

**INTERPRETIVISM AND THE FOUR PRINCIPLES APPROACH TO BIOMEDICAL  
ETHICS: JUDICIAL DECISION MAKING IN CASES WITH AN INHERENTLY  
ETHICAL CONTENT**

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## **Abstract**

Judges are often reluctant to interact with medical ethics when deciding cases with an inherently ethical content. They sometimes even transfer decision-making responsibilities to medical ethics groups. At times this unwillingness is based on the presumption that medical ethics will be able to perform an effective regulatory function. The problem is there is a wide range of ethical discourse, both official and unofficial; so much it can cancel itself out. Therefore, as a regulatory tool for the medical profession, medical ethics is insufficient for the job. Judges, on the other hand, could arbitrate between competing ethical conclusions. Indeed, there is a strong argument they *should*.

This thesis addresses this timely and complex issue. Judges need to be willing and able to rely on the soundness of their own moral convictions to recognise and deal appropriately with the inherent ethical content in certain cases. In order to do this, they need a decision-making framework that recognises the ethical nature of judicial decision-making, so as to provide judges with confidence in applying moral principles and medical ethics. This thesis will provide such an integrated framework.

*To Pop. Thank you for your sound pieces of advice regarding the thesis itself (“Why take so long to say everything?!”), and your encouraging words to me on this long journey (“When are you going to get a proper job?!”). I would not be the person I am today if it was not for you. And to my family. Thank you for always being there for me.*

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*Blyth v Bloomsbury Health Authority* [1993] 4 Medical Law Reports 151

*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

*Bolitho v City & Hackney Health Authority* [1998] AC 232; [1997] 3 WLR 1151

*Chatterton v Gerson* [1981] QB 432

*Chester v Afshar* [2004] UKHL 41

*Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55

*Fairchild v Glenhaven Funeral Services* [2003] 1 AC 32; [2002] UKHL 22

*Gold v Haringey Health Authority* [1988] 1 QB 481

*Jones v North West Strategic Health Authority* [2010] EWHC 178

*Lloyds Bank v Bundy* [1974] 3 ALL ER 757

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*Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634

*McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Medical Law Reports 343

*McGhee v National Coal Board* [1972] 3 ALL ER 1008; [1973] 1 WLR 1

*Nicholas v Imperial College Healthcare NHS Trust* [2012] EWHC 591

*Parker v British Airways Board* [1982] QB 1004

*Pearce v United Bristol Healthcare NHS Trust* [1999] PIQR 53

*Pretty v DPP and Home Secretary* [2001] UKHL 61

*Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital*  
[1985] AC 871

*Smith v Tunbridge Wells Health Authority* [1994] 5 Medical Law Reports 334

*Thorner v Majors* [2009] UKHL 18

*Waverley Borough Council v Fletcher* [1996] QB 334

*Wyatt v Curtis* [2003] EWCA Civ 1779

## **Other Cases**

*Cantebury v Spence* (1972) 464 F. 2d 772

*Chappel v Hart* [1999] 2 LRC 341

*Reibl v Hughes* (1980) 114 DLR (3d) 1

*Rogers v Whitaker* 16 BMLR 148

*Tennessee Valley Authority v Hill* (1978) 437 US 153

*White v Turner* (1981) 12 DLR (3d) 269

## **Table of Legislation**

The Endangered Species Act of 1973, Pub L No 93-205 sec 7, 87 Stat 884, 892 (codified as amended at 16 U.S.C. §1536 [1982]).

The Medical Act 1983

The National Environmental Policy Act of 1969, Pub L No 91-190, 83 Stat 852 (codified as amended at 42 U.S.C. §4321 *et seq*).

## **Chapter 1**

### **1. Introduction**

The following thesis is concerned with using ideas from the practices of jurisprudence and bioethics to solve problems best characterised as falling under the topic of medical law. Though many of the discussions this thesis will evaluate have been analysed previously, it highlights new questions and areas of investigation, and reinterprets traditional legal and ethical frameworks in order to deal with its central research question.

This chapter will analyse the fundamental issues motivating this thesis. It shall first analyse the research undertaken by José Miola. The chapter then provides an analysis of judicial approaches in two prominent medical law cases. The chapter then explores the developments in case law since Miola's research, and examines how this thesis builds upon Miola's work. Finally, it contends that judges *can* take a more proactive role in regards to the resolution of the issues in this chapter. This analysis and evaluation will establish a base on which the more detailed investigations of this thesis can take place.

### **2. Miola's analysis in *Symbiotic***

The thesis takes the work of José Miola as its starting point, in particular his book *Medical Ethics and Medical Law: A Symbiotic Relationship*.<sup>1</sup> Essentially, Miola highlights a three-element analysis regarding the relationship between medical ethics and medical law.

The first element is the increase in the capacity of medical ethics guidelines, analysis and discussion has had the negative effect of cancelling out these various sources of medical ethics. This then leaves 'a regulatory vacuum', with the practitioner's conscience filling the void.<sup>2</sup> This vacuum also stems from the absence of any hierarchy of the various sources of

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<sup>1</sup> José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) (hereafter *Symbiotic*).  
<sup>2</sup> *ibid* 1.

medical ethics. Miola highlights three categories of ethical discourse; the formal sector, the semi-formal sector and the unofficial sector. The formal sector encompasses the General Medical Council (GMC) ‘as it is the sole body with statutory mandate to provide ethical advice to the medical profession’;<sup>3</sup> the semi-formal sector includes the British Medical Association (BMA) and the Royal Colleges; the unofficial sector comprises others involved in medical ethical analysis from a range of disciplines such as law, philosophy, religious bodies, and pressure groups. Miola thinks this latter sector has had the greatest influence on the fragmentation of medical ethics, as it encourages a more analytical-orientated, less decisive-orientated approach to guidelines from the formal and semi-formal sectors. Overall, this fragmentation means in many scenarios, if a doctor wishes to show that his or her course action is ethical it is likely they are going to be able to find many sources that will both accept and reject a particular proposition.<sup>4</sup> This is made worse by the fact that as far as judicial decision-making is concerned, ‘there is no method for prioritising or choosing between the different categories of discourse’.<sup>5</sup>

The second element is on the other side of this relationship, the law and judges exacerbate the problem by misunderstanding the nature of medical ethics. This leads to the courts encouraging fragmentation, instead of restoring regulatory order.<sup>6</sup> Judges, even in cases with

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<sup>3</sup> *ibid* 6. See the Medical Act 1983, s35. For more detailed descriptions of the remit of the GMC and BMA, see Miola, *Symbiotic* (n1) 30-31.

<sup>4</sup> *ibid* 6-7.

<sup>5</sup> *ibid* 6. On the other side of this increasing proliferation and specification, Miola also notes that one problem which may have contributed to the ‘medical ethics renaissance’ (*ibid* 1) is ‘the historical *generality* of medical ethics, ethical principles and codes ... medical ethics, has traditionally, as a result, placed much emphasis on the “conscience” of the individual medical practitioner to interpret a principle’ (*ibid* 46-47) (footnote omitted) (emphasis added). Therefore, at both ends of the range regarding medical ethics, there is the same outcome (a lot of discretion on the part of the individual practitioner) in practice. Indeed, Miola recognises this himself when he states that ‘a logical consequence of normative analysis, particularly when designed to address the question of generality within ethical commentary, is that of subject specificity... this does not solve the perceived problem so much as creating one at the opposite end of the spectrum’ (*ibid* 47). More importantly, this also shows that in both circumstances, be it a medical practitioner or a judge, in relying on their own convictions, a question of arriving at their decisions in a *responsible*, ethically defensible manner is always pertinent.

