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HARD CASES AND MORAL DILEMMAS

The purpose of this paper is to draw attention to the close connection that obtains between two philosophical questions from two separate spheres. Although each of the issues has been widely discussed in the last decade, hardly any attention has been paid to the relation between them. I refer to the question of hard cases (hereafter: 'HC'), which belongs to the domain of legal philosophy, on the one hand,[1] and that of moral dilemmas (hereafter: 'MD'), which belongs to the realm of moral philosophy, on the other.[2] It is my contention that comparing the nature of the problems dealt with in these two spheres and, in particular, comparing the arguments offered to solve each of them will serve to advance our understanding of both.

In hard cases, a judge faces a practical question where it is unclear whether there is only one right answer, or whether there are a few possible right answers. Some philosophers argue that in HC there are no right answers, and, therefore, judges in HC are allowed to display judicial discretion. I shall refer to this thesis as 'the no-right answer thesis (N-RAT)'. Others, led by Ronald Dworkin, argue that in HC there are right answers and that therefore judges have no judicial discretion (at least in what Dworkin calls the "strong" meaning of the term). I shall refer to this thesis as 'the right-answer thesis [RAT]'. In the same way, MD are situations in which a certain agent faces a difficult practical question, where it is unclear whether or not there is a right answer to the question of what he or she should do. Some philosophers argue that MD are real, or genuine – that is, there are

[1] See, for instance, Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977); R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985); R. Dworkin, *Law's Empire* (London: Fontana Press, 1986); and M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), chaps. 4–7.

[2] See C. Gowans, ed., *Moral Dilemmas* (Oxford: Oxford Univ. Press, 1987) and the wide bibliography mentioned there.

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situations in which an agent has to do each of two[3] incompatible actions and there is no answer to the question of which should be preferred. So one might say that HC represent irresolvable *legal* decisions, while MD represent irresolvable *moral* decisions.

Wherever I say that HC (or MD) have no right answer, I intend it to be taken as a short way of saying that they have no *one* right answer. Similarly, when I say that HC (or MD) do have a right answer, I mean they have only *one* right answer, that a certain decision is, all things considered, better, or preferable, to all others, implying that it would be a mistake to make any other decision. Note that even if only one answer exists, usually more than one answer belongs to the range of reasonable or acceptable ones, to the category of answers that the judge or the agent would not be blameworthy for taking. The (one) right answer is the one an ideal judge or an ideal moral agent would necessarily make; that does not mean that all other answers are mistaken in the same way.

Elsewhere, I have shown that the concept of MD as being essentially irresolvable is not shared by all philosophers who have discussed moral dilemmas.[4] Some believe that dilemmas might be real even when resolvable, since, in their view, the overridden duty retains its validity or reality even when defeated by a stronger one. Since this latter concept of MD makes it harder to see the analogy between MD and HC, however, I shall refer in most of my paper to the first and more common view of MD, namely, the view that MD are essentially irresolvable. This view of MD is also held by Dworkin, one of the few philosophers to notice the connection between MD and HC. Dworkin says that an agent faced with a conflict of rules can either resolve it in some rational way, or "announce himself to be in a state of moral dilemma, and do nothing, or flip a coin or decide in some other irrational way that the legal system does not permit".[5] Thus, Dworkin seems to believe that MD are problems that have no rational solution, implying that the agent either refrains from acting altogether or decides in some arbitrary way like flipping a coin.

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[3] These being the common cases, I shall always refer to *two* options faced by agents in MD, though it is evident that, in principle, one might face a conflict between more than two moral considerations.

[4] Daniel Statman, 'The Debate over the So-Called Reality of Moral Dilemmas', *Philosophical Papers* **19** (1991): 191–212.

[5] R. Dworkin, *Taking Rights Seriously*, p. 73.

I said that both HC and MD represent practical problems where it is unclear whether a right answer exists. However, the problems they present are different from many other practical problems of the kind we may face, such as whether to spend our vacation in London or in Paris, whether to drink tea or coffee at supper, or whether to study in law school or in medical school. The important difference between both HC and MD, on the one hand, and these latter practical problems on the other, lies in the more personal character of the latter. An agent in a moral dilemma, searching for the right answer, is not just deliberating about what he or she will do, but about what ought to be done (probably by any agent in similar circumstances), on the basis of moral principles and values. Similarly, when judges decide HC they do not feel as if the decision is just a matter of what they would like the decision to be, but of what the decision should be, on the basis of the relevant legal material and legal considerations – whatever these are. It is thus the more general nature and applicability of both the legal and the moral systems which gives the questions of HC and MD their more general temper. I know that the nature of this generality or universality is controversial, and at this stage I really wouldn't like to commit myself to any particular view of morality or of legal theory. Yet I find it hard to see how anyone could deny the modest claim I am trying to make, that is, that the agent's problem, both in HC and in MD, derives from, and is tightly connected to, general normative systems, and therefore is of a more general nature than other practical problems (like those mentioned above), which lack such a connection.[6]

It is obvious, however, that the connection of the agent's problem, both in HC and in MD, to general normative theories, does not imply that the relevant normative systems do in fact provide the agent with an answer to his or her problem – whether or not they do is exactly the question at stake. If they do not, then the agent is called to some kind of personal expression in deciding the case, to a kind of "invention." Hence, both HC and MD raise the question of the relation between what might be loosely labeled the objective and the

[6] To be sure, the fact that one's decision in MD is *supposed* to be guided by moral principles and is often presented as such, does not guarantee that this is indeed the case, Psychological factors, such as cognitive dissonance, might be at the root of our decisions – both the more personal ones (which car to buy) and those concerned with moral or legal justification.

subjective elements in legal and in moral reasoning. By 'objective', I mean what is in a sense forced upon the agent by the law, or by what the agent acknowledges as fundamentally binding moral principles. Thus those who believe that there is no right answer to HC tend to conclude that judges have judicial discretion and are free to decide these cases according to their own subjective, or personal, ideology and values, namely, values that – in the judge's view – are not forced upon him or her in the same way that other strictures of law are.

Similarly, philosophers who believe there is no right answer to MD tend to emphasize the subjective nature of moral decisions. This view of moral decisions is clearly expressed in a well-known passage from Sartre's *Existentialism and Humanism.*[7] Sartre describes the following dilemma presented to him by one of his students at the time of the war: The student's father, who was inclined to collaborate with the Germans, had quarrelled with his mother and left the home. The student's elder brother had been killed in the German offensive of 1940 and he burned to avenge him. His mother was living alone and our student was her sole consolation. His dilemma was whether to go to England and join the Free French Forces or to stay with his mother and support her. Sartre continues:

> He realized that every action he performed on his mother's behalf would be sure of effect in the sense of aiding her to live, whereas anything he did in order to go and fight would be an ambiguous action which might vanish like water into sand and serve no purpose .... Consequently, he found himself confronted by two very different modes of action; the one concrete, immediate, but directed towards only one individual; and the other an action addressed to an end infinitely greater, a national collectivity, but for that very reason ambiguous – and it might be frustrated on the way. At the same time, he was hesitating between two kinds of morality; on the one side the morality of sympathy, of personal devotion and, on the other side, a morality of wider scope but of more debatable validity. (pp. 35–36)

According to Sartre, no ethics would help the student decide this dilemma by supplying him with an answer, therefore, the only possible advice Sartre could have given him was "You are free, therefore choose, that is to say, invent".[8] So if there is no right answer,

