of a mind-independent legal reality. Similarly, I operate with a metaphysical conception of *moral* objectivity, which does not presuppose the existence of a mind-independent moral reality, though it does presuppose the existence of a moral reality that is independent of our views about it and in virtue of which the relevant claims can be objectively true or false.<sup>45</sup>

Now my claim is that there is no such moral reality, and therefore no moral objectivity. I adduce two arguments in support of this claim. First, if there were such a moral reality, we should at least be able to agree on some sort of *method* for solving moral disagreements.<sup>46</sup> As Jeremy Waldron points out, moral disagreement remains "a continuing difficulty for realism, even if it doesn't entail

<sup>43</sup> Neil MacCormick, *Why Cases Have Rationes and What These Are*, Precedent in Law 155, 182 (Laurence Goldstein ed., 1987).

<sup>44</sup> I would like to thank Lennart Åqvist and Lars Lindahl for discussing questions about moral objectivity with me.

<sup>45</sup> I follow Jeremy Waldron here. See Jeremy Waldron, *The Irrelevance of Moral Objectivity*, Robert P. George (ed.) *Natural Law Theory* 158, 158-9 (1992).

<sup>46</sup> Although I speak of disagreement about moral method, not about matters of moral substance, it is worth noting that not everyone agrees that there is widespread disagreement about matters of moral substance. See, e.g., Michele Moody-Adams, *The Empirical Under-Determination of Descriptive Cultural Relativism*, *Moral Relativism: A Reader* (Paul K. Moser & Thomas L. Carson eds., 2001).

its falsity, so long as the realist fails to establish connections between the idea of objective truth and the existence of procedures for resolving disagreement."<sup>47</sup> He compares the situation in morals and politics with the situation in mainstream science. On the whole, he explains, scientists agree about methods for solving scientific disagreements, whereas "moralists" do not:

What tends to happen is that each main view comes along trailing its own theory of what counts as a justification: Utilitarians have one view, Kantians another, Christian fundamentalists yet another, and so on. Aristotelians, Nietzscheans, Marxists, traditional conservatives like Burke, liberals like Rawls, feminists like Gilligan—all acknowledge that the disagreements between them are important (if any are). Yet unlike their counterparts in the scientific community, they share virtually nothing in the way of an epistemology or a method with which these disagreements might in principle be approached.<sup>48</sup>

I find Waldron's line of reasoning persuasive. Surely our inability to agree on some sort of method for solving moral disagreements must speak against the existence of a moral reality that is independent of our views about it.<sup>49</sup> To be sure, there may be features of our moral thinking and moral reasoning – such as the point of moral inquiry and, perhaps, the form and content of moral claims – that would be best explained by the assumption that there is such a moral reality.<sup>50</sup> And we cannot of course rule out the possibility that human beings might not be equipped to detect the moral facts and properties that are said to exist.<sup>51</sup> Nevertheless, at the end of the day we have to acknowledge that we just don't seem to be able to get in touch with the alleged moral reality. And that is a reason to doubt its existence.

Second, it seems that if objective moral values and standards did exist, they would have to be rather *queer* or *mysterious*. And that, too, is a reason to doubt their existence. As John Mackie puts it: "If there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from anything else in the universe."<sup>52</sup> One might object that this argument from queerness applies only to *internalist* versions of moral realism, according to which there is a conceptual connection between moral facts and properties and

<sup>47</sup> Waldron, *Moral Objectivity*, *supra* note 45, at 173.

<sup>48</sup> *Id.* at 173-4.

<sup>49</sup> I am *not* suggesting that the absence of agreement about moral method *entails* that there is no moral reality of the relevant type.

<sup>50</sup> For more on this topic, see David O. Brink, *Moral Realism and the Foundations of Ethics* 23-5 (1989).

