

DETMOLD'S 'THE UNITY OF LAW AND MORALITY'

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In this important contribution to the philosophy of law, Michael Detmold mounts a highly original, resourceful and subtly argued attack on legal positivism, the view that there is a separation (or, perhaps more accurately, a number of significant discontinuities) between law and morality.¹ In the course of a wide-ranging discussion he offers fresh and provocative analyses of, inter alia, morality and moral judgment, rules in moral and legal thought, legal reasoning in hard cases and rule cases, legal statements, judicial discretion and responsibility, precedent, the foundations of legal systems, legal revolutions, and Parliamentary sovereignty. He scrutinizes (and finds wanting) the theories of Raz and Dworkin, and illuminates central aspects of those of Kelsen and Hart. Detmold can be difficult to read; his striving for clarity has produced a severely terse style which sometimes obscures rather than clarifies. Many will find it necessary to re-read particular sections of the book several times, but the effort is well worth while; although they may not be convinced of the unity of law and morality, they will have a better understanding of the central issues and some principal lines of debate. Having said this, I will attempt to show that some of Detmold's major arguments are not ultimately convincing. It is of course not possible to discuss all the issues he deals with.

It is notoriously difficult to define legal positivism, because of the variety of theories and propositions which have claimed, or have been stuck with, the label. Contemporary theories of legal adjudication typically distinguish between "hard" cases, where no definite answers are given by empirically identifiable legal materials, and other cases where they are. Since Detmold thinks that any case not determined by legal rules is hard, he distinguishes between hard cases and rule cases [61].² A comprehensive positivist theory of law must explain the relationship between law and morality in both types of case. The particular theses which Detmold attacks can be sub-divided accordingly; I will start with his attack on the positivist account of legal rules.

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¹ A number of different interpretations of this "separation thesis" are identified and discussed in D. Lyons, "Moral Aspects of Legal Theory" (1982) 7 *Midwest Studies in Philosophy* 223.

² All references in square brackets are to M. Detmold, *The Unity of Law and Morality* (Routledge & Kegan Paul, 1984).

LEGAL JUDGMENT IN RULE CASES

According to Detmold, the "most significant part" of the positivist thesis of the separation of law and morality is that one can make judgment under rules "without being committed to that judgment in any ultimate moral sense" [21–22]. This is often expressed by saying that legal rules "are provisional or *prima facie* and that for any decision under a rule the full moral question awaits separate answer" [22].

To undermine this thesis Detmold takes the case of a judge making the practical decision of whether or not an accused shall be hung. If the judge sentences the accused to be hung, then he must believe that the accused ought (legally *and morally*) to hang. The belief that the accused ought to hang "according to the law", or "*prima facie*", or "from the legal point of view" — but not morally — logically could not support the decision to order the hanging [22–23]. This argument can be set out as follows:

1. It is impossible to reach a practical decision — i.e. a decision to act (as opposed to a theoretical conclusion) — without believing the action to be morally justified.
2. A legal judgment under rules is a practical decision.
3. Therefore a legal judgment under rules entails that the judge believes action under the rules to be morally justified.

The second premise may be readily conceded: Detmold deals convincingly with possible objections to the effect that a legal judgment is simply "an authoritative certificate as to what the law requires" [28], which must be executed by others who make the relevant practical decisions to act [27–30].

The first premise will draw the most fire. According to Detmold, it depends on taking sides in a long standing philosophical debate as to whether "weakness of the will", leading to action known by the agent to be morally unjustified, is possible [30–31]. He concludes that it is not [121–22], but this depends on a further thesis concerning the meaning of "moral"; that it refers not to a particular category of reasons for action as opposed to other sorts of reasons (eg. of prudence or self-interest), but to *all* reasons for action [35–37]. On the former view, which he calls the "compartment view", it is possible for non-moral reasons to be preferred to moral ones, i.e. for the will to be (morally) "weak"; but on the latter view every decision to act, no matter how selfish or evil the reasons for it, represents a moral judgment (albeit a possibly mistaken one).

Detmold's reasons for the latter view are not convincing. First, he asserts that according to conventional usage judgment between self-interest and the interests of others is moral judgment, not judgment between morality and immorality (or amorality) [35]. Now this is true, but perhaps only up to a point. Few moral philosophies maintain that self-interest has no moral weight whatsoever. But once self-interest, properly weighted, has been taken into account in arriving at moral judgment, does not conventional usage allow for the possibility of a further decision — whether to do what one knows

one ought (morally) to do, or to do otherwise, perhaps (but not necessarily) out of an *excessive* regard for one's own selfish interests? There is nothing odd in the fact that *this* decision could not itself be described as a moral judgment (because it is a decision whether or not to act on the basis of one's moral judgment). The question, "why should I act morally?" has a long and respectable history in moral philosophy, and would strike most people as quite intelligible (if excruciatingly difficult to answer). But for Detmold this question must be strictly senseless: if whatever one does, including doing nothing, reflects one's moral judgment, then there is no conceivable alternative to acting on that basis.

A source of confusion is the fact that "I ought morally to do p" is generally taken to mean "I ought conclusively to do p" (ie. regardless of any non-moral reasons to the contrary). But this is true only because it is assumed that the requirements of morality override all competing considerations, not because there are none. (Those who make this assumption may have great difficulty in justifying it, if it is questioned.³ Indeed, perhaps it is not justifiable and moral skepticism is irrefutable. But our inability to provide morality with adequate philosophical support is not the issue here.) While admittedly skating over a number of difficult philosophical problems, the following suggestion might be ventured: that an analysis of this assumption would mirror Detmold's own analysis of similar assumptions underlying law, chess and other "games" [155ff].⁴ Morality claims "absolute supremacy" and the decision to play the game (to live morally) is a decision to accept that claim. To wonder about the point of the game (to ask "why should I be moral?") is to become external to it, i.e. to stop playing [157]. That the few who do this have difficulty in justifying their resuming play, is not to the point. This conception of morality might be called the "modified compartment view".