[7] Jean-Paul, Sartre, *Existentialism and Humanism* (London: Methuen, 1948).
[8] Ibid., p. 38.

both agents in MD and judges in HC seem to be forced to "invent" one.[9]

It is typical of agents in MD that their decision is accompanied by reluctance and even agony, however they ultimately decide to act. These emotions are connected with MD usually involving an unavoidable wrong done by the agent to some other human being(s) – that is, one of the options the agent faces involves unjustly hurting other people. (Think, for example, of the widely quoted dilemma of Agammemnon.) This cannot leave the agent indifferent and the feelings he or she senses when deliberating on which course to take are very different from those that accompany the solving of a purely theoretical problem that has no direct effect on the agent's life. Sometimes the decision in MD is so momentous that the agent feels she cannot live with it and the result is "some more radical break: denial, deliberate callousness, even madness or death."[10]

Needless to say, this consequence of one's decision on one's own life and on the lives of others is typical of HC too. Solving a hard case doesn't feel like just solving a puzzle, and, as in MD, judges cannot be indifferent to the results of their decision. A judge's decision in favor of the defendant might be destructive to the plaintiff in civil cases, and a decision against the defendant in a criminal case is certainly of the greatest significance to the accused.

Thus, decisions in HC and in MD are – and should be – considered seriously, because of the important consequences of these decisions on the lives of other people. However, in the case of HC there seems to be another reason for the reluctance with which decisions are made, and that is the fact that decisions the court makes (especially the Supreme Court) become precedents for all similar cases in the future. In deciding one particular case, the judge is making a decision that will concern many other cases. This feature of legal decision-making has no exact parallel in moral decision-making, which by its very nature is less institutionalized. There is, however, something similar in the moral domain, and that is the assumption, typical to

[9] Sartre's case if often referred to in discussions of MD as a paradigmatic case of a moral dilemma. See, for instance, E. J. Lemmon, 'Moral Dilemmas', in *Philosophical Review* **71** (1962): 132–58, at p. 152.

[10] Martha C. Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge Univ. Press, 1985), p. 32. See also J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 366.

moral reasoning, that particular moral decisions are right not only for the agent, but for anybody found in similar circumstances. If such a thought occurs in the agent's mind while deciding a moral dilemma, then, to use Kantian terminology, he might justifiably feel he is legislating a general rule, not merely deciding for himself. In that sense, he might feel like a judge who actually legislates universal rules – precedents – through his decisions.

However, this last point of analogy between HC and MD is controversial. Some philosophers hold the opposite view, according to which this element of general legislation, of deciding for others, marks an important difference between MD and judicial decisions. D. D. Raphael argues,[11] that an agent in a moral dilemma expressly does *not* mean his decision to set a precedent for others. A similar claim is raised by A. D. Woozley,[12] who argues that, contrary to the legal case, the moral agent "does not, and could not properly, claim that it was the right answer for everybody else, for whom all the relevant considerations were the same, to have given".

This view might be interpreted in two principal ways:

(1) Though there is a right answer to MD –

(a) It is the right answer only for the particular agent in the particular situation;

(b) The agent *believes* it is the right answer only for him or her in his or her particular situation.

(2) Assuming there is no (one) right answer to MD, the agent does not and cannot claim that the decision he or she made is the right one for anybody else in similar circumstances.

The argument presented in (2) is valid, but so trivially valid that it cannot be the intention of the view under consideration. According to (2), the agent in MD denies that his answer is the right one for others, because he is not even sure that it is the right one for *himself*. (1a) must be rejected on the basis of the universal character of moral judgments; it is incoherent to argue that two situations, similar in all

[11] D. D. Raphael, *Moral Philosophy* (Oxford: Oxford Univ. Press, 1981), pp. 64–65.

[12] A. D. Woozley, 'No Right Answer', in M. Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence*, p. 180.

morally relevant features, are nonetheless different with regard to their moral status, e.g. that in the one situation, A is the right answer, while in the other it is not. So the only possible interpretation of the above view is (1b). Yet, in the light of what has been said with respect to (1a), how can one consistently argue both that A *is* the right answer for one person and that it is *not* the right answer for others in similar circumstances? Maybe (1b) is merely a way of expressing the agent's uncertainty and hesitations regarding the right answer, that is, since the agent is not at all certain that A is the right answer, he says it is the right answer only for him and not for others. Nevertheless, he cannot have it both ways; either he believes A is the right answer and in that case it is necessarily right for everybody else in similar circumstances, or he does not believe A to be the right answer, in which case it is clearly not the right answer for him either.

To sum up this point, I have tried to show that MD set no exception to the universal character of moral judgments, which I presuppose here without argument. Thus agents in moral dilemmas can be seen as legislating general rules, a legislation which is close to the universal character of HC institutionalized in the form of precedent.

In the light of these analogies between HC and MD it is reasonable to expect that at least some of the arguments put forward for or against RAT with regard to one of these problems will be relevant to the other too. I believe this indeed to be the case and the rest of my article will be devoted mainly to the development of these analogous arguments.

II.

Moral philosophers have proposed various arguments to prove that MD are unreal, that is, to show that they *have* a right answer and the same approach has been taken by legal philosophers with regard to HC. Other philosophers have sought arguments to establish the reality of moral dilemmas, that is, to show the unavailability of one right answer as legal philosophers have done with regard to HC. It is my objective to examine the possibility of applying arguments put forward in the one field to the other, in a way that might enhance our understanding of the problems under consideration. I should confess from the outset that my personal bias is in favour of RAT – both

in MD and in HC. However, the comparison suggested below is equally relevant and fruitful, so I believe, to those who refute RAT – either in MD, or in HC, or in both. I shall first deal with arguments for RAT and then with arguments against it.

Two sorts of argument have been offered to establish RAT both in MD and HC, phenomenological and theoretical. The first seeks to demonstrate that the behavior of agents in MD, as well as that of judges in HC, is best explained on the assumption that they believe there is a right answer to their problems. The second relies on theoretical considerations; logical, conceptual and others, in order to prove RAT. Let us deal with each of them in turn.

Various considerations support the view that agents in MD and judges in HC presuppose the existence of one right answer. We should note that these considerations are equally relevant to both fields:

(1) *The attempt to demonstrate the preferability of some particular answer.* The best argument for belief in RAT, argues Dworkin, is the very attempt to establish that a particular answer A is the right answer, an attempt typical both of MD and of HC.[13] Judges in HC make a great effort to show that a certain sentence is more justified than others and the same is true of agents in MD, who wish to show – at least to themselves – that some particular way out of the dilemma is preferable to others. Had they believed that there was no right answer to their problems, this behavior would have been wholly redundant and irrational. Why should anyone endeavor to argue for solution A, if he sincerely believes that solution B is no worse?

(2) *Moral advice.* McConnell points out that it is often the case in MD that agents seek advice in attempting to find the right answer.[14] A case in point is that of Sartre's student mentioned above, who approached his teacher for moral advice. This search for advice would be absurd if the agent sincerely believed there was no right answer to the question of whether A or B was the right thing to do in the circumstances. If there were no right answer, the only respon-

[13] See R. Dworkin, 'A Reply by Ronald Dworkin', in M. Cohen, *Ronald Dworkin and Contemporary Jurisprudence*, p. 280.