<sup>51</sup> See, e.g., Lars Bergström, *Grundbok i värdeteori* 82 (1990). Says Bergström: "Why should we believe that we are so well equipped epistemologically that nothing in nature can in principle be inaccessible to us?" *Id.* ad 82. (My translation) See also Michael S. Moore, *Law as a Functional Kind*, Robert P. George (ed.) *Natural Law Theory* 188, 228 (1992).

<sup>52</sup> John Mackie, *Ethics* 38 (1977).

reasons for action.<sup>53</sup> But it seems the argument applies to externalist versions of moral realism as well. As David Brink puts it, "[e]ven if we deny that moral facts need to be intrinsically prescriptive, we may still wonder whether the realist's account of moral facts and properties is queer or mysterious."<sup>54</sup> The idea, of course, is that moral facts and properties are queer or mysterious when compared with *empirical* facts and properties.

Now a problem with the argument from queerness is said to be that it mistakenly assumes that moral facts and properties must be conceived of as some sort of *objects* that have a place in the "fabric of the world." Thomas Nagel, for example, states the following:

The objective badness of pain, for example, is not some mysterious further property that all pains have, but just the fact that there is reason for anyone capable of viewing the world objectively to want it to stop. The view that values are real is not the view that they are real occult entities or properties, but that they are real values: that our claims about value and about what people have reason to do may be true or false independently of our beliefs and inclinations. No other kinds of truths are involved. Indeed, no other kinds of truths *could* imply the reality of values.<sup>55</sup>

I cannot accept Nagel's view, however. I take Mackie to be saying that we ought to understand moral claims in the same way that we understand empirical claims, if we are to understand them at all. Nagel does not share this view, but I cannot see that he offers an alter-native analysis of moral claims that is credible.<sup>56</sup> To say that the objective badness of pain is "just the fact that there is reason for anyone capable of viewing the world objectively to want it to stop" is just to shuffle the problem around. Now we must ask instead: What does it mean to view the world 'objectively'? And how do we go about determining whether or not a person does view the world objectively?

Like Nagel, Brink rejects the argument from queerness. But unlike Nagel, he accepts Mackie's (implicit) claim that we ought to understand moral claims in the same way that we understand empirical claims. He does, however, reject Mackie's assumption that moral facts and properties are entities *sui generis*,<sup>57</sup> or more specifically, he rejects the argument most commonly adduced in support of

<sup>53</sup> See, e.g., Brink, Moral Realism, *supra* note 50, at 43-5.

<sup>54</sup> *Id.* at 172.

<sup>55</sup> Thomas Nagel, The View from Nowhere 144 (1985). Ronald Dworkin shares Nagel's view that it is a mistake to believe that moral facts and properties must be conceived of as some sort of objects that have a place in the "fabric of the world." See Ronald Dworkin, *Objectivity and Truth. You'd Better Believe It*, 25 *Philosophy and Public Affairs* 87 (1996).

<sup>56</sup> For a critical appraisal of Nagel's view, see Sigrún Svavarsdóttir, *Objective Values. Does Metaethics Rest on a Mistake?*, Brian Leiter (ed.) *Objectivity in Law and Morals* 144 (2001).

<sup>57</sup> Brink, Moral Realism, *supra* note 50, at 174.

this assumption, namely that it follows from Hume's law that moral facts and properties must be some sort of *non-natural* facts and properties. Instead, he maintains that moral facts and properties are *natural* facts and properties,<sup>58</sup> and therefore we have no reason to object that they are metaphysically queer:

The ethical naturalist's appeal to the constitution of moral facts by natural facts is not metaphysically queer. This relation of constitution, composition, or realization is quite familiar. Tables are constituted by certain arrangements of microphysical particles; biological processes such as photosynthesis are constituted by physical and chemical events causally related in certain ways; psychological states are constituted by certain arrangements of brain states, and large scale social events such as wars and elections are constituted by enormously complex sets of smaller scale social and political events causally and temporarily related in certain ways.<sup>59</sup>