Detmold's second reason for rejecting the "compartment" view is that it absurdly "requires us to say that selflessness is no virtue", because the choice between selflessness and self-interest does not itself involve a moral decision. This must be amended to allow for the legitimate moral weight which self-interest has. But the point remains — how can someone be praised as morally virtuous for making a non-moral decision? The modified compartment view suggests a solution. Those who act morally do so not for non-moral reasons (which may indeed be conceptually impossible) but because from within the moral point of view itself they assume that they ought (conclusively) to do so. It is this which *exemplifies moral virtue, and is thought to be (morally) praiseworthy.*

Detmold's third reason is that only on his non-compartment view does the positivists' thesis have any point: positivism depends on separating "legally

³ One problem is what the "ought" means in "ought one to be moral?" It cannot be a moral ought without circularity, and it seems difficult, if not impossible, to show that the assumption is justified if it has some other sense. See K. Nielsen, "Why Should I Be Moral? Revisited" (1984) 21 *American Philosophical Quarterly* 81.

⁴ See text following n. 11, *infra*.

valid" not from "morally required", understood in the narrow, compartment sense, but from "conclusively required, all-things-considered". However this is anything but obvious. It is Detmold's argument that practical judgments entail moral conviction which is most obviously at stake, and even the modified compartment view seems fatal to it.

Apart from the validity of this argument, the significance of its conclusion can be questioned. It is that a decision to act under a legal rule entails the belief that the action is morally justified. It is important to say "the action" rather than "the rule" because Detmold concedes that it is possible to believe both that a rule is morally wrong (in the "weak" sense that it ought not to have been enacted and ought to be repealed⁵) and that it ought morally to be followed [33]. Only beliefs of the latter sort are logically entailed by decisions to apply rules, if Detmold's argument is sound. Does the coexistence of action under a rule and the (perhaps *correct*) belief that the rule is morally wrong in the "weak" sense establish a separation between law and morality? Yes, concedes Detmold, but this sort of separation is not philosophically interesting [33-34]⁶. But why not? It is surely not trivial; to deny the possibility of such a coexistence would be extremely controversial, for obvious reasons. Because it is obvious? Indeed, positivists have taken it to be so obvious that apparent denials by natural lawyers have seemed to them incredible. Perhaps then the positivists could reply that this is what they have said all along: positivism is not only true, but obviously true!

At this point the suspicion arises that the fundamental disagreement between Detmold and at least some positivists may be terminological, in that they may have in mind different concepts of law. This suspicion is confirmed much later in the book when Detmold defines law as an activity rather than an inert system of norms [148].⁷ If the activity of making and enforcing legal judgments, in rule or hard cases, is "law", then the case for the unity of law and morality is plausible for the following reasons. It cannot be denied that legal judgment is practical judgment. Furthermore, although Detmold fails to show that practical judgment is necessarily moral judgment (because he fails to show that weakness of the will is impossible), as a contingent matter most of us (including legal officials) aspire always to act morally. If so, then the most fundamental reasons for legal judgment — including judgment under legal rules which are morally wrong in the "weak" sense — are usually moral reasons, both as a contingent matter of fact and as an ideal aspired to. Hence, the unity of law (i.e., legal judgment) and morality.

⁵ A rule is morally wrong in a "strong" sense if it is so wrong that it ought not to be followed. The predicament of a judge faced with such a rule is discussed in the next section.

⁶ He also argues that this would not amount to a thesis of the separation of law and morals because it applies to *legal* criticism of a legal rule as well as to moral criticism, but this is doubtful. True, a court might have to follow a precedent although it would have decided the other way *on legal grounds* in the absence of the precedent: nevertheless, it could not say that the precedent is not law whereas it can say that the rule is immoral.

⁷ It is interesting that another critic of legal positivism also defined law as an activity: L. Fuller, *The Morality of Law* (New Haven, Yale University Press, rev'd ed. 1969), 106.

However positivists such as Raz would not concede the initial premise, that "law" is this activity.⁸ For such a positivist "law" refers to a body of norms which constitutes only a sub-set of the reasons for legal judgment — and never the most fundamental ones — distinguished by their being publicly ascertainable by an objective, empirical test. They are only a sub-set because in hard cases the immediate reasons for legal judgment are not part of "law" understood in this way (although laws may require recourse to them).⁹ In rule cases, the immediate reasons for judgment are, although the most fundamental reasons for judgment (the reasons for obeying or applying law) are not. On this understanding of law, the existence of legal rules which are morally wrong (in either the "weak" or "strong" sense) undermines the unity thesis. At the conclusion of this review article, I will consider whether this terminological disagreement is a trivial one, a dispute over labels rather than issues of substance.

To sum up, if Detmold's argument to this point were valid it would establish that when a legal rule is acted on the actor must believe his action to be morally justified. This does not entail that the rule is morally justified, or even that the actor thinks the rule is morally justified (in the "weak" sense). This would help to establish the unity of legal judgment and morality, but not the unity of law and morality, if the positivist concept of law sketched in the preceding paragraph is adopted.

Detmold claims [38] to have established much more than this, namely, that it is "logically impossible" for a lawyer, citizen or judge to assert both "that X ought to be done is the law" and "X ought not (morally) to be done". This is a much stronger claim; indeed, it is perhaps the strongest possible claim for the unity of law and morality. But the argument in Chapter II, which we have just reviewed, does not establish it, since the lawyer, citizen or judge can make both assertions without contradiction, provided that he does not *act* upon the former. If the argument goes through, doing X contradicts the statement "X ought not (morally) to be done"; but *not* doing X does not contradict the statement, "X ought to be done is the law".¹⁰ In Chapter III Detmold makes a different argument which suggests that the latter is contradictory. This argument depends on the statement of law being an "internal" statement (one which assumes the moral bindingness of what is

⁸ See nn. 22 and 28, and accompanying text, *infra*.

⁹ See the discussion of hard cases in the text to n. 22, *infra*.