[14] T. C. McConnell, 'Moral Dilemmas and Consistency in Ethics', *Canadian Journal of Philosophy* 7 (1978): 269–87, at 280.

sible advice could be: 'Well, you ought to do A *and* you ought to do B – and there is no way of deciding between the two', but surely nobody would be content with such advice. The phenomenon of seeking advice exists in the judicial realm too, though maybe to a smaller degree. At any rate, in both cases the seeking of advice is best understood as an attempt to improve one's chances of finding the right answer, as an assumption that such an answer indeed exists.

(3) *Doubts.* A second phenomenon mentioned by McConnell[15] is that of moral doubt. It is commonplace that agents in MD as well as judges in HC have doubts even after deciding the case, wondering whether they have done the right thing. In some momentous decisions, especially those concerning questions of life and death, these doubts can have a destructive effect on one's life (think of a decision to kill one human being in order to save many other human lives, or of a judicial decision to sentence a criminal to death). Now these doubts are rendered irrational if we assume the denial of RAT; if judges believed that solution A is, in principle, no less justified and rational than solution B – both being legitimate right answers – why are they sometimes full of doubt as to whether or not they made the right decision?

(4) *Mistakes.* Doubts as to whether or not one made the right decision result sometimes in an acknowledgment that one did *not.* Both agents in MD and judges in HC acknowledge at times their wrong decisions. The possibility of (acknowledging) such mistakes necessarily presupposes (the belief in) the existence of one right answer – an answer about which one might be right or wrong.[16]

With regard to MD, these considerations lead to the conclusion that the agents' deliberation as to what they ought to do is best described as an attempt to *discover* the right answer and not to "invent" it, as Sartre told his student to do. According to Sartre, says Raphael, in moral dilemmas –

> We just 'choose', out of the blue .... But that is not *choice.* Sartre's young friend in real life, when faced with his dilemma, had to *think* about his conflicting

[15] Ibid.

[16] R. Norman, *The Moral Philosophers* (Oxford: Oxford Univ. Press, 1984), p. 245.

obligations, and had to *decide* in the end that one of them was more important or had the greater claim upon him or something of the kind.[17]

The same applies to HC too. A central thesis of Dworkin is that the process of deciding a case, "even in hard cases, can sensibly be said to be aimed at discovering, rather than inventing, the rights of the parties concerned."[18] There is of course a possibility that judges only pretend to believe there is a right answer to HC when they write long and scholarly verdicts, and when they consult with their colleagues. That is, judges might really believe there is no right answer to HC, but deliberately try to deceive the public into thinking that they (the judges) believe the opposite. However, this possibility seems to me so fantastic that it can hardly be taken seriously.[19]

The natural objection to the phenomenological argument, both in MD and in HC, is this: that it is *believed* that a right answer exists to a certain problem does not entail that it does, in fact, exist; both agents in MD and judges in HC may simply be wrong in their presumption regarding the existence of one right answer to their problems. Maybe they just do not understand the real nature of the complex problems they face. At any rate, a widespread belief in p is far from sufficient for establishing p.

Nonetheless a widespread belief among judges in HC and agents in MD in RAT is sufficient to shift the burden of proof to those who deny RAT. This denial amounts to the claim that most agents in MD and most judges in HC behave irrationally, not understanding the real nature of the problems they face. This sounds a highly unreasonable claim,one which nobody would accept without very strong evidence. It sounds particularly unreasonable in the legal realm, since, after all, judges are the bearers of the judicial process and, therefore, they are supposed to have the best, or almost the best, ability to understand accurately the nature of this process. While anybody could be trapped in a moral dilemma, including people who have never reflected very much on moral questions beforehand, and thus might not understand the true nature of the dilemma, this possibility is less reasonable with regard to judges whose training prepares them to be experts – *the* experts – in the legal realm.

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[17] Raphael, *Moral Philosophy*, p. 65. Cf. Norman, ibid.

[18] Dworkin, *Taking Rights Seriously*, p. 280.

[19] Cf. Dworkin, *Law's Empire*, p. 37.

Before we turn to present the theoretical arguments for RAT we should note an important difference between these arguments and the previous ones. The object of the phenomenological arguments is to show that agents in MD, or judges in HC, believe in the existence of one right answer to their problems, while it is the object of the theoretical arguments to show that there indeed *is* one right answer to the problems under discussion. In this respect, the theoretical arguments are "stronger" than the phenomenological ones. One such argument is prevalent mainly in the debate around MD and is based on the Kantian principle 'ought implies can'. Another argument, which is developed by Dworkin in the context of the debate over HC, is based on the idea that judicial propositions must be either true or false. Let us deal with them in turn.

The "standard" argument for RAT in MD was presented by Terrance McConnell in his 1978 article. The argument is based on two standard principles of deontic logic: (a) the "agglomeration" principle, according to which if, relative to circumstances C, S ought to do A, and S ought to do B, then S ought to do (A&B), (b) the principle 'ought implies can' (henceforth referred to as 'the argument from ethical consistency [AEC])':

1.	OA	premise
2.	OB	premise
3.	$\sim \Diamond$ (A&B)	premise
4.	OA&OB from 1,2 by conjunction	
5.	O(A&B)	from 4 by agglomeration
6.	$\Diamond$ (A&B)	from 5 by OIC

And thus we are faced with a direct contradiction between (3) and (6). This means that so long as one wishes to hold on to both OIC and the agglomeration principle, one has to give up at least one of the premises 1–3. Now since premise (3) is a given fact which cannot be denied, one must deny either premise (1) or (2), that is, one must contend that only one of the two actions, A or B, is the agent's duty, all things considered, not both. And this means that in MD there is really only one thing the agent ought to do, only one right answer to the agent's predicament. Therefore, and this was McConnell's main objective, moral dilemmas are not genuine.

Needless to say, this argument for RAT and against moral dilemmas entails nothing as regards the question *which* of the conflicting obligations should override the other in any actual circumstances. It only entails that one obligation must be defeated by the other, and be revealed as invalid (in the circumstances). So even if we have no idea of how to solve some particular dilemma, we can still be confident – the argument assures us – that there *is* a right answer to it. It is impossible that one can be under two incompatible obligations.

Let me say something about the two principles mentioned above, OIC and the agglomeration principle. I shall start with a methodological point regarding how we should approach questions concerning the validity of such general and formal principles. My contention is that such questions should be taken primarily to mean 'Do we want our moral theory to adopt such principles or not?' The answer to this last question will involve considerations of consistency, coherence, and – of special importance – normative considerations. Thus, many of the formal aspects of moral theories have their source in substantive moral principles, and the same holds for deontic logic, whose basic axioms rest on substantive moral principles.[20] Viewed in this manner, I believe that the best way to interpret OIC is as a meta-norm, that is, as a limiting principle to the norms a moral theory might entail, directly or indirectly.[21] More specifically, it is the following principle:

> A moral theory should be construed in such a way that it is never the case that one ought to do what one cannot do.

The grounds for this meta-norm are both moral and practical. A theory which violated it would be unjust because it would make people accountable and blameworthy for actions they had no option but to perform. This sounds unfair. This moral basis of OIC often

[20] For defense of this claim with regard to deontic logic see Sayre-McCord 1986. For the relation between meta-ethical principles and moral theory see T. C. McConnell, 'Meta-Ethical Principles, Meta-Prescriptions and Moral Theories', *American Philosophical Quarterly* **22** (1985): 299–309.