One may, however, object that Brink purchases the pleasing familiarity of moral facts and properties at too high a price, namely that it is left unclear just how we can *identify* those natural facts that are also moral facts. By contrast, on a non-naturalist analysis, moral facts and properties may be queer or mysterious, but there is at least no doubt that they *are* moral facts and properties. Of course, Brink is well aware of this difficulty. As he himself points out,

. . . these metaphysical claims aid substantive moral investigation no more than they aid substantive investigation in any other higher-order discipline. For although the truth of materialism assures us that there is some configuration of physical properties by which any higher-order property is realized, this gives us no idea which configurations of physical properties these are. Indeed, it may be practically, if not theoretically, impossible to identify the physical realization of many, if not all, higher-order properties.<sup>60</sup>

But Brink's awareness of the difficulty does not make it go away.

#### 8. *Andrei Marmor on Legal Positivism and the Objectivity of Law*

Having argued that anti-realism is compatible with metaphysical objectivity, Andrei Marmor maintains that this means that legal positivists can coherently hold that in many cases there is an objective answer to the question of what the law is on a certain issue:

Basically, the picture would be this: in each and every legal system, there are conventionally established practices that are taken to constitute the source of law. These are the conventions establishing the procedures for the creation, modifica-

<sup>58</sup> Brink advocates a *materialist* version of naturalism, according to which moral facts and properties are *physical* facts and properties. Physical properties in turn are "basic properties of matter," and physical facts are "the possession by particulars of physical properties." *Id.* at 178.

<sup>59</sup> *Id.* at 177.

<sup>60</sup> *Id.* at 179.

tion, and annulment of legal standards. These conventions leave certain gaps. But in most standard instances they also make it possible to say that there is an objectively determinate answer to the question of what the law is on a given issue. The answer is given by the truths about the conventions establishing the sources of law, coupled with the relevant truths about those facts which are taken to yield legal results of various sorts according to the conventions (such as the fact that a certain act of legislation had taken place, or a judicial decision rendered, etc.).<sup>61</sup>

But Marmor does not pay sufficient attention to the distinction between the level of the sources of law and the level of interpretation and application of the legal raw-material found in the sources of law. The "conventionally established practices" that he has in mind clearly concern the level of the *sources of law*, whereas the answer to the question "what the law is on a given issue" is to be found at the level of *interpretation and application of the law*. Since this is so, Marmor's conclusion that in most cases there is an objective answer to the question of what the law is on a certain issue, does not follow from the premise that there are conventionally established practices concerning the "the procedure for the creation, modification, annulment of legal standards".

#### 9. Doubts About the Significance of Objectivity at the Level of the Sources of Law

I have argued that on a legal positivist analysis we can attain legal objectivity at the level of the sources of law, though not at the level of interpretation and application of the law. But, as I hinted in Section 8, the interesting question is rather whether we can attain objectivity at the level of *interpretation and application of the law*.<sup>62</sup> But if that is so, one may doubt the significance of objectivity at the level of the sources of law, and, therefore, the significance of a theory of law – exclusive legal positivism – that applies solely to the level at the sources of law.

I should like to emphasize, however, that in this section I have merely *questioned* the significance of exclusive legal positivism, or any other theory of law that applies solely to the level of the sources of law. I have *not* claimed – much less shown – that such theories are pointless or otherwise misguided.

<sup>61</sup> Marmor, *Positive Law*, *supra* note 1, at 139.

<sup>62</sup> This is a central question in Kent Greenawalt's important study of law and objectivity. See Kent Greenawalt, *Law and Objectivity* 3 (1992). See *id.* at 91-231. See also Brian Leiter, *Objectivity, Morality, and Adjudication*, *Objectivity in Law and Morals*, *supra* note 56, at 66; Gerald J. Postema, *Objectivity Fit for Law*, *Objectivity in Law and Morals*, *supra* note 56, at 99, 100-1.