¹⁰ In his final chapter, Detmold argues that if judges cannot say "this statute because of its iniquity is not the law", i.e. if they must either mechanically apply the rules or resign (or, "which is equivalent", just refuse to apply them), then it is not possible to be a judge but only a computer [258-59]. Apart from the contentious use of the term "judging", and related terms (after all, the facts must still be determined, and the rules interpreted — and what about hard cases?), it should be noted that this concedes the *intelligibility* of what on page 38 is called a contradiction: "X is the law but it ought not (morally) to be done." Perhaps therefore the emphasis on p. 38 is not on whether the statement is intelligible, but on whether it can be uttered by a judge (as opposed to a "computer"). Detmold's argument does often depend on contestable definitions: see, e.g., his definition of "citizen" at p. 59.

asserted). The strong claim made on page 38 can only be based on this second argument, to which we now turn.

RULES AND INTERNAL LEGAL STATEMENTS

The second argument, which can be briefly stated, rests on Detmold's analysis of what has come to be known as the "internal point of view."¹¹ According to him, this point of view is constituted by two assumptions. First, that the legal system's rule of recognition is morally binding, and secondly, that those to whom one is speaking make the first assumption [49-50 and 59-60]. The first assumption "is an assumption of the ultimate [i.e. conclusive] bindingness of the norm of the rule . . . Anything less would preclude the possibility of a rule decision to act, for it would necessitate some further deliberation before action" [49], which would be "obviously inadequate as an explanation and elucidation of the thought which does lead to such decisions" [52]. The existence of a legal system depends in part on a sufficient number of people making these two assumptions. Indeed, "a legal system is an ongoing conversation constituted by the two assumptions of the rule of recognition" [59]. If they are not made, "any ensuing statement is external, and we have lost the thing, law" [ibid.], and replaced it with relationships based on mere force, i.e. with war [58]. Those who make the assumptions are officials or citizens of the legal system; those who do not are outsiders "at war with the community" [59]. A legal statement, at least in its "primary sense", is one made on the basis of these assumptions, i.e. it is an internal statement [59-60].

On the strength of these premises, Detmold concludes that any assertion that a law (i.e. a rule which is valid according to the rule of recognition) ought not (morally) to be followed or applied, implicitly repudiates the first assumption; it would therefore contradict a *legal* statement that the rule is a law because by definition such a statement is made on the basis of that assumption.

Another way of putting the argument is this: one who makes the two assumptions which constitute the internal point of view is committed to the belief that rules which are valid according to the rule of recognition are morally binding. To deny this in a particular case is to abandon the first of those assumptions and thereby place oneself outside the bonds of citizenship, to declare "war" on the community whose legal system it is.¹²

When the argument is put in this way it is clear that there is no contradiction between the statements "X is required by law" and "X ought not to be done".

¹¹ He argues that Kelsen accepted this analysis [32, 57-8], and that Hart is ambiguous but logically must accept it [32-3, 53-4].

¹² Actually the argument cannot be as straightforward as this because of a position which Detmold adopts later in the book. This is the "second argument" discussed in the text following n. 14, *infra*.

What it shows is that the former cannot be an internal statement which assumes the moral bindingness of the law. The latter statement may commit the speaker to the external point of view but it does not commit him to the statement, "X is not required by law". Detmold seems to need a further argument to show that someone making the latter statement should say, "X is not required by law", rather than, "X is required by law, but the law in this instance ought not to be obeyed".

In Chapter X Detmold discusses the predicament of a judge faced with a rule ("kill all blue-eyed babies") which is clearly valid according to the rule of recognition accepted as binding by "all the populace and all [his] brother judges" [222], but which the judge concludes ought not morally to be applied. According to Detmold the judge should say that the rule is not a law.

Detmold offers two arguments for this proposition, although he does not acknowledge any difference between them.¹³ Let the rule of recognition initially accepted by everyone be P (it is, say, "all statutes are to be recognized"). P-Q is P, subject to the exception that statutes like the blue-eyed babies statute are not to be recognized. According to one argument, when the judge decides not to apply the blue-eyed babies statute, he rejects P and accepts P-Q [Sections X.8 and X.9]. According to the other argument, however, he can continue to accept P as binding but refuse to follow it in the single case of the blue-eyed babies statute [Section X.7]. It is important to note that according to this second argument the reasons for not following P in that single case are not reasons for replacing the absolute rule P with a new rule of recognition which is subject to an exception [254]: this is the difference between the two arguments, which we will now consider in turn.

According to the first argument, before the blue-eyed babies statute was enacted, the dissenting judge

"assumed (1) that P was binding, and (2) that others in the legal system to whom he was accustomed to address his legal statements accepted P. When the blue-eyed babies case arose [he] rejected P and accepted P-Q *with a corresponding pair of assumptions.*" [222, my emphasis].

Detmold goes on to explain that a legal system can survive discrepancies among the rules of recognition actually accepted by judges and citizens, as long as there is still "approximate agreement" in assumptions (P and P-Q closely approximate one another "so long as Q is either unimportant or does not commonly arise") [223]. But this argument seems to fail, because the italicized words in the long passage just quoted are mistaken. In the example Detmold uses, the judge knows that "the populace and all [his] brother judges" accept P, and not P-Q [222]. If so he cannot make the second assumption which is required in order to constitute the internal point of view. Now according to Detmold's previous discussion of situations in which this second assumption breaks down, "any ensuing statement is external, and we have lost the thing, law. The rule of recognition is no longer a present rule" [59].

¹³ See, e.g., his description of the two arguments in his Synopsis, at [xv] (in X.7 and X.8).

Moreover, to persist in behaving as if this has not happened is condemned by Detmold as either obtuse or wicked, at least in cases involving political prisoners [56–8]. Given all this, how can the dissenting judge honestly or even meaningfully assert that the blue-eyed babies statute is not the law? This would be either stupid or an attempt to mislead his fellow judges and the citizenry, who (he knows) do not share the assumption on which such an assertion would be based. Would it not be more accurate for the dissenter to say that the statute is a law (as understood by his audience) but so immoral that it ought not to be obeyed? But this is what a positivist judge would say! (Admittedly, it might be forcefully argued that the judge should attempt to mislead; that it would be better (more politic) to sacrifice accuracy and manipulate legal doctrine in order to prevent the application of the evil statute, rather than openly proclaim a "legal revolution".¹⁴ A positivist might accept such an argument).