[21] Compare K. E. Tranoy, '"Ought" Implies "Can" – A Bridge from Fact to Norm?', *Ratio* **14** (1972): 116–30; Rawls, *A Theory of Justice* (Oxford: Oxford Univ. Press, 1973), pp. 236–37; and J. Brown, 'Moral Theory and the Ought-Can Principle', *Mind* **86**: 220–23.

expresses itself in the way we (implicitly or explicitly) apply OIC in concrete situations. Smith has shown that the sort of inability ('cannot') which typically causes us to withdraw our ought-statement ('not-ought') is not strict inability but a weaker sort of inability.[22] For instance, suppose a student is hit by a car on his way to a meeting with me; I shall withdraw my ought-statement even if the student could, with terrible pain, drag himself to my office. Thus we have a strong moral intuition in favor of OIC.

Violating the above meta-norm would also be "impractical", because imposing obligations that cannot be fulfilled runs against morality's most comprehensive end, that is, the guidance of human behavior. The guidance offered by a theory which implied that an agent ought to do both A and B while she cannot do so, would not be very helpful. This aspect of OIC was especially emphasized by Hare,[23] who argues that ought-statements in cases of inability strike us as incomprehensible because of the essentially practical nature of such statements. We do not ask whether we ought to do A unless it is within our power to do so. To conclude then, the objection to MD formulated by AEG is based on the assumption that a moral theory which allows for genuine MD, that is, which allows for situations where one ought to do both of two incompatible actions, is both unjust and running against the practical interest of ethics.

The picture with regard to the agglomeration principle is more complicated, because the main motivation for adopting it or rejecting it seems to be one's view about moral dilemmas. Though the agglomeration principle is regarded an axiom in standard deontic logic,[24] it is hard to think of arguments for or against it that are independent of one's view on the reality of moral dilemmas. While the acceptance of this principle (together with OIC) means the denial of moral dilemmas, its rejection means affirming the existence of genuine moral dilemmas. The question then is on whom the onus rests. My contention is that the onus is on the objector for two reasons.

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[22] See J. Smith, 'Impossibility and Morals', *Mind* **70** (1961): 360–75, at 367. Smith's analysis was adopted by Frankena 1976, pp. 146–47. On OIC as a normative principle, see also D. Collingridge, '"Ought" – Implies – "Can" and Hume's Rule', *Philosophy* **52** (1977): 348–51; and C. Keilkopf, '"Ought" Does Not Imply "Can"', *Theories* **33** (1967): 283–89.

[23] R. M. Hare 1963, 59–60.

[24] See, for instance, Follesdal & Hilpinen 1971, p. 13.

First, the agglomeration principle seems to me intuitively true;[25] what could be more natural than thinking that if I ought to do A and I ought to do B, then I ought to do A and B? Second, it is common to draw an analogy between the deontic operators 'O' and 'P' and the modal ones '□' and '◊', respectively, an analogy which is natural if we interpret 'O' as expressing a kind of moral necessity. Now the modal analogy to the agglomeration principle is accepted as valid, that is, (□A&□B)>□(A&B) and thus we have some reason to believe that so is the agglomeration principle.[26] Hence, as the onus rests on the objectors to this principle, and as they have not raised any convincing argument against it, I believe we are justified in assuming the "agglomerative" nature of our obligations.

The framework defined by AEC to discuss the problem of MD has been widely accepted as the appropriate way to deal with this problem. While objectors to MD, like McConnell, seek to establish the validity of AEC by establishing the validity of OIC and the agglomeration principle, proponents of MD seek to show that for reasons (allegedly) independent of the debate over MD, at least one of these principles should be rejected.[27] The question I would like to examine now is whether AEC, or some analogous argument, can be applied in the legal realm too.

To be sure, AEC provides us with a clear explanation of what is wrong with conflicting laws, or, more generally, with a legal system which, directly or indirectly, issues conflicting requirements to its subjects. If such conflicting requirements were entailed by a legal system, that would constitute the same kind of paradox expressed in AEC, on the lines explained above, that is, if, legally, S ought to do A and also ought to do B, it follows that S ought to do A&B. Given that S cannot do A&B, however, it would be unjust to impose such a demand on S and to hold S accountable for not fulfilling it. It would also run against the basic interest of any legal system as a

[25] Cf. G. Sayre-McCord, 'Deontic Logic and the Priority of Moral Theory', *Noûs* **20** (1986): 179–97.

[26] For this analogy, see McConnell, 'Moral Dilemmas and Consistency in Ethics': 274.

[27] Some philosophers, such as Lemmon, Nagel, Trigg, and others, reject OIC, while others, such as Williams, Marcus, Tannsjo, and others, reject the agglomeration principle. For references, see Statman, *Moral Dilemmas* (Amsterdam: Rodopi, 1995), ch. 2.

means of guiding the behavior of its subjects.[28] Hence, just as one cannot be under two incompatible *moral* obligations, that is, be in a genuine moral dilemma, one cannot be under two incompatible *legal* obligations either.

However, this way of applying AEC to the legal realm is not really what we are looking for. Whereas in MD the agent is (allegedly) under an obligation to do A *and* under an obligation to do B, the two being incompatible, in HC no one claims that judges have both an obligation to do A, for example, convict a certain defendant *and* an obligation to do B (more precisely, non-A), namely, acquit him. Rather, objectors to RAT in HC contend that in HC judges have discretion to choose either of these options, neither of which can be said to be *the* right answer. This enables us to see an important difference between MD and HC with regard to RAT: In MD, as in HC, endorsing RAT means that some particular solution is the right one, while any other solution is wrong. In contrast, denying RAT in MD means that *both* the obligations faced by the agent are real, with the implication that whatever the agent does is wrong, whereas in HC this denial means that both answers are legitimate and, therefore, the judge is acting rightly if she chooses *either* of them. To be sure, the denial of RAT leaves room for discretion in both fields, yet in a different way; in HC the judicial discretion is between two legitimate and permissible decisions, while in MD the discretion is between two morally wrong decisions, neither of which is preferable to the other. The conclusions of this discussion can be represented by the following table:

	MD	HC
RAT	A is the right decision B is wrong	A is the right decision B is wrong
N-RAT	A is wrong B is wrong (neither is preferable)	A is right B is right (neither is preferable)

[28] On some other characteristics of legal systems which are identified by OIC, see Rawls 1971, pp. 236–39.

An interesting way of relating OIC to HC is suggested by Rolf Sartorius. Sartorius contends: (a) that in the vast majority of cases there is a uniquely correct decision, and (b) that there is no criterion to identify the few cases where such a decision is absent. Therefore, he concludes, "a judge is never entitled to treat a case before him as one in which there was no uniquely correct result, for *in all probability* it will not be".[29] However, adds Sartorius, this seems to be a case where OIC breaks down, "[F]or if one has no way of knowing in a given case that one can't, and one usually can, then there is nothing untoward about institutional norms that always imply that one ought to".[29a] However, it is unclear what exactly the 'ought' statement, allegedly valid even when it cannot be obeyed, is. The quotation above implies that the judge's obligation is to treat every case as if it had a uniquely correct answer. But, surely, this is something judges can always do, that is, they can always treat their case *as if* it had one right answer; even if a certain case does not have a uniquely correct answer, it can certainly be treated as if it has. The same argument would apply to the judge's obligation to *look for* the right answer, which can be fulfilled even if no uniquely correct answer existed (or if it existed but could not be discovered by the particular judge). If, however, Sartorius has in mind a stronger obligation, for example, 'judges always ought *to find* the right answer', an obligation which admittedly cannot be fulfilled in cases where such a unique answer does not exist, this, in any case, seems far too demanding. Hence, contrary to Sartorius, I believe that accepting RAT in HC (in Sartorius's version of this thesis) does not constitute any counterexample to OIC.