<sup>6</sup> *ibid* 1.

an ‘inherently ethical content’<sup>7</sup>, display a deferential attitude to the medical profession.<sup>8</sup> Indeed, as judges’ ‘awareness of the ethical context to cases appears to grow...[p]aradoxically, this can sometimes lead to a lessening of the role given to medical ethics’.<sup>9</sup> The issue is courts could reverse this fragmentation and maintain control. They could send a message to doctors regarding which source of discourse to prioritise, instead of inappropriately medicalising such matters. Instead, courts are complicit in this fragmentation.<sup>10</sup> To be sure, it is not always the case judges abrogate responsibility to medical ethics because they are *scared* to engage with medical ethics. Indeed, at times this abrogation is based on the presumption “medical ethics” as a concept is able to perform an effective regulatory function. This premise is false in the current context.<sup>11</sup>

Therefore, a problem exists that needs to be recognised and rectified. That problem is not just that medical ethics is in an ‘amorphous, fragmented state’<sup>12</sup>, but more importantly, the courts have not recognised this fact and continue to act as if medical ethics is in a suitable regulatory state. The courts need to realise and recognise their delegation to medical ethics is not effective.<sup>13</sup> In the absence of a formal body which explicitly contemplates and delivers law

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<sup>7</sup> *ibid* 8. Miola notes that ‘[t]he designation of ethical content is based on three criteria. First ... there are what may be termed traditional ethical principles involved. Secondly, each issue [that Miola looks at] is the subject of traditional ethical guidance from the medical profession, which thus claims an authority over them. Lastly, in each case the decisions are not strictly medical in nature in the sense that doctors are not uniquely qualified to make them’ (*ibid* 9). This designation shall be followed here.

<sup>8</sup> *ibid* 9.

<sup>9</sup> *ibid* 9. This passage is interesting, because if Miola means that the courts are displaying a less deferential approach to the *medical profession* (which seems to be implied given the foregoing analysis) then this does not seem like a paradoxical situation at all, but simply the courts taking a more proactive stance in light of more sensitive ethical analysis surrounding the case. In addition to this, though Miola highlights this issue at various points (see, for example in the context of informed consent, 65, 72, 84-85), he never comments explicitly on whether this issue is a bad thing or not. However, it seems to be implied that there may be some negative consequences for medical ethics when he notes that ‘if medical ethics are less stringent than the law, the new found willingness of the judiciary to recognise and protect ethical principles will make it increasingly redundant as a regulatory tool, and the paradox identified should become ever more common’ (Miola, *Symbiotic* (n) 85).

<sup>10</sup> *ibid* 212-213. The issue of whether the law and the courts *can* do this is discussed at the end of this chapter.

<sup>11</sup> *ibid* 214.

<sup>12</sup> *ibid* 216

<sup>13</sup> *ibid* 216-217. Miola goes on to further note that ‘[a]fter this, there must be a further recognition that the discretion given to individual medical practitioners rather than medical ethics is a consequence of the fragmentation of discourse’ (*ibid* 217).

reform in conjunction with ethical standards,<sup>14</sup> one solution is to ensure the courts recognise their confidence in medical ethics is misplaced where the ethical guidance does not perform an effective regulatory function. It could then provide judges with an appropriate decision-making framework that recognises the ethical nature of judicial decision-making and allow them to take a less deferential stance based on robust ethical theory.

The final element of Miola's analysis is the process by which the fragmentation and failure of medical ethics' regulatory function occurred is problematic. That process is where there are 'cultural flaws combining with excessive professional autonomy leading to a fragmentation of and a failure in regulation';<sup>15</sup> 'while medical ethics *has* progressed through history, the doctor-based nature of ethical codes has not changed to any significant degree, and therefore the development of medical ethics has tended to reflect changes in the attitudes of medical practitioners rather than patients or society as a whole'.<sup>16</sup> Furthermore, when this traditional model is contrasted with society's diminishing trust in doctors, a tension is created that subsequently needs to be relieved.<sup>17</sup>

What can be implicitly seen from this outline are calls from consistency in the courts' treatment of medical ethics, in both action and principle. Furthermore, there needs to be a greater understanding of the role of "medical ethics" in the broad sense of the term, and the

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<sup>14</sup> José Miola, 'Why I Wrote...Medical Ethics and Medical Law: A Symbiotic Relationship' (2011) 6 (1) Clinical Ethics 52, 53-54 (hereafter *Why I Wrote*). Indeed, this is Miola's solution; see *Symbiotic* (n1) 216-219.

<sup>15</sup> Miola, *Symbiotic* (n1) 1.

<sup>16</sup> ibid 18. See Miola, *Symbiotic* (n1) chapter 2, "Historical Perspectives of Medical Ethics" for his full discussion.

<sup>17</sup> ibid 37. Contemporary examples Miola attributes to society's increased distrust in doctors include the events in the Bristol Royal Infirmary, and the effect of the trial of Harold Shipman (Margaret Brazier & José Miola, 'Bye Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Medical Law Review 85, 100) (hereafter B&M: *Bye Bye*). For Miola's discussion of the Bristol Inquiry Report, see *Symbiotic* (n1) 2-5. On the other side, Miola also highlights that the recent 'proliferation of medical ethics has appropriated the subject from the medical profession and to a significant extent has alienated doctors' (Miola, *Symbiotic* (n1) 33). For further discussion see Miola, *Symbiotic* (n1) chapter 3. Miola puts this down as a cultural flaw within the medical profession, since doctors *themselves* start to perceive medical ethics, with its increased academisation, as largely *irrelevant* to the practice of medicine. However, this proliferation in medical ethics was and continues to be justified by past events such as the medical experimentations carried out by Nazi doctors, which show the presumption of benevolent paternalism on the part of the doctor cannot always be taken for granted (ibid 210; 34).

ethical nature of judicial decision-making. This is for many reasons; in order for judges to be sensitive to the state of official and unofficial ethical discourse; in order to see whether the (particularly formal) ethical guidance is in a position to be able to perform an effective regulatory function; in order to clear up the hierarchical issue of ethical discourse so as to prevent fragmentation; and to be able to deal appropriately with the legal and ethical issues in each case.

The symbiosis referred to in the title of Miola's book is borne out when he states:

The relationship between medical law and medical ethics is clearly a symbiotic one. Both organisms must coexist and must rely on the other. We have seen...that medical ethics and ethical principles have had to be dealt with by the courts and committees, while legal rules have had to be considered by medical ethics. Moreover, the law has frequently seen medicalisation and the abrogation of responsibility as a panacea, and the latter has therefore had to shoulder this burden, albeit willingly. But can this relationship be said to be mutually beneficial? I would have to say no.<sup>18</sup>

Notice however Miola, when describing the symbiosis, does not go on to suggest a *break* in the relationship. Therefore, it seems a reasonable inference given his recommendations at the end of the book this relationship is salvageable and has the potential for good.