According to the second argument, which is more complex and difficult, the judge can continue to accept P as binding but refuse to follow it in the single case of the blue-eyed babies statute [217–19]. This is because of "the primacy of the single case", a "fundamental moral notion" [219] which Detmold discusses at several points in the book [206–8, 217–19, 250–59]. But this notion, or at least his use of it, is puzzling because it seems difficult to reconcile with his own analysis of rules.

The notion of the primacy of the single case seems, in a nutshell, to be this. There may be a balance of reasons (DEF outweighing UVW) in favour of there being an absolute rule, for example the rule of recognition P which makes no exceptions even for cases like the blue-eyed baby statute, because a qualified rule such as P–Q "may cause more wrong decisions than it saves" [219]. Nevertheless, in a single case such as that of the blue-eyed baby statute there may be a balance of reasons (XYZ outweighing ABC) in favour of not applying that absolute rule. In short, there may be reasons for both having an absolute rule and not applying it in a single case. Detmold denies that there is any inconsistency here, because the actions (taking and keeping the rule, and not applying it in the single case) are different and so are the reasons for them.¹⁵ The following passage is critical:

"Is there not something wrong in this whole argument? Is not the action of rejecting the statute in the single case at the same time the action of not keeping the rule? Thus must not the decision of the single case necessarily also be the decision of the question of keeping the rule? No. The action of rejecting the statute is not the action of not keeping the rule. Rather, it is the action of not keeping the rule *in the single case* . . . DEF outweighs XYZ means that there is a balance of reasons in favour of a

¹⁴ Dworkin discusses this possibility in *Taking Rights Seriously* (London, Duckworth, 1977), 326–27.

¹⁵ Reasons DEF "are not the same as the single case reasons ABC, though there would be a considerable overlapping. One difference is that the loss of certainty when there is no rule is far more widespread than its loss when the rule is simply not applied in the blue-eyed baby case." [217–18].

rule which by its terms is to be kept in all cases and which may as it turns out be kept in all cases; it does not mean that there is a balance of reasons in favour of keeping it in all cases . . ." [218-19].

Thus, Detmold concludes that "I can quite rationally decide both to take a rule and in any single case decide not to apply it. These decisions do not conflict." [255]

He concedes that this seems paradoxical, but argues that this is "more apparent than real" [254]. But this is far from clear. The problem is that on his own analysis, to have a rule is to hold two assumptions in relation to it, including the assumption that (in his words) the rule "gives the ultimately true (moral) answer to the class of cases which it defines, of which my single case (any actual practical problem) is one" [51; see also 187]. As he says elsewhere, "no matter what the moral strength of my reason in a single case for driving on the right . . . the whole moral discourse about it is precluded (appropriated), for the rule is absolute and that is an end of the matter" [39; see also 33].

To *have* a rule is to assume that it gives the morally right answer to all the single cases it covers. To *take* a rule is to adopt that assumption and allow it to govern future decisions until the rule is abandoned [125]. To refuse to apply a rule in a single case it covers, indeed, even to go into the merits of following it in such a case, is to reject that assumption and thereby abandon the rule — to "cancel or suspend it" [65].

Thus it would be not only inconsistent, but psychologically impossible, to *simultaneously* take or keep a rule and not apply it in a single case it covers. By refusing to apply the rule one either postpones taking it, or abandons it — at least temporarily. This may be enough to dispose of Detmold's claim that these two decisions "do not conflict" [255]. But is there a relevant difference between "not keeping the rule *in the single case*" and "not keeping the rule" [218]? Is this why he speaks of "suspending" a rule as distinct from "cancelling" it [65]? Can a rule be "kept" in the sense that although "suspended" in a single case, it then revives?

As a matter of strict logic this may be permissible but is it possible as a matter of psychology? What is envisaged is that an assumption that a rule gives the right answer in all cases which it covers can be adopted or revived immediately after a single case has been decided on the ground that this very assumption is false! It would seem, then, that once a rule (P) is not kept in a single case, the rule is cancelled and a new rule incorporating an exception for such a case (P-Q) substituted for it. The first argument is therefore to be preferred.

Difficulties for the second argument do not end here, however. Detmold argues that the responsibility of deciding single cases on their merits, regardless of the applicable legal rules, is one which judges can never avoid. The parties in any case are always entitled to say to the judge that "the adoption of a rule (or its reaffirmation) even though it covers our case is not the decision

of the case. You, responsible for your actions, must decide it" [255]. Not only is this a legitimate claim, but if it is made the judge must consider it — if not, he may decide the case wrongly [ibid.]. It would seem to follow that the judge should consider the question even if the parties fail to raise it. That is, he should always ask himself whether the rule(s) should be applied in the instant case. But this would be tantamount to saying that no judge should ever decide a case by rule, or, at the very least, that no judge should decide a case by rule if the parties challenge the moral propriety of doing so. The responsibility of deciding single cases on their merits would preclude judges from being permitted just to assume that a rule gives the morally correct answer in a single case, i.e. from truly adopting the internal point of view towards any rule, including the rule of recognition.

Detmold earlier maintained that "if these assumptions are not made, any ensuing statement is external, and we have lost the thing, law" [59]; that "law [is] necessarily a matter of assumption" [60]; and that "the rule of the game gives an unequivocal answer, which you can reject only by rejecting the game" [49]. On the other hand his arguments for the primacy of the single case lead him to assert that if judges did apply legal rules on the unquestioned assumption that they gave the right answer to all single cases, this "would not be a case of law: we would not call [this] a legal system" (because they would really be computers, not judges) [257]. One and the same assumption is thus said to be both the essence and the negation of law. Far from there being a merely illusory paradox here, there seems to be a fundamental contradiction.

Finally, it is difficult to understand how a judge who accepts this second argument could say of the blue-eyed baby statute, "This is not the law", because this judge still regards the rule of recognition P as binding (except in the single case). How can he say both "P is the law" and "the blue-eyed baby statute is not the law", when according to P the blue-eyed baby statute *is* the law? As in the case of the first argument, it would seem to be more plausible for Detmold's judge to be a positivist and say "this statute is a law, but it is too iniquitous to be applied". Thus, neither argument succeeds, and in addition the second seems to make Detmold's conception of law incoherent.