This brief discussion of Sartorius helps us to pinpoint a central difference between MD and HC, a difference which is revealed through the examination of AEC. The essence of MD is a conflict between two incompatible obligations, or ought-statements, with the result that, necessarily, one obligation is (allegedly) neglected by the agent. In contrast, in HC judges are not in any such conflict between different actions they ought to take. As judges, they have really only one obligation, an obligation to *apply the law*; it is just that *what* the law demands is unclear and controversial. Consider, for example,

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[29] R. Sartorius, 'Social Policy and Judicial Legislation', *American Philosophical Quarterly* **8** (1971): 151–60.

[29a] Ibid., note 28.

a certain argument against RAT in HC which we will discuss later, the argument from the vagueness and ambiguity of legal terms. This argument contends, that since legal terms are ambiguous, there is no one right way of interpreting them, and therefore, it is false that in HC only one right answer exists. Now note that this argument and the notion of HC it presupposes make no reference at all to any *conflict of obligations* faced by the judge; the locus of the problem of HC is not – as in MD – that of deciding between two incompatible obligations, but rather that of interpreting a very complex and ambiguous text. For this reason, AEC, such a powerful argument in the debate over MD, seems to fail in revealing any inconsistency in N-RAT in HC.

So far I have dealt with the main argument put forward for RAT in MD, namely, the argument from ethical consistency, and I have pointed to the difficulty one encounters in attempting to apply it to HC. Let us turn now to a central argument for RAT in HC and see whether it can be utilized in the debate over MD. The argument I have in mind is what Dworkin calls 'the "bivalence thesis" about dispositive concepts', that is:

> [T]hat in every case *either* the positive claim, that the case falls under a dispositive concept, *or* the opposite claim, that it does not, must be true even when it is controversial which is true. Lawyers seem to assume, for example, that an exchange of promises either does or does not constitute a valid contract. If it does, then judges have a *prima facie* duty to enforce these promises if so requested within their jurisdiction; but if it does not, then they have at least a *prima facie* duty not to do so on contractual grounds.[30]

The bivalence thesis rests on a general thesis concerning the truth value of propositions, namely, that propositions must be either true or false. This last thesis seems to be denied by the objectors to RAT in HC, since they contend that in HC neither of two possible answers (for example, that a certain company is liable for some economic damage, and that it is not liable), is false, since both are legitimate answers, but neither is true either, since that would make the other false.[31] Let us take another look at the table we sketched above. In the rubric referring to HC according to the N-RAT position, it says that both A and B are right, that is, true answers. But that is surely odd; how can both A and B be true when B is a straightforward

[30] Dworkin, *A Matter of Principle*, p. 120.

[31] See Dworkin, *Taking Rights Seriously*, p. 284.

contradiction of A, stating, for example, that a company is *not* liable for a damage? How can both p and non-p be regarded as true answers?

This argument for RAT, which I shall call 'the argument from the truth value of propositions [ATV]' seems to be the most natural argument which comes to mind when one becomes acquainted for the first time with the idea that there is no uniquely correct answer to HC. ATV is clearly distinguishable from the phenomenological arguments discussed earlier; while those arguments seek to show that judges in HC *believe* in the existence of one right answer, ATV seeks to show that, necessarily, there cannot be more than one such answer. These two different lines of argument – assuming they are valid – strengthen each other; the fact that there must be one right answer is reflected in the judges' (correct) belief that there is indeed such an answer. In other words, ATV assures us that our judges, who, according to the phenomenological argument, believe in RAT, are not mistaken in their belief and, thus, are not guilty for a fundamental misunderstanding of the legal system.

In order to apply ATV to the case of MD we need to find some dispositive concept related to MD which behaves the same way as the legal concepts mentioned above. I believe that 'the morally preferable course of action'[32] might serve as such a concept. In MD, the agent has to choose between two possible courses of action, each of which is supported by weighty reasons. Yet, in most cases, only one of these options can be said to be the *best* one from a moral point of view, what one ought to do *all* things considered. (The exception are cases where the options have exactly the same weight, and I shall return to this possibility later.) Let's take another look at the table sketched above. The bottom left rubric says that denying RAT in MD means that *both* actions involved are wrong. That, however, seems obscure; if A is wrong, then surely B must be right, and if B is wrong, then A must be right. So either A is the best action, in which case B is not, or B is the best action, in which case A is not.

To sum up this discussion. I have presented two central arguments for RAT, one in MD, namely, AEC, and the other in HC, namely, ATV. I have tried to show that while AEC does not seem to apply

[32] I use 'preferable', rather than 'best', to prevent the impression that the thesis presents a consequential view.

to the debate over HC, ATV can be applied to the debate over MD, thereby introducing a new argument for RAT in MD.

In closing this section, it might be important to reiterate that endorsing RAT in MD or in HC says nothing as to what the right answer to any particular case is, and how it should be found. Thus RAT doesn't make life easier for ethical theorists or theorists of law, if anything, it makes life harder; they are challenged to construe their theories in such a way as to offer some reasonable way (or ways) to resolve the problematic situations in question. And this requires a process of systematization – both in the moral and in the legal realm. It goes far beyond the scope of this paper to examine the different possible forms of systematization. I only wish to remark that a characteristic feature of theories which seek to exclude irresolvable situations is the model of two hierarchical levels in practical (moral or legal) reasoning, one being more fundamental than the other. This structure enables us to argue that though irresolvable conflicts or queries do occur on a certain level of reasoning, on a more fundamental level they vanish or appear as not genuine. Usually the more basic level is conceived as the level of *principles*, both in the philosophy of law and in moral philosophy. In this manner Dworkin suggests we distinguish between the positive rules of law and the principles "that 'underlie' or are 'embedded in'" these rules.[33] Thus, the key to finding the answer to hard cases lies in the ability to go beyond the *rules* of law to the *principles* that carry and validate these rules. Similarly, Hare, one of the leading "objectors" to MD, argues that moral reasoning includes two levels, 'critical moral principles' and 'prima facie principles', the former being more fundamental than the latter. While prima facie principles might conflict, critical principles may not, and hence MD are not genuine.[34] Thus, endorsing RAT (in MD or in HC) tends to lead to the construction of a two-level (moral or legal) theory.

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[33] Dworkin, *Taking Rights Seriously*, p. 105.

[34] R. M. Hare, *Moral Thinking – Its Levels, Method and Point* (Oxford: Clarendon Press, 1981), part one.

III.

Let us turn now to the arguments put forward to support a sceptical approach towards RAT. Such an approach might be based on some general scepticism with respect to moral or legal propositions, arguing that such propositions have no truth-value, since they represent no objective facts but rather the subjective attitudes or emotions of the speaker. It is sometimes argued in this context that moral values are not part of 'the fabric of the universe', and thus, contrary to empirical propositions, moral propositions cannot be said to be either true or false.

This general scepticism, however, is too "strong" to be offered as an explanation of the fact that there is no right answer to HC or to MD. The reason for this is simple. Those who argue that there is no right answer to HC or to MD assume that there is some *special* feature of these situations which prevents them from having one right answer, a feature which is absent in the more regular (moral or legal) cases. The objector to RAT in HC does not contend that there is no right answer to *any* legal case, but only that there is no right answer to *hard* ones. And, similarly, the objector to RAT in MD does not hold the extreme view that there is no right answer to any moral problem, but claims that there is no right answer only in the case of moral *dilemmas*. Hence, if there is something of special interest in HC and in MD, it is disguised rather than revealed by presupposing general scepticism towards the truth-value of moral and legal propositions.