However, in order to substantiate these claims, a more detailed analysis of certain cases must be provided. This analysis will also highlight areas where Miola's work can be improved. Last, this analysis will go towards refining the central research question of this thesis.<sup>19</sup>

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<sup>18</sup> ibid 209.

<sup>19</sup> This chapter, due to the constraints of space, shall leave out an analysis of the influence of *Bolam v Friern Hospital Management Committee* ([1957] 1 WLR 582) on the matters discussed in this chapter. For a discussion of the influence of *Bolam*, see Miola, *Symbiotic* (n1) 10-15. Suffice to say here, though a strong case can be made that the test in *Bolam* was intended to be normative (Miola, *Symbiotic* (n1) 12), the case was not subsequently interpreted in this manner. Therefore, what has arisen since *Bolam* is a perception that if a practitioner does bring experts to testify on their behalf, they are honest and prepared to stand by this testimony,

### **3. Specific case analysis**

In order to substantiate these claims, Miola examines case law surrounding five issues in *Symbiotic*, ‘to give a representative idea of how the courts treat medical ethics’<sup>20</sup>. This thesis shall look at case law involving risk disclosure and informed consent, both in this initial chapter and when looking to reinterpret the case law in the sixth chapter. Unfortunately, space precludes a consideration of other issues, as well as a detailed consideration of the law as it relates to risk disclosure. This chapter shall look in detail at two cases; *Sidaway v Bethlem Royal Hospital Governors*<sup>21</sup> and *Chester v Afshar*.<sup>22</sup> Whilst initially this may seem like a very limiting analysis, both these important House of Lords’ decisions are at opposite ends of the spectrum, not just time wise but in terms of (certain) judges’ deference to the medical profession. Therefore, these two cases allow the contrast in judicial attitudes to be highlighted in a succinct, yet sharp way. This is not to say the intervening cases Miola examines will be neglected. Where necessary, certain intervening cases shall be used to further highlight the courts engagement (or lack of) with the ethical issues that arise.<sup>23</sup>

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then the judge will not ask for the defendant nor the expert to justify their practice. The judge will engage in no evaluation at all (B&M, *Bye Bye* (n17) 88). Given the situation regarding ethical matters and the medical profession above, this state of affairs is at best less than desirable. Though *Bolitho v City & Hackney Health Authority* has stated that the normative test is to be used ([1998] AC 232; [1997] 3 WLR 1151), it is also the case that *Bolitho* is limited in its impact. See, for example, B&M, *Bye Bye* (n17) 100-101; 105-107; Miola, *Symbiotic* (n1) 14-15.

<sup>20</sup> *ibid* 15. Those are risk disclosure and informed consent, minors’ rights to refuse and to consent to medical treatment, sterilisation of people with learning disabilities, issues at the end of life, as well as analysing three government-commissioned reports on topics with an ethical element (Miola, *Symbiotic* (n1) 16-17). See, respectively, chapters 4-8 of *Symbiotic*.

<sup>21</sup> [1985] AC 871.

<sup>22</sup> [2004] UKHL 41.

<sup>23</sup> For example, Brazier & Miola highlight the importance of *Pearce v United Bristol Healthcare NHS Trust* ([1999] PIQR P53), a case decided in the Court of Appeal subsequently accepted by *Chester*. They note that ‘[e]ven the cynic must concede that, whatever the outcome on the facts, the “reasonable doctor” test [regarding risk disclosure] received a body blow in *Pearce*. It survives only if the reasonable doctor understands that he must offer the patient what the “reasonable patient” would be likely to need to exercise his right to make informed decisions about his care’. (B&M, *Bye Bye* (n17) 110) (footnote omitted). However, see Maclean’s arguments concerning Lord Woolf’s test, in particular that ‘there is no discussion of how far the test clarifies the duty [to disclose]’ (Alasdair Maclean, ‘From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?’ (2012) 20 Medical Law Review 108, 119) (hereafter *Sidaway to Pearce*) at 118-119, and that ‘it seems that the question [as to what constitutes a significant risk that must be disclosed] was ultimately decided [in *Pearce*] by clinical judgment rather than by informational needs of the reasonable patient. Lord Woolf’s words provide clearer guidance than those of Lord

At its most basic, ‘[t]he ethical, as opposed to technical medical issue [is] how much information a doctor must provide to a patient before her consent can be said to be “informed” and therefore valid’.<sup>24</sup> Concerning risk disclosure, Miola contends the interaction between medical law and medical ethics works well. ‘There, the law recognise[s] the ethical component to the case, but set[s] a threshold for doctors that [is] below that demanded by the ethical guidance— so a doctor can be acting unethically, but legally’.<sup>25</sup> Moreover, ‘this has been achieved within the context of formal and semi-formal medical ethics that have, [ ] exceptionally... sought to maximise the autonomy of the patient’.<sup>26</sup>

Therefore, it might seem counterintuitive to look at this area of law. However, the interaction between medical law and ethics was not always complementary. Indeed, by examining more conservative judgments, these highlight the need for an ethical component to judicial decision-making. Further, as Miola notes, ‘the problem lies not just in how medical law and ethics *have* combined, but in what the perceived model of this ethico-legal relationship has the *potential* to do’.<sup>27</sup> This process of cultural flaws, excessive autonomy and fragmentation has not been identified and therefore cannot be rectified. Therefore, the effective relationship that presents itself in the risk disclosure scenario is *fortuitous* and the *exception* to the rule.<sup>28</sup> Further, it is not just identifying the process that is relevant, but *remedying* that process which will lead to judges dealing with the inherent ethical issues in cases in a consistent, responsible manner.

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Bridge [in *Sidaway*] but the implementation of his test simply muddied the waters’ (*ibid* 121) (footnote omitted) at 120-121. Nonetheless, he does note that ‘*Pearce* followed a number of cases that ultimately redefined the judiciary’s approach to the relationship between the standard of and professional practice’ (*ibid* 117). See Lord Steyn at [16] in *Chester* for his acceptance of Lord Woolf’s test. However, it must be noted that *Chester* ‘concerned causation rather than the standard of care. Since a breach of duty was accepted, any comments were *obiter* and give only limited guidance on how the test will be applied in practice’ (Maclean, *Sidaway* to *Pearce* (n23) 122).

<sup>24</sup> Miola, *Symbiotic* (n1) 16. As Maclean notes, ‘[a]ll aspects of consent have been judicially considered, including capacity, voluntariness, the duty to disclose, and causation’ (Maclean, *Sidaway* to *Pearce* (n23) 109) (footnotes omitted). Here, the topics of capacity and voluntariness shall not be considered.

<sup>25</sup> Miola, *Why I wrote* (n14) 53.

<sup>26</sup> Miola, *Symbiotic* (n1) 211.

<sup>27</sup> *ibid* 209-210 (emphasis in original).

<sup>28</sup> *ibid* 210.