If these arguments in Chapter X fail, as they seem to, Detmold lacks persuasive reasons for his insistence that an official or citizen who concludes that a law morally ought not to be applied or obeyed should say "this is not a law" rather than "this is a law, but it ought not to be obeyed". But there is then nothing to prevent a positivist from accepting the whole of the argument presented in Chapter III (based on the "internal point of view"), and indeed the argument discussed in the previous section as well. If valid, they establish that someone necessarily accepts the moral bindingness of a legal rule if (a) their point of view in relation to the legal system is "internal", i.e. they make the two assumptions (and in particular the first) which constitute that point of view, or (b) they decide to act, or to command action, under the rule. True, accepting these arguments would mean rejecting Hart's

view that the internal point of view does not entail full moral commitment.¹⁶ But that view is not essential to the positivist distinction between law and morality: Raz, for example, is a positivist but rejects it.¹⁷ It remains the case that (a) laws may be so morally objectionable that they ought not to be followed or applied, and (b) this may be perceived not only by “outsiders” but by citizens and even officials of the legal system in question. Even Detmold’s insistence that by this very act of perception they *become* “outsiders” might be conceded, although his notion of “citizenship” is surely contestable. One of the advantages of Hart’s analysis of legal systems is that it enables us to explain how a legal system can be said to exist although a large number, perhaps even a majority, of those governed by it do not accept its claim to *de jure* authority over them.¹⁸ Even if it is true that at least all officials must accept that claim, and (as Detmold insists) thereby make a full moral commitment to the system, they may be small in number and, much more importantly, *they may be wrong to do so* (as in Nazi Germany, for example).

HARD CASES

In hard cases particular decisions are not required by rules of law, but must be based at least in part on other grounds. A positivist might deal with hard cases in two different, but not mutually exclusive,¹⁹ ways. First, while conceding that these “other grounds” (reasons, principles, policies or whatever) are part of the law, he might argue that they are to be identified not by direct moral insight or evaluation, but through an enquiry which is at least partly empirical. If successful this would preserve positivism, because a significant discontinuity between law and morality would be shown to exist even here. This is the approach taken by Dworkin, although this may be surprising since he proclaims himself, and is often taken to be, an opponent of positivism. As Detmold suggests [98], by accepting the fundamental

¹⁶ H. L. A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961), 55–6, 198–99 and *Essays on Bentham* (Oxford, Clarendon Press, 1982), 158–61. This aspect of Hart’s theory is discussed by Neil MacCormick in *Legal Reasoning and Legal Theory* (Oxford, Clarendon Press, 1978), 175–92 and H. L. A. Hart (London, Edward Arnold, 1981) 30–40, by J. Raz in *The Authority of Law* (Oxford, Clarendon Press, 1979), 154–55 and “The Purity of the Pure Theory” (1981) 35 *Revue Internationale de Philosophie* 441, 447–48 and 454–55, and by R. A. Duff in “Legal Obligation and the Moral Nature of Law” (1980) *Juridical Review* 61, 68–73.

¹⁷ In his earlier writings Raz accepted Hart’s view: J. Raz, *Practical Reasons and Norms* (London, Hutchinson & Co, 1975), 147–48 and *The Authority of Law*, op.cit., 155. But more recently he has repudiated it: J. Raz, “The Purity of the Pure Theory”, op.cit., 454–55. Admittedly Raz claims here only that “internal statements” express moral beliefs which may not in fact be sincerely held, but this seems to concede that the “internal point of view” involves full moral commitment while maintaining that it can be feigned. Hart replies to Raz in *Essays on Bentham*, op.cit., 153–61.

¹⁸ See H. L. A. Hart, *The Concept of Law*, op.cit., 113–14.

¹⁹ See n. 31, *infra*.

distinction between legal judgment and moral judgment Dworkin is really in the positivists' camp.²⁰ Although he argues that legal principles, which (should) determine hard cases, cannot be identified through any straightforward, empirical test such as the application of a rule of recognition, their existence depends ultimately upon sources (the rules and institutions of the law) whose existence is a matter of empirical fact, and they may therefore exist even though they are thoroughly immoral.²¹ Other philosophers also take this first approach to hard cases, although their theories differ from Dworkin's and from one another in relation to, inter alia, the identification of legal principles. Sartorius,²² for example, argues that legal principles *can* be identified by the application of something like Hart's rule of recognition, while MacCormick²³ stands somewhere between Dworkin and Sartorius on this issue.

Alternatively, a positivist might argue that if these other grounds can be identified and applied only through a process of moral evaluation, they are not "legal"; that when the rules run out we reach the limits of law, decisions in hard cases depending partly on non-legal (moral or political) grounds rather than solely on law. This is the approach of Raz, who points out that it depends on a distinction between a theory of law and a theory of adjudication: the latter will offer an account of reasons which are used (quite properly, i.e. as authorised by law) to decide hard cases but which are not part of the law or, therefore, within the purview of the former.²⁴ Underlying this distinction is a concept of law as a system of authoritative norms; it has already been shown that Detmold has in mind a very different concept of law.²⁵

Detmold attacks these alternative positivist accounts of hard cases in Chapters IV and V respectively. His attack on the former (Dworkin's) is more persuasive than his attack on the latter (Raz's).

The rebuttal of Dworkin's approach can be stated briefly. According to Dworkin, hard cases are determined by the application of principles which are not absolute, unlike rules which are "applicable in all-or-nothing fashion",²⁶ but have "weight" or "gravitational force". Detmold agrees that hard cases can only be decided by "weighing".²⁷ He prefers to say that

²⁰ This characterization depends upon a definition of "positivism" which differs from Dworkin's: see his discussion in *Taking Rights Seriously*, op.cit., 346, where he points out that this definitional question is not one of substance.

²¹ *Id.*, 326 and 341.

²² R. Sartorius, *Individual Conduct and Social Norms* (California, Dickenson, 1975) 191-93, 196-99 and 206-10.

²³ N. MacCormick, *Legal Reasoning and Legal Theory*, op. cit., Ch. IX and H. L. A. Hart, op.cit., 126-33.