To be sure, such radical scepticism is more prominent in ethics than in legal theory. However, it is interesting to note that granted a certain relation between moral and legal reasoning, moral scepticism might inevitably lead to legal scepticism too. Woozley, for instance, argues, that –

> given the nature of legal reasoning, and the extent of its similarity to nonlegal reasoning, I find it hard to believe that his [Dworkin's] statement is true. When a person is faced with a real moral problem, and with the question "What ought I to do here?", there characteristically is *no* right answer, no answer waiting there, darkly hidden, for him to find it if he can.[35]

Thus, according to Woozley, the similarity between moral and legal reasoning should persuade us that RAT is wrong in the legal domain

[35] A. D. Woozley, 'No Right Answer', p. 180.

just as it is wrong in the moral one. A more substantial relation between the two domains which concerns our problem is entailed, however, by the assumption that legal reasoning is not only similar to moral reasoning but itself involves the use of moral considerations; "Judicial decision", Hart tells us, "especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle".[36] Now since these "matters of high constitutional import" are typical instances of hard cases, we arrive at the following argument against RAT in HC:

1. There is no right answer to moral questions (since moral judgments are not part of "the fabric of the universe"; are subjective; have no truth-value; etc.)
2. Hard cases typically involve moral questions.
3. Therefore, there is no right answer to hard cases either.

As it stands, the argument rests on a general moral scepticism referred to in premise (1), quite a controversial thesis. However, this premise could be replaced non-arbitrarily by a more modest one, which is both more plausible in itself and also more interesting from the point of view of the current inquiry, namely:

1′. There is no right answer to MD.

As the moral judgments referred to in premise (2) typically involve a decision between competing moral values (see the quotation from Hart), it is clear that premises (1′) and (2) are sufficient to yield the required conclusion. This modification of the argument is tantamount to the argument that since MD have no uniquely right answer, HC have no such answer either. As premise (2) seems to be obviously true, the question of whether the above argument is valid turns on the question of whether premise (1′) is true or false, that is, the validity of N-RAT in HC is contingent on the validity of N-RAT in MD.

What, then, are the arguments for N-RAT in MD? Two main arguments are usually put forward, the argument from the *equal* value of the conflicting options (henceforth 'AE') and the argument

[36] Hart, *The Concept of Law*, p. 200.

from the *incommensurable* value of these options ('AI'). AE points to cases where the horns of the dilemma have exactly the same value, and hence there is no rational basis for claiming that one of them should override the other. This supposed equality is guaranteed by the fact that both options derive their moral status from the same moral principle, for example, when a doctor has to save both of two identical twin babies, but, in the circumstances, can save only one.[37] (Gowans has called this argument 'the argument from single-value conflicts'.)[38] Since the same principle entails two incompatible obligations so, other things being equal, there is no (rational) way of solving the dilemma. I find this argument quite unconvincing. First, situations where one moral principle entails incompatible courses of action which have exactly the same value are so rare that they seem irrelevant to the vast majority of MD. Indeed the cases cited by writers who use AE require a high level of imagination (a doctor saving one of identical twins, etc.). Thus, as part of an argument for N-RAT in HC, AE would be offering extremely weak support, since, surely, most HC do not involve situations of this sort. This objection against AE has been raised by Dworkin too against the analogue of AE in the legal domain, namely, the argument that HC occur when there is an exact balance between the considerations for each side. Dworkin's claim is that such a balance is highly unlikely.[39] Second, granted that such situations are still possible (though very rare), I believe the most natural – and rational – answer to the question of which option to choose is; "Choose either. It is morally insignificant which one you choose." "Buridan's ass" should be a constant reminder to us that too strict an interpretation of the demands of practical rationality can kill one.

Thus the more promising argument for N-RAT seems to be AI. According to this argument, human values are irreducibly plural and, therefore, incommensurable. Hence, in typical MD, where different values are in conflict, it is impossible to determine that one is worth more than the other, and overrides it. It is also impossible (unlike the situation in AE) to argue that the value of the options is equal; if there is no common currency to compare the values of A and B, then there

[37] See R. Marcus, 'Moral Dilemmas and Consistency', *Journal of Philosophy* **77** (1980): 121–36, at 125.

[38] See Gowans, *Moral Dilemmas*, p. 14.

[39] Dworkin, *Taking Rights Seriously*, pp. 286–87.

is practically nothing we can say about the relation between them.[40] So, to return to our main concern, if hard cases normally involve a conflict between two incommensurable moral considerations (e.g. rights and utility; liberty and justice), and if AI is a good argument, then we are supplied with a powerful argument for N-RAT in HC. Let us call this argument 'the argument for N-RAT in HC based on the incommensurability of moral considerations', henceforth referred to as 'ANIM'.

To the best of my knowledge, ANIM does not appear in the literature dealing with HC, though a close cousin is to be found. We indicated above that the objection to RAT in HC has two versions, one based on the fact that legal reasoning necessarily *involves* moral considerations, while the other is based on the fact that legal reasoning is *similar* to moral reasoning (see the quotation from Woozley). While ANIM was based on the first version, an analogue to it can be derived from the second one, arguing that just as moral considerations are incommensurable, so too are legal ones. According to this new argument, in HC judges face a conflict between incommensurable *legal* considerations, a conflict which is necessarily irresolvable – just as analogous conflicts in morality are. Let us call this argument 'the argument for N-RAT in HC based on the incommensurability of legal considerations', henceforth referred to as 'ANIL'. ANIM and ANIL seek to achieve the same conclusion (N-RAT) utilizing the same idea (incommensurability), and that's why they are cousins. They differ in that while ANIL uses the idea of incommensurability directly, so to speak, ANIM does so indirectly, through the mediation of morality. Needless to say, a clear distinction between ANIM and ANIL exists only if one presupposes that moral considerations, *qua* moral considerations, play no role in legal reasoning. In contrast, if one allows them such a role (Dworkin, for instance), then ANIM and ANIL boil down to more or less the same argument.

Taking into account the central role played by AI in the debate over moral dilemmas, it is quite surprising that it has received relatively little attention in the debate over hard cases. In fact, up to 1984, as Dworkin himself remarks,[41] Mackie was the only one to have

[40] See T. Nagel, 'The Fragmentation of Value', in *Mortal Questions* (New York: Oxford University Press, 1979), pp. 128–41; Raz, *The Morality of Freedom*.

[41] Dworkin, 'A Reply by Ronald Dworkin', p. 271.

raised it when he argued against Dworkin that "considerations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced".[42] Since then, a similar argument has been developed against Dworkin by John Finnis.[43]

Dworkin agrees with Mackie that if there is no answer to a hard case, "this must be in virtue of some more problematic type of indeterminacy of incommensurability in moral theory."[44] Dworkin, however, argues that his thesis that ties are rare "presupposes a conception of morality other than some conception according to which different moral theories are frequently incommensurate".[45] In modern, developed and complex systems, contends Dworkin, "it is antecedently unlikely that two theories will differ sufficiently to demand different answers in some case and yet provide equally good fit with the relevant legal materials".[46]

A careful reading of Mackie's objection, on the one hand, and of Dworkin's reply, on the other, raises, however, some doubt as to whether they have the same concept of incommensurability in mind. Whereas Mackie speaks of the incommensurability of (legal) *considerations* in accordance with the way AI is interpreted in morality (and, in a similar manner, Finnis speaks of the incommensurability of *criteria*),[47] Dworkin speaks of the incommensurability of *theories*. Let me try to clarify the difference between these two options. As presented above, AI rests on the irreducible plurality of moral considerations, which supposedly prevents any rational comparison between conflicting considerations. This plurality is not a result of any particular ethical *theory*, but a kind of a meta-ethical fact about our moral values, which any adequate theory must take into account. Furthermore, it is not at all clear that this is the sort of fact moral theories *can* take into account, since it threatens the

[42] Ibid., p. 165.