Related to above is whilst it is to be praised that judges may be ‘promoting patient autonomy as fundamental’,<sup>29</sup> their view of autonomy may not be ethically sophisticated. If it is not, this may indicate that whilst the courts are *aware* of such ethical issues, those ethical issues may not receive much (or as much) sustained analysis as they should do. This point is bound up with developments since Miola’s analysis in *Symbiotic*. It might be thought as ‘this is an area in which medical law and medical ethics interact well with each other’,<sup>30</sup> this positive trend would continue. However, the case of *Al Hamwi v Johnston and Another*<sup>31</sup> shows this is not so, and the dangers of the court’s view of autonomy are realised.<sup>32</sup> Indeed, it is noted that ‘the primacy accorded to the principle of autonomy [ ] in *Chester*...does not accord with the dicta of Simon J in the present case’.<sup>33</sup> Further, the case of *Birch v University College London Hospital NHS Foundation Trust*<sup>34</sup> highlights ‘[l]ittle attention has ever been given to the attendant requirement to disclose alternatives, a facet of the duty which is arguably every bit as important in the quest to protect patient autonomy’,<sup>35</sup> until now. Given these developments, it could be contended the positive relationship between medical law and ethics in this area has taken a turn for the worse. The courts are inconsistent in their use of different conceptions of the concept of respect for autonomy, of which some conceptions are ethically unsophisticated.

Overall, these foregoing points highlight an analysis regarding whether judges recognise the ethical nature of judicial decision-making and rely on their convictions to provide an ethically robust judgement in the area of informed consent is warranted. Miola’s analysis of *Sidaway* and *Chester* shall be followed and developed. However, this thesis shall treat *themes* as

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<sup>29</sup> Sara Fovargue & José Miola, ‘One Step forward, Two Steps Back? The GMC, the Common Law and “Informed” Consent’ (2010) 36 J Med Ethics 494, 495 (hereafter F&M, *One Step Forward*).

<sup>30</sup> Miola, *Symbiotic* (n1) 85.

<sup>31</sup> [2005] EWHC 206.

<sup>32</sup> F&M, *One Step Forward* (n29) 496.

<sup>33</sup> José Miola, ‘Autonomy Rued OK?’ (2006) 14 Medical Law Review 108, 112.

<sup>34</sup> [2008] EWHC 2237.

<sup>35</sup> Rob Heywood, ‘Medical Disclosure of Alternative Treatments’ (2009) 68 (1) CLJ 30, 30 (hereafter *Alternative Treatments*).

opposed to persons (as Miola does). The selection of themes and their interaction is discussed with each case in mind, though there are overlapping themes between both cases. Each theme is selected to give a *representative illustration* of the problems involved when courts take a deferential attitude towards the medical profession in cases with an inherently ethical content.

### **3.1. Sidaway**

*Sidaway* is important because the case ‘was the first time that the House of Lords dealt with a non-negligence case, and the issue was, in substance if not in form, more concerned with ethics than technical medical practice’.<sup>36</sup> Succinctly; ‘[t]he plaintiff had suffered paralysis due to a small inherent risk materialising following an elective operation to cure back pain. She had not been warned of this risk and sued, arguing that she should have been’.<sup>37</sup> But ‘the House of Lords, however, was to have trouble in reaching a decision, and indeed, in the end *Sidaway* may be best described as messy. The courts could not seem to decide on which interpretation of *Bolam* to use, and some judges wanted to dispense with it altogether’.<sup>38</sup> Thus, the key issue in *Sidaway* was how to define a risk as material so that the doctor must disclose this risk in order for the patient’s consent to be deemed autonomous and informed.<sup>39</sup>

The themes that shall be used to analyse the approaches in *Sidaway* are as follows: the misidentification of the nature of arguments; the nature of the relationship between doctor and patient; (protection from) paternalism; and recognition (*and prioritisation*) of the principle of respect for autonomy. It is also important to clarify the argument in two respects. First, many of the Law Lords’ arguments do not fit exclusively within one theme, but instead overlap with others. Second, though one of the section’s main aims is to analyse the

<sup>36</sup> Miola, *Symbiotic* (n1) 55. However, it must also be noted ‘their lordships confirmed that negligence, rather than trespass was the appropriate vehicle for regulating the duty to disclose information regarding risks’ (Maclean, *Sidaway to Pearce* (n23) 112). See specifically, Lord Diplock (n21) at 892-895, Lord Bridge at 900 (with whom Lord Keith concurred). See also *Chatterton v Gerson* [1981] QB 432.

<sup>37</sup> Miola, *Symbiotic* (n1) 16. See Lord Scarman’s judgement (n21) at 877-882 for the detailed facts of the case.

<sup>38</sup> Miola, *Symbiotic* (n1) 16.

<sup>39</sup> ibid 57. However, eventually all five Law Lords dismissed Mrs Sidaway’s claim.

sophistication with which judges treat the ethical issues and medical ethics, there shall *not* be a theme of “ethical sophistication”. The analysis undertaken under the themes identified will go towards showing the ethical sophistication of the particular judgements.

### **3.1.1. (Protection from) paternalism**

*Sidaway* was concerned in substance with an ethical matter. Therefore, it would be beneficial if the courts were to identify the real, ethical nature of the issues and their arguments. However, once it was decided (incorrectly) to resolve the *ethical* issue in *Sidaway* by deference to *clinical* judgment, the judgments have a much more paternalistic tone. This is the nature of the test in practice.<sup>40</sup> The problem here is not paternalism as a concept itself. In some circumstances, some forms of paternalism may be justified.<sup>41</sup> The issue is advocating paternalism without reference to *any* ethical principles, the judgements in *Sidaway* leave open the possibility patients may not be protected from the excesses of unjustified medical paternalism.<sup>42</sup> Therefore, these passages highlight the need for a decision-making framework that not only identifies the ethical nature of judicial decision making, but also allows judges to come to an ethically sophisticated conclusion.

For example, in Lord Diplock’s judgement ‘there are several instances...where he came close to openly sanctioning such paternalism’.<sup>43</sup> He notes:

Inevitably all treatment, medical or surgical, involves some degree of risk that the patient’s condition will be worse rather than better for undergoing it...All these are matters which the doctor will have taken into consideration in determining, *in the exercise of his professional skill and judgement, that it is in the patient’s interest that*

<sup>40</sup> See Beauchamp and Childress’s (hereafter B&C’s) discussion of the professional practice standard in Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (7<sup>th</sup> edn, OUP 2013) 126 (hereafter PBE), and in chapter 6 of this thesis.

<sup>41</sup> See, for example, B&C’s discussion of paternalism in PBE (n40) at 214-226.

<sup>42</sup> Miola, *Symbiotic* (n1) 58.

<sup>43</sup> *ibid.*

*he should take the risk involved and undergo the treatment recommended by the doctor.*<sup>44</sup>

The deference to the medical profession (and its ethics<sup>45</sup>) and the clearly paternalistic tone is highlighted in the italicised portion above. Further, as there is no engagement with medical ethics or ethical principles in Lord Diplock's judgment, it looks more like he is simply *asserting* this paternalistic stance is the ethically correct one to take, as opposed to basing this on any ethical framework or sound convictions.

Additionally, Lord Templeman believed the principle of respect for autonomy was adequately protected by the right of the patient to ask questions which must be fully and truthfully answered. Though seemingly a welcome approach, Miola notes 'this approach somewhat eroded any notion that the principle of self-determination was being prioritised'.<sup>46</sup>

This is because Templeman further notes:

I do not subscribe to the theory that the patient is entitled to know everything...An obligation to give a patient all the information available to the doctor would often be inconsistent with the doctor's contractual obligation to have regard to the patient's best interests. Some information might confuse, other information might alarm a particular patient.<sup>47</sup>

Again, this position is based on ethically unsophisticated arguments. How is the patient able to exercise a right to judge whether to undergo treatment, if the doctor is to gauge how much information to tell the patient on the basis of her medical experience and training? Although

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<sup>44</sup> (n21) at 890-891 (emphasis added).