²⁴ See J. Raz, "The Problem About the Nature of Law" (1983) 21 U.W. Ontario L. Rev. 203, 217. The distinction between a theory of adjudication and a theory of legal validity has been expounded by David O. Brink in "Legal Positivism and Natural Law Reconsidered" (1985) 68 *The Monist* 364.

²⁵ See the discussion in the text to n. 7, *supra*.

²⁶ R. Dworkin, op.cit., 24.

²⁷ He says that this is an inexact metaphor, however [244-45].

reasons, not principles, are weighed, but nothing turns on this if principles are understood simply as the entailed universalisations of reasons to which no additional or independent normative force is added [75-8]. His objection is this: it is logically impossible for a judge to understand the weight of a principle without being morally committed to it. Dworkin maintains that a judge who does not himself morally approve of a certain principle can nevertheless ascertain its weight according to law by studying institutional history, in particular, the way in which other judges have weighed it in the past. Detmold argues, convincingly, that no examination of institutional history can inform a judge of the weight to be accorded a principle in *his* case. This is not only because the competing principles (reasons) in his case will be different, but because the weight of each principle necessarily changes from case to case [86-8, 92-4]. Weight varies indefinitely according to the facts of each case; for example, the weight of the principle that promises be kept depends on the nature of the promise, the degree of reliance on it, and all other relevant circumstances [75-6, 79-80]. To decide a hard case a judge must make a fresh moral judgment in the light of all relevant facts [90, 95-6]. "Principles, therefore, as a matter of logic cannot be dependent for their existence, as rules can, on some contingent enunciation in the institutions of society" [86].

The argument is of course more complex and subtle than this truncated summary suggests, and it appears to be persuasive, although it will undoubtedly be faced with objections. It should be noted that even if the argument fails against Dworkin, it may succeed against others who take the first approach, such as Sartorius and MacCormick.²⁸ But Detmold fails to deal convincingly with the second of the two approaches mentioned above to which he turns in Chapters V and VII.

This alternative positivist account of hard cases is often expressed in terms of judicial "discretion". For example, Dworkin says that "positivists hold that when a case is not covered by a clear rule, a judge must exercise his discretion to decide that case by what amounts to a fresh piece of legislation".²⁹ This has led to considerable discussion of the nature of discretion, and of whether or not judges have it even in hard cases — a discussion which Detmold continues in Chapter V. However, this issue may be something of a red herring. In discussing the positivist thesis that there are limits to law, Detmold poses the really important question when he says:

"If there were a significant difference in the quality of the thought on each side of the limit, as there would be if there were discretion in outer but not inner cases, then the thesis would certainly have an importance" [149].

The question is whether there is a "significant difference in the quality of the thought on each side of the limit." There would be such a difference if judges have discretion only in outer cases; on the other hand, there may be

²⁸ See nn. 20 and 21, *supra*.

²⁹ R. Dworkin, *op.cit.*, 30-1. See Detmold [148].

such a difference even if they do not. Debating the nature and incidence of judicial discretion therefore cannot determine the issue. This becomes abundantly clear when Detmold argues that even if judges decided hard cases on the basis of chance or whim "there is still no discretion. Only gods can choose or direct chance. And if it is on the basis of whim the same is true ..." [115]. Perhaps — but there is nevertheless a significant difference between applying rules and tossing coins.

According to Raz, an essential function of law is to provide "publicly ascertainable ways of guiding behaviour", in the form of authoritative rulings which can be identified "without engaging in a justificatory argument". These rulings claim to bind all members of the community regardless of their disagreements with them, i.e. even if their disagreements are justified. In other words there must be an end to disagreements and questions — as Detmold puts it, "a substitution of certainty for truth" [21] — and according to Raz the authoritative rulings which perform this function constitute law: to the extent that uncertainty, and the opportunity for further moral disputation, remains — as in hard cases, for example — there is no law, although a fresh authoritative determination of the dispute will fill the void.³⁰

If this is the positivist thesis that there are limits to law, then Detmold's question becomes whether there is a "significant difference in the quality of the thought" which decides rule cases (based on authoritative rulings which are law, i.e. which are within the limits) and hard cases (based on other considerations which are not law, i.e. which are outside the limits).³¹

Oddly enough, elsewhere Detmold seems to agree that there is a significant difference in the reasoning used to resolve hard cases and rule cases. He says: "The world is mysterious and difficult to live in, and its difficulties are compounded by the fact that we must live in it with others who can be expected not to see it quite like we do. So we try to make it simpler, more obvious, more settled and more public. One result of this, the main one, is that we minimize the incidence of hard decisions by making rules, whose

³⁰ J. Raz, *The Authority of Law*, op.cit. 51-2; see also his "The Problem About the Nature of Law", op.cit., 213-216. Raz has recently supported this thesis with another argument based on the law's claim to authority, in "Authority, Law and Morality" (1985) 68 *The Monist* 295.

³¹ This formulation of the issue conceals difficulties in the interpretation of Raz. In an early article he conceded that law includes principles as well as rules, the difference between them being merely one of degree, principles prescribing less specific and more generic acts than rules: "Legal Principles and the Limits of Law" (1972) 81 *Yale L. J.* 823, 838. In later work he discusses "law", "norms" and "exclusionary reasons" without discriminating between rules and principles. Detmold argues that despite this varied terminology, Raz actually conceives of law as a system of rules [101]. This raises questions which cannot be discussed here, but if Detmold is wrong the discussion of Raz in the text should be amended as follows. First, the text at this point should contrast hard cases with norm cases rather than rule cases. Secondly, since Raz does affirm that all legal norms are identifiable without resort to moral evaluation, he should be understood as combining the two alternative positivist accounts of the standards which determine hard cases (see the text to n. 19, supra). On this view, Raz argues both that (a) there are legal norms other than rules, but they are identifiable without resort to moral evaluation (the first account), and (b) other standards are also used in deciding cases not fully determined by legal norms, but these are not part of the law (the second account).

logical character is calculated towards simplicity (the assumption of bindingness in a rule excludes all the difficulties of the questions it covers). This simplification is rightly thought to be important by legal positivists ...” [147].