[43] J. Finnis, 'On Reason and Authority in *Law's Empire*', *Law and Philosophy* **6** (1987): 357–80, at 370–76.

[44] Dworkin, *A Matter of Principle*, p. 144.

[45] 'A Reply by Ronald Dworkin', p. 272.

[46] *A Matter of Principle*, p. 145.

[47] Finnis, 'On Reason and Authority in *Law's Empire*': 373.

very possibility of a systematic organization of the moral domain.[48] This sort of incommensurability seems to be presupposed by Mackie in the legal domain, though, admittedly, his brief discussion makes it hard to be certain about this interpretation. At any rate, it seems clear that Dworkin's concept of incommensurability is different and derives from its use in the philosophy of science. Briefly, two scientific theories are regarded as incommensurable if each supplies a reasonable, though an entirely different explanation for the empirical data. Since this data itself is interpreted and explained differently by both theories, it cannot serve as a criterion for deciding between the theories. Thus, inasmuch as both theories are logically consistent and inherently coherent, we seem to be left with no rational way of deciding between them. Applying this notion of incommensurability to the legal domain would result in the following line of reasoning: Since the legal material, or "data", namely, statutes, precedents etc., can be equally accounted for by two (or more) different theories, these theories are incommensurable and, thus, there is no way of deciding which is right. Hence, if they entail different answers to a certain (hard) case, there is no way of arguing that one answer is true while the other is false.

It is this last argument that Dworkin sees as a challenge to RAT and to which he replies, as quoted above, that it is unlikely that two theories will differ sufficiently to demand different answers in some case and yet provide equally good fit with the relevant legal materials". Though two different answers to a hard case can equally fit some *particular* statute, thus giving the (mistaken) impression that there is no right answer, they cannot equally fit *all* the material a legal system should take into consideration. Therefore, only one of them might be uniquely correct. This reply of Dworkin regarding the incommensurability of legal (or moral) theories seems to me a satisfactory one. Note, however, that in the light of the distinction made above, this reply does not refute the first version of AI, which is based on the irreducible plurality of moral (or legal) considerations. This version implies that *no* theory can find the right answer to hard cases, since in conflicts between incommensurables there is no way of rational comparison and hence, necessarily, no answer to be

[48] I develop this point in my *Moral Dilemmas*, ch. 3, and in my article, 'The Debate Over the So-Called Reality of Moral Dilemmas'.

found. Though Dworkin does not address this problem, I believe he could answer it by denying the assumption that incommensurability implies incomparability. Such a move has indeed been suggested by a few writers, for example, James Griffin,[49] and I myself have argued for it elsewhere.[50] If incommensurability does not necessarily exclude the possibility of rational comparison, then conflicts between incommensurables are not necessarily irresolvable – and both AMIN and ANIL can be rejected.

Though the arguments from equality and incommensurability fail in refuting RAT, they might serve to reinforce a different and an independent argument against RAT, based on the lack of any clear procedure to deciding MD and or HC, or on the fact that there is a longstanding controversy about what the right answer is.[51] Following Dworkin, I shall call this argument 'the argument from controversy', hereafter 'AC'. AC is reinforced by the fact that the options under question are incommensurable, since though incommensurability might not preclude comparability, it no doubt makes the comparison much harder and rougher. However, the reply to this objection, both in MD and in HC, is that the difficulties in *finding* the right answer to a certain question and in proving its preferability over competing answers do not show that there is no answer to be found, and bitter dissension does not indicate that *both* sides might be right. These various difficulties only remind us that we have to work hard and carefully, and that we can never be absolutely sure that we have reached the right answer.

The last argument I would like to mention in this section is 'the argument from vagueness' (hereafter: 'AV'), a very popular argument against RAT in HC. AV contends that the vagueness of the language used in legal material makes it impossible that there be only one right answer to every legal question. Whereas AI plays a crucial role in discussions about MD but is widely neglected in discussions around HC, the situation is the opposite with respect to AV, which is a major concern in the debate over HC while it is ignored in the debate over MD. However, while neglecting AI in HC

[49] J. Griffin, *Well-Being – Its Meaning, Measurement, and Moral Importance* (Oxford: Clarendon, 1986).

[50] Moral Dilemmas, chap. 3. Cf. also M. Stocker, *Plural and Conflicting Valves* (New York: Oxford Univ. Press, 1987).

[51] See Sartre, *Existence and Humanism*, pp. 37–8.

is, I believe, unjustified and regrettable, ignoring AV in MD seems absolutely justified. Indeed, AV seems to have no application in the moral domain, which, unlike the legal domain, is not concerned with the interpretation of *texts*. To be sure, explaining the exact meaning of moral principles is often a matter of great controversy in ethics, yet the objects of controversy are ideas, principles, and so on – not *words*. (Needless to say, I am not arguing that lawyers are concerned *only* with words.) At any rate, even with regard to the legal domain, one should take seriously Dworkin's suggestion that AV "does not depend on any argument from vagueness after all",[52] but rather on some version of AC.

IV.

We began our discussion by assuming an *analogy* between the problem of RAT in MD and in HC. In the previous section a more intimate relation was suggested, namely, that HC themselves often involve a conflict between moral considerations. This relation, as you may recall, was the basis for an important, yet widely-neglected argument for N-RAT in HC, that is, ANIM. However, irrespective of ANIM's validity, it might be thought to suggest an even more intimate relationship between HC and MD, namely, that HC *are* cases of MD; if, in circumstances C, S is a judge in a hard case, that implies S is at the same time also an agent facing a moral dilemma. I shall call this thesis of the relation between HC and MD 'the implication thesis (IT)'. Needless to say, the opposite implication (if S is an agent in a moral dilemma, that implies S is at the same time a judge in a hard case) is false. If IT were true, it would have an effect on the description and the understanding of HC, since the extensive philosophical literature on MD would at once become relevant to the problem of HC too.

To examine the merits of IT we should remind ourselves of what a moral dilemma is. I mentioned at the beginning of my paper the disagreement about whether or not irresolvability is a necessary condition for the existence of genuine MD. Despite this disagreement, I believe there is wide consensus that this condition is not, by itself, sufficient for the existence of MD. Another necessary condition must

[52] *A Matter of Principle*, p. 131.

be fulfilled, one regarding the moral status of the options faced by the agent: "it is of the essence of dilemmas", argues Joseph Raz,[53] "that those facing them have no morally acceptable option", and that the options involved are, so to say, "seriously" unacceptable. This necessity of wrongdoing expresses itself in guilt-feelings which are typical of agents in MD, and which usually seem to us entirely rational. As the agent is doomed to act in a morally reprehensible way in every course of behaviour he chooses, guilt and remorse are inevitable.