<sup>45</sup> Miola, *Symbiotic* (n1) 59.

<sup>46</sup> *ibid* 61.

<sup>47</sup> (n21) at 904. As Miola points out this is 'the only passing reference to medical ethics as a concept or construct as opposed to the ethical *principle* of self-determination in any of the judgments' (Miola, *Symbiotic* (n1) 65). This is worthwhile noting because it substantiates Miola's claim that judges are not in fact scared to abrogate decision-making responsibility to medical ethics, even though in this case, a degree of oversight was maintained (*ibid*).

the patient has the ultimate decision, this is curtailed in substance. The ultimate objective is to ensure the patient undergoes the procedure, as the doctor has deemed this in the patient's best interest.<sup>48</sup>

To compound these issues, subsequent developments in case law have ensured the principle of respect for autonomy has not been prioritised. As seen in *Blyth v Bloomsbury Health Authority*<sup>49</sup> and *Gold v Haringey Health Authority*<sup>50</sup> patient choices were again subject to what the doctor thought was best for them.<sup>51</sup> Indeed, it is noted by Miola '[i]n both cases the court not only refused to recognise the ethical content, but also moved further away from the principle of autonomy than even Lord Diplock in *Sidaway*.'<sup>52</sup>

### **3.1.2. Relation of doctor and patient**

Bound up with above, it is apparent Lords Diplock, Templeman, Bridge (and implicitly Lord Keith's) focus in the doctor-patient relationship was on the conduct and actions of the doctor. The upshot is there is a consequent lack of focus upon the patient, the principle of respect for autonomy and the patient's right to information in the informed decision-making scenario.<sup>53</sup> Therefore, this view of the doctor-patient relationship is 'overly simplistic',<sup>54</sup> and there is no

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<sup>48</sup> Miola, *Symbiotic* (n1) 61. Indeed, this analysis is pertinent to both Lord Diplock's comment that if the patient was to question the doctor '[n]o doubt ... the doctor would tell him whatever it was the patient wanted to know' ((n21) at 895), as well as Lord Bridge's comment 'that, when questioned specifically by a patient of apparently sound mind about risks involved ... the doctor's duty must, in my opinion be to answer both truthfully and fully as the questioner requires' (*ibid* at 898).

<sup>49</sup> [1993] Med LR 151. *Blyth* was decided in 1987 but subsequently not reported until 1993.

<sup>50</sup> [1987] 2 All ER 888.

<sup>51</sup> B&M, *Bye Bye* (n17) 91.

<sup>52</sup> Miola, *Symbiotic* (n1) 65. See, for example, Neill LJ's discussion of *Sidaway* in *Blyth* at 160, and Kerr LJ's discussion of *Sidaway* at 157, which is complementary to that of Neill LJ's position. See also Lloyd LJ's discussion of *Sidaway* in *Gold* at 489-90, which also defines (incorrectly) the provision of information as a different sort of technical medical skill (Miola, *Symbiotic* (n1) 68).

<sup>53</sup> F& M, *One Step Forward* (n29) 495.

<sup>54</sup> Maclean, *From Sidaway to Pearce* (n23) 111.

ethical sophistication to their Lordship's positions. They may have been 'too readily convinced by arguments that enhancing patient autonomy may damage patients' health'.<sup>55</sup>

Examples of this can be seen in the following. Lord Bridge states the intention in the risk disclosure scenario is 'how best to communicate to the patient the significant factors necessary to enable the patient to make an informed decision whether to undergo the treatment'.<sup>56</sup> However, in some circumstances, in order to achieve this aim, the doctor 'may take the view, certainly with some patients, that the very fact of his volunteering, without being asked information of some remote risk in the treatment proposed...may lead to that risk assuming an *undue significance* in the patients calculations'.<sup>57</sup> This position is ethically unsophisticated. It focuses not on 'co-operative decision making'<sup>58</sup>, but on a unilateral practice, with the *doctor* determining what is best. Furthermore, the idea certain risks will be *unduly* significant, albeit remote, cannot be as easily analysed from the doctor's perspective as Lord Bridge's passage suggests. Indeed, B&C note '[a]n individual's perception of risks may differ from an expert's assessment. Variations may reflect not only different goals and "risk budgets" but also different qualitative assessment of particular risks, including whether the risks in question are voluntary, controllable, highly salient, novel, or dreaded'.<sup>59</sup> Therefore, there needs to be a more nuanced consideration than suggested by Lord Bridge.<sup>60</sup> Further, like Lords Diplock<sup>61</sup> and Bridge, it is clear Templeman takes the view of the doctor-

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<sup>55</sup> Margaret Brazier 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) 7 Legal Studies 169, 170 (hereafter *Autonomy and Consent*).

<sup>56</sup> (n21) at 899.

<sup>57</sup> (n21) at 899 (emphasis added).

<sup>58</sup> Maclean, *Sidaway to Pearce* (n23) 116.

<sup>59</sup> B&C, *PBE* (n40) 235 (footnote omitted). See generally B&C, *PBE* (n40) 232-237.

<sup>60</sup> However, Lord Bridge does highlight that '[i]n so far as it is possible and appropriate to measure such risks in percentage terms[,] some of the expert medical witnesses called expressed a marked and understandable reluctance to do so' ((n21) at 900-901).

<sup>61</sup> It is clear that Lord Diplock views the relationship of patient and doctor as unilateral. Though Lord Diplock does note that the present issue was one of 'how to conduct a bilateral discussion with the patient' he goes on to immediately after to say that this "bilateral discussion" is one to be done 'in terms best calculated not to scare [the patient] off from undergoing an operation which, in the exercise of the paramount duty of care ... [the doctor] is satisfied that it is in [their] interests to undergo despite such risks as may be entailed ((n21) at 891). It is clear, therefore, that the reference to a "bilateral discussion" is more in form than any actual substantive

patient relationship as unilateral in nature, given he explicitly highlights the dangers of providing *too much* information to the patient.<sup>62</sup> This analysis therefore reinforces Brazier's point that those Lordships in the majority assumed patients do not want comprehensive information concerning treatment proposals.<sup>63</sup>

### **3.1.3. Recognition (and prioritisation) of respect for autonomy**

This theme is important because whilst all of the judges in *Sidaway* identified the ethical principle of respect for autonomy,<sup>64</sup> this is not necessarily enough to lead to an ethically sophisticated argument. This recognition needs to be *implemented*.<sup>65</sup> As seen in Lord Scarman's judgment, this leads to a more ethically sophisticated discussion, with explicit ethical arguments against the professional practice standard, resulting in a better overall judgment. 'For Lord Scarman...the key principle was the right to self-determination of patients, with everything else flowing from that...For his Lordship, the principle of autonomy *should* be given primacy over medical opinion regarding what was best for the patient'.<sup>66</sup>

Lord Scarman states:

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endorsement. See also how Lord Diplock notes '[t]he only effect that mention of risks can have on the patient's mind, if it has any at all, can be in the direction of deterring the patient from undergoing the treatment *which in the expert opinion of the doctor it is in the patients best interest to undergo* ((n21) at 895) (emphasis added).