Elsewhere he says that “rules, and pre-eminently legal rules, achieve a degree of certainty in the public realm which suits the rational arrangement of affairs ...” [128], and that “law, that vast array of rules ... is a settlement, an end to questions, a substitution of certainty for truth ...” [21]. But once it is conceded that reasoning in rule cases is simpler, and its conclusions more certain, than in hard cases (which is, after all, why the latter *are* “hard”), and that this is “rightly thought to be important”, then it cannot be disputed that there is a “significant difference in the quality of the thought” in the two sorts of case.

Detmold realizes that the issue ultimately depends on the comparative objectivity of the reasoning in rule cases and in hard cases [108]. Positivists insist that the greater certainty which even Detmold concedes is available in rule cases shows that there is a degree of objectivity there which is lacking in hard cases; that moral judgments are inherently more subjective or at least, if that term is too controversial, more disputable, than rule judgments. For Raz, the claim to this higher degree of objectivity is part of the very concept of law. Detmold, however, seems to maintain that the moral reasons which determine hard cases are every bit as objective, and as binding, as the legal rules which determine rule cases, and should therefore be considered to be part of the law.

“But reasons as well as rules bind judges. They do not have discretion about reasons (V.4). Thus a judge’s duty binds him to reasons as well as rules.

What could be the point of saying that one part of a judge’s duty, rules, was law and another part, reasons, was not law?” [150].

To fully test his position, it is necessary to examine his conception of morality and moral reasoning, since the supposedly objective reasoning which determines hard cases *is* moral reasoning.

MORAL JUDGMENT

Detmold begins his book with a brief account of the foundations of moral reasoning and judgment, an account which is, as we can now see, crucial to his subsequent analysis of legal judgment in hard cases. Unfortunately this account is the least persuasive section of the book.

Unconditional reasons for action (reasons upon which actions are ultimately based) are of two sorts, “self-regarding” and “other-regarding” [2]. Basic human desires (hunger, thirst, sexual desire) constitute unconditional self-regarding reasons for action; it would be irrational for someone to say he was thirsty but deny that his thirst was a reason to drink [1–2]. But are there, Detmold asks, unconditional other-regarding reasons for action which it would be irrational to deny? [3].

At this point he could perhaps have argued that the desire to care for another person (for example) is such a reason: might it not be irrational to say that one had the desire, but deny that it constituted a reason to help that person? But this would mean that we have unconditional other-regarding reasons only if we happen to have the requisite desires, and Detmold wants more than this. He wants to show that we have such reasons whether or not we have such desires, and this prompts him to make a puzzling argument which can be set out as follows:

1. The world is mysterious in that it is logically impossible to explain its existence, or the existence of any particular (fact) in it [4–5].
2. Such mystery “requires respect” [4]. To admit the mystery “but deny that it requires respect . . . is not logically in order. How could one who affirmed mystery but denied respect be thought to have made his meaning clear?” [7].
3. To respect something is to have an unconditional reason for action in relation to it [3–4].
4. No practical decision can avoid taking at least one particular fact into account, which is to say that none can avoid the mystery of the world [6].
5. Therefore no practical decision can be based entirely on self-regarding reasons for action.

Let us concede the first premise. But why should this commit anyone, logically or in any other sense, to “respecting” the world and every particular in it? It is clear that respect is a “passionate response” (his preferred term in later chapters for moral judgment), and the second premise might therefore seem to involve a category mistake — how can any proposition of logic entail any sort of passionate response? But this impression is unfair, if we concede that it would be irrational for a thirsty person to deny that he has a reason to drink, because here the concept of rationality falls short of logical entailment and it is this concept which Detmold has in mind in the second premise (despite his using the word “logically”). Nevertheless the premise needs much more support than it is given. The irrationality of being unmoved by one’s own desires is intuitively apparent (although analysis is required even here), but not the irrationality of failing to respect mystery (if “respect” is to mean what the third premise requires). After all, if the existence of every particular fact is equally inexplicable, then it seems to follow that every fact should be accorded equal respect. But then human beings, snails and lumps of mud could not be distinguished in terms of the respect due to them. Detmold’s response to this objection, that “in the first stages of moral thought . . . the weight of a particular fact as a reason for action depends . . . upon its universals” (i.e. on the particular properties it has) [106], in the light of the argument connecting respect to mystery, is wholly unsubstantiated.

On the strength of this argument from mystery, Detmold goes on to speak of facts, rather than desires, as constituting reasons for action (since every particular fact must be respected). There is an unexplained asymmetry between his accounts of self-regarding, and of other-regarding, reasons. In

the former case desires are reasons, but in the latter case facts (which he thinks *require* passionate responses) are reasons. But why not say that in the former case it is food (a fact), not hunger, which constitutes my reason for eating? Because food does not rationally require that I desire to eat it? But then if by *just having* this not-rationally-required desire I have a reason for action, why is this not the case for other-regarding desires as well (especially given the implausibility of the argument that such desires are required)?

The failure of the argument that other-regarding reasons for action are (logically) required threatens the objectivity of moral judgment, and this in turn undermines Detmold's account of legal judgment in hard cases. If the existence of other-regarding reasons depends on our having certain passionate responses to other persons or things, and if our having those responses is not in any sense required but is entirely contingent, his account of moral judgment would resemble that of the emotivists. According to them, moral judgments simply express our emotional responses which are not subject to the requirements of rationality (subject perhaps to the requirement of consistency).

Detmold's description of moral deliberation is somewhat reminiscent of emotivism. In deciding what to do one must weigh all the relevant reasons (i.e. the facts at hand), the weight of a reason being "the degree of passionate response to the fact which constitutes it" [73, 105]. But if our passionate responses are *contingent rather than required*, they may vary from person to person — no one's responses being "correct" or more "appropriate" in any objective sense. Detmold's solution to this problem, which he anticipates [80], is set out in Chapter V and it draws on Hume's distinction between the calm and the violent passions [116ff].

A passion is calm when it is based upon "a clear . . . conception of the object". Violent passions such as anger, jealousy and so on distort our perceptions of, and consequently our passionate responses to, reality. To achieve objectivity in moral judgment we must see the world clearly, as it "really is". By doing so, we establish "a connection between your moral judgment and mine" [120].