Does this characterization apply to judges in HC too? Strictly speaking, the answer seems to be negative. Since the essential feature of HC is their irresolvability, i.e. the fact that the legal system does not supply us with a clear solution to a certain judicial problem, HC may occur – (a) when the legal problem has no special connection with morality, and, more likely (b) when, in any case, the moral stakes are quite low and not dramatic as in the case of MD. Furthermore, (c) it seems possible that in HC the *moral* picture would be clear, while it would still not be *obvious* whether the morally required decision is also necessary from a *legal* point of view. In such a case, it would be false to say that the judge has no morally acceptable decision. To this last point it might be replied that sometimes the justification for rejecting the morally preferable option on the basis of formal legal considerations might itself be based on (indirect) moral reasoning. For example, it might be argued that a judge must stick to the precedents of the supreme court even if these lead, in some particular case, to immoral, or unjust results, since otherwise the authority and stability of the legal system would be affected, and it would be unable to fulfill its crucial social role. Hence, a hard case which appears at first glance to involve a conflict between two options, one morally required while the other required only from a legal point of view, might on reflection turn out to be a "standard" moral dilemma, that is, a dilemma between two *moral* considerations.[54]

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[53] *The Morality of Freedom*, p. 360.

[54] The view that a moral dilemma occurs only when both horns of the dilemma represent moral considerations has been endorsed by Lemmon, 'Moral Dilemmas': 148. The logic of the view is clear; in a conflict between a moral obligation and some nonmoral consideration, one is really in no dilemma regarding the moral situation. Hence, we should not be said to be facing a *moral* dilemma.

However, the cumulative force of points (a–c) does seem to urge us to weaken IT to the following modified thesis:

(AT′) Often judges in HC are simultaneously in a moral dilemma vis-à-vis at least some of the considerations that constitute the hard case.

Nevertheless, even AT′ seems to be too strong. With respect to MD, it is common to distinguish between dilemmas that are real, or genuine, and those that are merely apparent. My own interpretation of this distinction is as follows: Some situations have really no morally acceptable option. These are genuine moral dilemmas. Others are situations in which though *it appears* to be the case that there is no such option, in fact there *is*. These are apparent moral dilemmas. For one to face a moral dilemma, one has to be in a situation where one must choose between options which are really unacceptable, not options one merely *believes* to be so. Bearing this distinction in mind, it seems less likely that judges can be said to be in (real). MD, since it is very rarely the case that judges feel that whatever they decide will result in guilt-feelings and remorse. I do not deny that judges do have guilt-feelings sometimes, but this is often because they have doubts as to whether they have decided the case correctly, not because they assume there was no morally acceptable answer to the case and, at any rate, this phenomenon is far more widespread in MD. This reveals a basic difference between HC and MD: Whereas the chief problems in HC are whether a right answer exists and how one should find it, problems which are independent of the *content* of the options in question, this content is central to MD, that is, that all the options faced by the agent are morally objectionable. It is, of course, still possible that HC exist which are at the same time instances of MD, but this does not seem to be the *typical* case.

Another difference between MD and HC concerns the way one enters the situations in question. A salient feature of MD is that the agent does not enter into them voluntarily but is "trapped" into them by circumstances over which he has no control.[55] Once trapped, the

[55] Some philosophers contend that the debate over the possible existence of MD refers only to dilemmas into which the agent enters involuntarily, not to dilemmas for which the agent is to blame. See McConnell 1978, p. 277; Donagan 1984, p. 305.

agent cannot (morally speaking) escape the dilemma by refusing to play, so to speak, the moral game. The picture seems to be different with regard to judges. First of all, the very decision to become a judge, thereby committing oneself to what is entailed by this job, is not forced upon the future-judge but undertaken voluntarily. Second, having committed oneself to being a judge, one has still some influence, albeit minor, on the cases one will deal with and more importantly, those one will *not*. Third, judges can always simply quit if they wish to avoid taking part in a morally problematic decision – quit not only from the particular case, but from being judges altogether. This option of quitting, unpleasant and uncommon as it is, is not available to agents in MD who cannot opt out, so to say, from their role and commitment as moral agents. This expresses the difference between the universal character of moral obligations which apply equally to all human beings, and the particular nature of one's duty as a holder of a specific position, for example a judge.

The various differences between HC and MD should not, however, blur the fact that at times judges do in fact face MD. Consider the case of Carola Bruner. Carola was two years old when she was kidnapped from her parents in Brazil and sold (that is, given for adoption for a sum of money) to Mr. and Mrs. Turgeman in Israel, who knew nothing about the kidnapping and sincerely believed this was a normal and legitimate act of adoption. The Turgemans gave the girl a Hebrew name and treated her as their daughter. Somehow the Brazilian parents found out where Carola was, and then appealed to the Israeli courts to let them have their child back. This involved taking the child from her adopted parents who loved her very much and whom the child saw as her parents, and returning her to her biological parents. The supreme court faced one of the most momentous decisions it had ever had to make. With much reluctance and hesitation the court decided at last to return the child to her biological parents, who took her back to Brazil, leaving the Turgemans behind, heartbroken and longing for their child.

I thus suggest that the judges who decided Carola's case were facing a moral dilemma, in the standard sense of the term I articulated above; they had no morally acceptable option. Returning the child to her biological parents would cause, and, indeed did cause, unbearable agony to the adopting parents who had reared a child with love and

care, and who saw the child being taken from them forever. On the other hand, rejecting the biological parents' demand would have been no less painful – what could be more terrible for a parent than to have a child kidnapped, to find the child after days and nights of agony, and then to be denied the most natural right to have the child back and to function as a parent?

Nevertheless, it might be objected, there is a fundamental difference between the way one approaches (or should approach) this dilemma as a judge and the way one approaches it as a layperson; while the latter views the dilemma through the prism of moral considerations, the former is (and maybe ought to be) primarily concerned with legal considerations, that is, he is engaged in the interpretation of *texts*. According to this objection, the judges in Carola's case could judge the case simultaneously from two points of view – from their view as judges seeking to find out what the law requires, and from the (legally irrelevant) view as moral agents, seeking to discover the morally right decision. Yet this sharp distinction between the role of a judge *qua* judge, and his role *qua* moral agent is not something that can be taken for granted as a necessary truth about the concept of a judge, or something like. In fact, the question of whether, and to what extent, moral principles function (or should function) in legal reasoning is a central question in the philosophy of law. It is important to notice that one's answer to this general question determines one's view as to the closeness, or the remoteness, of the two roles mentioned above; the more one imports, so to speak, moral principles, into the legal realm, as legitimate legal considerations, the closer the gap between one's attitude to a moral dilemma 'as a judge' and one's attitude 'as a moral agent'. And the more moral principles are "exported" out of legal reasoning, the greater this gap grows. Thus, the similarity and closeness which obtain between HC and MD depend (partly) on the extent to which one's legal theory views morality as part and parcel of legal reasoning. Once again, I shall refer to Dworkin. According to Dworkin, arguments about legal rights, even in HC, are really "about something relevant to fairness", and people have these rights "by virtue of reasons of fairness".[56] So the boundaries between one's viewpoint as a moral agent with

[56] *Taking Rights Seriously*, pp. 336–37.

a concern for fairness, and one's viewpoint as a judge, seeking to apply the law, seem to get more and more blurred.

The last point I would like to make is that the similarity between HC and MD depends also on *moral* theory, in particular, on whether, and to what extent, one interprets morality in legal terms. Among other things, such an interpretation means assigning central importance in moral theory to the deontological concepts – obligations, duties, rights, and so on. So, to combine these two points, the more moral principles are allowed to play a role in legal reasoning, and the more morality is interpreted in legal terms, the weaker the distinction between HC and MD becomes, thereby making the entailment thesis more plausible.[57]

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