<sup>62</sup> F&M, *One Step Forward* (n29) 495. This can be seen (in addition to the quote accompanying footnote 47) when he notes that '[a] patient may also make an unbalanced judgement if he is provided with too much information and is made aware of possibilities which he is not capable of assessing because of his lack of medical training, his prejudices or his personality. Thus the provision of too much information may prejudice the attainment of the objective of restoring the patient's health' ((n21) at 904).

<sup>63</sup> Brazier, *Autonomy and Consent* (n55) 186. Professor Brazier identifies this as one of the courts 'three basic assumptions. That is, '[t]he proposition that patients in general do not want comprehensive information on treatment proposals, and may react capriciously to such information'. Brazier goes on to note that this assumption 'is not founded on any hard evidence. Indeed ... what evidence there is from the USA [at the time of the article] to the contrary' (Brazier, *Autonomy and Consent* (n55) 186). For this evidence to the contrary, see *ibid* 174-175. What is also interesting in Lord Templeman's judgement is that he states '[i]f the doctor making a balanced judgement advises the patient to submit to the operation, the patient is entitled to reject that advice for reasons which are rational, *irrational, or for no reason*' ((n21) at 904). This links into Beauchamp and Childress's analysis of risk perception, as highlighted when analysing Lord Bridge's judgement earlier.

<sup>64</sup> Even including Lord Diplock; see (n21) at 895. For Lord Bridge, see *ibid* at 897. For Lord Templeman see *ibid* at 903.

<sup>65</sup> Though it will be shown when analysing *Chester* that even the prioritisation of the principle of respect for autonomy may be done in an ethically unsophisticated manner.

<sup>66</sup> Miola, *Symbiotic* (n1) 62 (emphasis in original).

If...the failure to warn a patient of the risks inherent in the operation which is recommended does constitute a failure to respect the patients right to make his own decision, I can see no reason in principle why, if the risk materialises and injury or damage is caused, the law should not recognise and enforce a right in the patient to compensation.<sup>67</sup>

Here Lord Scarman promotes the ethical principle of respect for autonomy, whilst warning against a too deferential approach to the medical profession. It is his *recognition* of the ethical principle that allows him to separate out diagnosis and treatment as primarily clinical matters from the ethical matter of risk disclosure.<sup>68</sup> Because of this recognition, Lord Scarman goes on to state that:

Ideally, the court should ask itself whether in the particular circumstances the risk was such that this particular patient would think it significant if he was told it existed. I would think that, as a matter of ethics, this is the test of the doctor's duty. The law, however, operates not in Utopia but in the world as it is: and such an inquiry would prove in practice to be frustrated by the subjectivity of its aim and purpose.<sup>69</sup>

Nonetheless, because of this distinction, Lord Scarman further states '[t]he law, however, can do the next best thing, and require the court to answer the question, what would a reasonably prudent patient think significant of in the situation of this patient'.<sup>70</sup> Thus, Lord Scarman's approach advocates the doctrine of informed consent. Importantly, Lord Scarman's discussion of the ethical principles underlying the doctrine of informed consent,<sup>71</sup> coupled with his warnings against medical deference in light of *Bolam*, make the arguments ethically

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<sup>67</sup> (n21) at 884-885. Lord Scarman further notes '[i]f it be recognised that a doctor's duty of care extends not only to the health and well-being of his patient but also to a proper respect of his patient's rights, the duty to warn can be seen to be part of the doctor's duty of care' (*ibid* at 885).

<sup>68</sup> Miola, *Symbiotic* (n1) 63.

<sup>69</sup> (n21) at 888.

<sup>70</sup> *ibid*.

<sup>71</sup> *ibid* at 882.

sophisticated. There is a considered discussion of whether the patient's autonomy should be prioritised over the principle of benevolent paternalism.<sup>72</sup> There is also a discussion of the moral status of the informed consent test, and a discussion of the values the law should promote and be seen through.<sup>73</sup> Therefore, the judgement is the polar opposite of Lord Diplock's, and is ethically more considered, responsible and defensible. For this it is to be welcomed.<sup>74</sup>

### **3.1.4. Misidentification of the nature of arguments: ethical and technical**

The negative implications of some of the Law Lord's approaches in *Sidaway* have been highlighted. These include some of the judgements taking on an ethically unsophisticated paternalistic tone, and in focusing on the conduct and actions of the doctor in the doctor-patient relationship, providing an ethically crude analysis of this relationship in practice. Further, whilst the principle of respect for autonomy is identified by all the Law Lords, the majority do not go on to implement this principle. Therefore, a more significant issue emerges. All of the foregoing issues stem from the lack of understanding and misidentification that the pertinent issues in *Sidaway* are ethical, and not technically medical in nature. Many of these negative implications stem from the willingness of the Law Lords to defer decision-making responsibility to the medical profession, on the basis of an *incorrect* characterisation of the issues in practice. Further, the issue is not simply there is an ethically unsophisticated analysis by the Law Lords, with then a failure at the end of their decision to

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<sup>72</sup> Miola, *Symbiotic* (n1) 63.

<sup>73</sup> As Miola notes '[t]he law's role would thus be to prioritise the autonomy of patients. In effect, his Lordship began with the premiss that the principle of self-determination was paramount and then asked how the law could best protect it' (Miola, *Symbiotic* (n1) 63).

<sup>74</sup> Miola, *Symbiotic* (n1) 63. But this makes it all the more perplexing that in *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634, Lord Scarman was willing to be *so* deferential to medical authority, whereas he was to deliver such an ethically sensitive judgement a mere year later. However, these two cases might be distinguished on the bases that *Sidaway* concerned the provision of information, whereas *Maynard* concerned treatment and diagnosis. Again, whilst this is only a single instance and is subject to the foregoing counter-point of the distinction between the facts of the two cases, it does suggest that there is not a *consistent* application of a judicial decision-making framework that provides confidence to judges in relying on their convictions in applying moral principles and medical ethics. This, in itself, is problematic.

fully consider the implications of their reasoning. It is this lack of understanding is *pervasive* throughout the entire judgement of many of the Law Lords' decisions in *Sidaway*.

Indeed, in *Sidaway*, as pointed out immediately above, there were two key points at which the Law Lords were to misidentify the nature of their judgements. The first was in initially outlining the nature of the matter before them as one of clinical practice or not.<sup>75</sup> The second was in misidentifying the nature of their further arguments throughout the remainder of their decision, for example in rejecting alternative tests or elaborating upon their initial position. Both these matters interlink with one another. Arguably the more important misidentification is at the initial stage of whether the matter is clinical or ethical in nature. Therefore, it shall suffice to concentrate on the former, as the consequences of both instances of misidentification are the same.<sup>76</sup>

In not identifying the real nature of their arguments even though it is apparent their judgements rely on moral claims, this means it is difficult to analyse the judge's ethical reasoning (if there is any) and the basis for the judge's ethical (and possibly legal) claims becomes unclear. Second, whilst doctors may have expertise in matters of *technical medical skill*, it is not necessarily the case they have expertise in matters of *morality and ethics*.

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<sup>75</sup> This issue is similar to what Brazier and Miola term '*Bolamisation*', whereby 'the case is taken outside its proper limits' (Miola, *Symbiotic* (n1) 13). Brazier and Miola in *Bye Bye* (n17) divide the actions of the courts into the categories of 'overt *Bolamisation*, covert *Bolamisation* and the widening of *Bolam's* sphere of influence' (Miola, *Symbiotic* (n1) 13) (emphasis in original). See Miola, *Symbiotic* (n1) chapters 6&7 for discussion of these two latter issues. See also, in general B&M, *Bye Bye* (n17) 90-95.