"[I]f you manage to pull me through my hatred or fantasy away from a certain moral judgment will I not say something like?: Oh, you were right, I now see what really happened (she was not doing this out of spite, he is not the wicked person I thought . . .). What more in point of objective connection could be required? The weight of the reasons which activate your and my judgments is objective in that it is open to objective influence in the way stated." [120-21]

Detmold seems falsely to assume a need to choose between two extreme views: on the one hand, the view that our passionate responses are purely "solipsistic . . . about which no question of untruth arises" (e.g. the emotivists' representation of "moral agents huffing and puffing their emotions independently of each other") [120], and on the other hand the view that where our responses differ one of us must be "wrong", failing to see "the world-as-it-really-is". But we may concede the possibility of some sorts of

error, and of interpersonal agreement, without committing ourselves to the second view. As to error, under the influence of "violent passion" we may overlook or misunderstand matters of fact, and in addition we may misconstrue or ignore our own deepest or "truest" feelings. Others may realize that we have made one of these errors, and attempt to show this to us in the manner Detmold refers to. As to interpersonal agreement, this is obviously not only possible, but is to be expected, to the extent that our emotional make-up, out-look on life and so on is similar to those of others. Our genetic constitution guarantees almost universal agreement to some (still controversial) extent, and on this foundation upbringing within a common culture or sub-culture (what Detmold describes as "moral education" [80-90]) ensures still further agreement within particular groups (but of course this may reduce agreement *between* such groups). Where members of a group share the same moral "point of view" in relation to certain matters, it may be appropriate to speak of truth or error in assessing a judgment of an individual member of the group: the judgment which members of the group would tend to make, reflecting calmly and under standard conditions, provides a yardstick which may be called "objective". But nothing guarantees even that the members of such a group will tend to agree on *all* matters, let alone that in a society containing a vast number of different "points of view" there are criteria available making it meaningful to speak of objective truth or falsity in every case of disagreement.

If Detmold's argument that moral judgments are objective is rejected, his objection to Raz's distinction between reasoning in hard cases and in rule cases should also be rejected. That distinction provides one rationale for positivists restricting the concept of law to authoritative rulings which can be identified empirically. No doubt *other* objections could be made either to that distinction or to that restriction (there are, for example, many other arguments to the effect that moral reasoning is objective). All that is claimed here is that Detmold's argument against both fails.

CONCLUSION

At the root of Detmold's various arguments is his conception of law as an activity rather than an inert system of norms [148]. The most fundamental questions in law are practical, not theoretical: they are questions not of "is" ("what is the law here?") but of "ought" ("what ought to be done here?"). According to Detmold such questions are moral questions, and therefore the most fundamental reasons for legal judgment must be moral reasons. *If* law is the institutionalised activity of making and enforcing legal judgments, whether in rule or in hard cases, then he has demonstrated the unity of law and morality.

Most of this must be conceded by the positivist. Raz, for example, has acknowledged that a theory of adjudication (i.e. a theory of legal judgment) must be a moral theory, since "the question of which considerations courts

should rely upon . . . is clearly a question of political morality", and that if a theory of adjudication is a theory of law then the latter must also be a moral theory.³² But Raz insists that our concept of law is narrower than this, that it refers to a body of authoritative norms which can be identified without resort to moral argument, rather than to the set of all reasons for legal judgment (let alone the activity of legal judgment itself).

If the disagreement between Detmold and such a positivist is terminological, is it trivial? No. As Hart maintained in his famous debate with Fuller, the choice between different uses of the word "law" may significantly affect the advancement and clarity of both our theoretical and practical deliberations.³³ In the case of a judge who refuses to apply, because it is immoral, a rule (X) which is valid according to the prevailing rule of recognition, Detmold's argument that he can (accurately) say "X is not a law" rather than "X is a law but ought not to be obeyed" has been shown to generate confusion, even on Detmold's own assumptions. He must also deal with Hart's argument against Fuller that to conclude in such circumstances "X is not a law" tends to obscure the difficult moral issues.³⁴

Detmold may of course be able to overcome these difficulties, and to raise other arguments to support his concept of law. In an important chapter on precedent, which cannot be discussed here, he argues that a positivist theory of law cannot accommodate common law [Ch. IX, esp. 198-200]. He might also want to say that a theory of law such as Raz's which needs to be supplemented by a theory of adjudication, cannot by itself solve any practical problem and therefore is of no, or very little, practical use.³⁵

How we define "law" is therefore not a trivial matter. But how we define "positivism", and how we decide whether it can be refuted, is.³⁶ The problems of substance, once our definition or conception of law has been settled, are to analyse the relationship(s) between legal judgment, law and morality in order to identify both their connections and discontinuities.

The principal merit of Detmold's book is its continual insistence that practical, legal judgment should be moral judgment. Even if he has failed to show that legal judgment is necessarily moral judgment (because he fails to show that weakness of the will is impossible), he has shown that it ought to be (bearing in mind that it will often be morally right to enforce legal rules which are morally wrong).³⁷ The purpose of this review article is not to depreciate this very significant contribution to jurisprudential thought, but to show that Detmold has not succeeded in refuting Raz's brand of positivism, and to clarify the issues which separate them.³⁸

³² J. Raz, "The Problem About the Nature of Law", op.cit., 217.

³³ H. L. A. Hart, *The Concept of Law*, op.cit., 204-5. For criticism of Hart's argument at this point, see D. Beylveid and R. Brownsword, "The Practical Difference Between Natural Law Theory and Legal Positivism" (1985) 5 Ox.J.Leg. Stud. 1.

³⁴ *Ibid.*, 206-7.

³⁵ Raz discusses this issue in "The Morality of Obedience" (1985) 83 Mich. L. Rev. 732, 735-36.

³⁶ See N. MacCormick, *Legal Reasoning and Legal Theory*, op.cit., 240 and n. 19, supra.

³⁷ See n. 5 and accompanying text, supra.

³⁸ I am indebted to Michael Detmold for helpful comments on a draft of this review essay.