<sup>76</sup> For examples of the misidentification of the nature of their further arguments, See Lord Bridge recognising 'the logical force of the *Canterbury* doctrine, proceeding from the premise that the patients right to make his own decision must at all costs be safeguarded against the kind of medical paternalism which assumed that "doctor knows best"' (*ibid* at 899, relying on *Canterbury v Spence* (1972) 464 F. 2d 772). It can be argued Lord Bridge is not recognising the *logical* force of the doctrine at all, but in fact the ethical force of the doctrine of informed consent. In recognising that a valid *ethical* principle underpins the status or attractiveness of this *legal* test, it seems what Lord Bridge is commenting on here is the moral status of this fact, with the test itself bound up with the arguments concerning its moral status (Stephen Guest, 'How to Criticise Ronald Dworkin's Theory of Law' (2009) 69 (2) Analysis 1 <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how\\_to\\_criticize\\_ronald\\_dworkins\\_theory\\_of\\_law.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how_to_criticize_ronald_dworkins_theory_of_law.pdf)> 4 (online) accessed 27<sup>th</sup> June 2014 (hereafter *How to Criticise*)). See also how Lord Bridge then goes on to reject this doctrine as 'the doctrine as quite impractical in application for three principal reasons' ((n21) at 899). Again here, Lord Bridge misinterprets the nature of his arguments, as the reasons he puts forward for rejecting the *practicality* of the test are *ethical* in substance.

Therefore, incorrectly characterising an ethical decision as *clinical* in nature, decision-making responsibility is deferred to professionals who may not be appropriately qualified to make these *sorts* of decisions.<sup>77</sup> Third, this incorrect characterisation means that courts end up unintentionally delegating decision-making responsibility not to technical professional practice, but to medical ethics.<sup>78</sup> As we have seen above, this means ‘delegated issues are often being abrogated to the personal morality of individual medical practitioners’.<sup>79</sup> Cumulatively, all of this, and the fact itself the courts are misidentifying the nature of their arguments points in favour of a change to a decision-making framework that not only recognises the ethical nature of judicial decision-making but facilitates an ethically responsible decision. It might also be thought these consequences would encourage judges to be explicit in identifying the nature of their arguments. However, this is not so.

The following passages show the initial misidentification of the nature of the arguments. In stating the question before him was ‘a naked question of legal principle’<sup>80</sup>, Lord Diplock refuses to recognise any ethical content in the case and therefore subsequently deal with it.<sup>81</sup> ‘[O]nce risk disclosure was perceived as just another area of medical practice, the law effectively lost any of the powers of oversight that it may have had’.<sup>82</sup> Lord Bridge and Lord Templeman were also to hold that *Bolam* did apply. However, this was with the proviso that

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<sup>77</sup> Ian Kennedy, *The Unmasking of Medicine: A Searching Look at Healthcare Today* (rev edn, Paladain Books, Granada 1983) 83; Miola, *Symbiotic* (n1) 13.

<sup>78</sup> Miola, *Symbiotic* (n1) 13.

<sup>79</sup> *ibid* 216.

<sup>80</sup> (n21) at 892.

<sup>81</sup> Miola, *Symbiotic* (n1) 57.

<sup>82</sup> *ibid* 58. Indeed, Lord Diplock notes that ‘[w]hat we do know, and *this is in my view determinative of this appeal*, is that all the expert witnesses specialising in neurology … agreed that there was a responsible body of medical opinion which would have undertaken the operation at the time the neuro-surgeon did and would have warned the patient of the risk involved in the operation in substantially the same terms’ ((n21) at 892) (emphasis added). Further, he notes that ‘[m]y Lords, no convincing reason has been in my view advanced before your Lordships that would justify treating the *Bolam* test as doing anything less than laying down a principle of English law that is comprehensive and applicable to every aspect of the duty of care owed by a doctor to his patient’ ((n21) at 893). But it might be pertinent to ask here, given that Lord Scarman was willing to find that the key ethical principle underpinning the case was that of respect for autonomy, could Diplock himself not have identified this principle? Again, in light of this, the judgement begins to look even less ethically sophisticated.

in some circumstances the courts would be able to decide on the standard of care and therefore declare the professional practice unreasonable, and thus negligent.<sup>83</sup> Lord Bridge goes on to ask whether ‘the patient’s right to decide...is sufficiently safeguarded by the application of the *Bolam* test without qualification’.<sup>84</sup> In stating ‘that a decision what degree of disclosure of risks is best calculated to assist a particular patient... must primarily be a matter of clinical judgement’,<sup>85</sup> Lord Bridge decides to disregard the separation of ethical and technical issues, despite identifying the ethical principle of respect for autonomy throughout his judgement, and despite the separation being needed most at this point. However, Lord Bridge did state he was ‘of opinion that the judge might in certain circumstances come to the conclusion that the disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical man would fail to make it’.<sup>86</sup> Therefore, although the issue was primarily a clinical one for Lord Bridge, his approach (reluctantly) ensured that the courts could still be the ultimate arbiters.<sup>87</sup> As Miola notes, ‘Lord Templeman adopted a similar approach with respect to the use of *Bolam*..However, he

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<sup>83</sup> Miola, *Symbiotic* (n1) 59. Given that Lord Keith concurred with Lord Bridge’s judgement, these three judges provide the statistical majority in *Sidaway*. I would also question Miola’s assertion here that ‘especially for Lord Bridge, it was for the law, not the medical profession, to decide the standard of care’ (*ibid*) (emphasis added). For example, see how Lord Templeman notes that ‘[w]here the practice of the medical profession is divided or does not include express mention *it will be for the court to determine* whether the harm suffered is an example of a general danger inherent in the nature of the operation ... *It is for the court to decide*, after hearing the doctors explanation, whether the doctor has in fact been guilty of a breach of duty with regard to information’ ((n21) at 903) (emphasis added).

<sup>84</sup> (n21) at 899.

<sup>85</sup> (n21) at 900.

<sup>86</sup> *ibid*. However, Professor Brazier has critiqued the approach taken by Lord Bridge, stating that his caveat meant ‘[t]he doctor is left to “second guess” the courts ... he has to judge the materiality of that risk by reference not to the patient before him, the patient he knows, but the unknown judicial standard’ (Brazier, *Autonomy and Consent* (n55) 182). But, as Maclean notes, Professor Brazier has ‘ignored the fact that Lord Bridge’s caveat explicitly refers to the “informed choice ... of the patient”’ (Maclean, *Sidaway to Pearce* (n23) 118) (footnote omitted) (emphasis in original). Maclean also points out that ‘the same caveat may be found in Lord Templeman’s speech’ (*ibid* 113) (footnote omitted). Since *Sidaway*, Lord Woolf has reinterpreted Lord Bridge’s approach in *Pearce* (as discussed at footnote 23). That test is as follows: ‘if there is a significant risk which would affect the judgement of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt’ ((n3) at 59). Maclean notes that despite Lord Woolf’s test being a ‘significant refinement of Lord Bridge’s approach’, the general tenor of Professor Brazier’s ‘complaint remains apposite: how will a judge decide what information is “obviously” necessary? ... there is no discussion of how far the test clarifies the duty and allows doctors to predict when a judge will consider a risk as one that must be disclosed’ (Maclean, *Sidaway to Pearce* (n23) 118-119). For further discussion surrounding Lord Woolf’s test in *Pearce*, see Maclean, *Sidaway to Pearce* (n23) 117-125.

<sup>87</sup> Miola, *Symbiotic* (n1) 64.

framed his argument differently: the responsibility to ask questions and become better informed would rest with patients'.<sup>88</sup> Thus, although they interpreted *Bolam* in the manner that *Bolitho* did, holding that the test was normative in character, they *still* saw the issue of risk disclosure as primarily a clinical matter.<sup>89</sup>

In contrast, Lord Scarman goes on to explicitly recognise the ethical nature of the arguments as concerning the principle of respect for autonomy. Having recognised and placed this ethical principle at the centre of his decision making, this enabled him to then interpret existing case law so as to provide a more proactive stance for the courts. Indeed, he goes on to critique *Bolam* on the basis it is incompatible with the right of patients to have their decisions be respected.<sup>90</sup>

### **3.1.5. Overall case conclusion**

Initially it might seem a good thing that all the judges *identified* the ethical principle of respect for autonomy, and to a greater or lesser extent this principle influenced each of the judgements in the case.<sup>91</sup> However, it is less pleasing to note that if Lord Diplock is included,

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<sup>88</sup> ibid 60-61. His Lordship went on to state that '[i]n my opinion if a patient knows that a major operation may entail serious consequences, the patient cannot complain of lack of information unless the patient asks in vain for more information or unless there is some danger by which its nature or magnitude or for some other reason requires to be separately taken into account by the patient in order to reach a balanced judgement'. Templeman makes clear that '[a] patient may make an unbalanced judgement because he is deprived of adequate information' ((n21) at 904).

<sup>89</sup> Miola, *Symbiotic* (n1) 62.

<sup>90</sup> ibid. Lord Scarman notes that '[t]he implications of this view of the law are disturbing. It leaves the determination of a legal duty to the judgement of doctors. Responsible medical judgement may, indeed, provide the law with an acceptable standard in determining whether a doctor in diagnosis or treatment has complied with his duty. But is it right that medical judgement should determine whether there exists a duty to warn of risk and its scope? It would be a strange conclusion if the courts should be led to conclude that our law, which undoubtedly recognises a right in the patient to decide whether he will accept or reject the treatment proposed, should permit the doctors to determine whether and in what circumstances a duty arises requiring the doctor to warn his patient of the risks inherent in the treatment which he proposes' ((n21) at 882). See Scarman's further discussion of the limits of *Bolam* at 885. Last, see also how Scarman further notes '[m]y Lords, I think the *Canterbury* propositions reflect a legal truth which too much reliance on medical judgement tends to obscure. In a medical negligence case where the issue is as to the advice and information given to the patient as to the treatment proposed, the available options, and the risk the court is concerned primarily with a patient's right. The doctor's duty arises from his patients rights' (ibid at 888) (emphasis added).

<sup>91</sup> Miola, *Symbiotic* (n1) 63-64.

four Law Lords accepted a test based on professional practice,<sup>92</sup> despite this being an *ethical* issue. Furthermore, this also means their Lordships' view of the doctor-patient relationship is unilateral in nature. This is the best way to see the judgement they are giving, despite that it might be an *inadvertent* consequence of their decision (though in some circumstances, it seems deliberate). It also means it is less likely patients will be protected from the excesses of unjustified medical paternalism. Lord Scarman's decision is the most ethically robust, whilst both Lord Bridge and Lord Templeman do not recognise the extent to which their discussions rely on ethical claims. Finally, 'the identification of an ethical context to a case by judges does not necessarily mean medical ethics are engaged with'.<sup>93</sup> Thus these conclusions highlight the need for a decision-making framework that not just recognises, but facilitates ethical analysis by judges and provides confidence to rely on their convictions in applying moral principles and medical ethics.

This chapter shall now explore *Chester*. Again, this case is important to examine as it came some twenty years after *Sidaway*. Therefore, it is an appropriate case to analyse the changes in judicial awareness of the ethical nature of the case before them, and judicial deference towards the medical profession. Although there is a greater discussion of the ethical principles underpinning the case, various points throughout the judgement demonstrate the need for a judicial decision-making framework that not only recognises the ethical nature of judicial decision making, but enables judges to deal with the ethical principles in the case in a responsible, confident manner.

### **3.2. Chester**

Two positions have emerged in the previous case law; one approach which is sensitive to the ethical principles underlying these cases, and another that abrogates responsibility over

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<sup>92</sup> Maclean, *Sidaway to Pearce* (n23) 112.

<sup>93</sup> *ibid* 63.

technically ethical issues to the medical profession. What is important about *Chester* is the ethically sensitive approach advocated by *Pearce* was chosen by the House. Indeed, *Chester* goes even further.<sup>94</sup> In the case Ms Chester suffered nerve damage as a result of undergoing surgery to remove three spinal discs which had degenerated. Although she consented to surgery, she was not warned of this risk, which the parties agreed should have been given. What makes the case interesting is Ms Chester admitted *had* she been informed of the risk, it could not be said with certainty she would not have consented to the operation at all. Thus, the issue was one of causation; as it currently stood, Ms Chester would fail the test for causation as she could not demonstrate the breach of duty caused the harm. The question put before the House of Lords was whether it would be possible to relax the rules of causation. It was decided, by a bare majority, it *was* possible to relax these rules.<sup>95</sup> Again, the decisions shall be analysed through the use of themes. The themes of the misidentification of the nature of arguments and recognition (*and prioritisation*) of the principle of respect for autonomy shall be used again. However, each theme here deals with arguments slightly different in nature to the issues in *Sidaway*.

### **3.2.1. Recognition (*and prioritisation*) of respect for autonomy**

Like *Sidaway*, each Law Lord identified the principle of respect for autonomy. But, this did not necessarily lead to an ethically sophisticated argument. Also, when *prioritising* the principle of respect for autonomy and relying on different sources of medical ethics discourse, this could have been done in a more ethically sophisticated manner.

The prioritisation point can be seen in Lord Walker's judgement. Though Miola is correct in noting 'the basis of his conclusions were formed...by a desire to see the law fit in with the

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<sup>94</sup> ibid 72-73.

<sup>95</sup> ibid 73. For the simplified facts of the case see (n) at [11] per Lord Steyn. For the detailed facts of the case see (n22) at [41]-[48] per Lord Hope. Lords Bingham and Hoffman were to form the dissenting minority in this case, with Lords Steyn, Hope and Walker forming the majority.

guiding principle he identified’,<sup>96</sup> what is concerning about Lord Walker’s brief judgment is the simple assertion of autonomy as important without any *real* discussion as to the nature of the principle of respect for autonomy (or any other pertinent principles for that matter), nor its (potentially wider) implications for the doctor-patient relationship. For example, he notes ‘[i]n *Sidaway*...Lord Scarman described the patient’s right to make his own decision as a basic human right...during the twenty years which have elapsed since *Sidaway*, the importance of personal autonomy has been more and more widely recognised’.<sup>97</sup> Walker also notes ‘[t]he surgeon’s duty to advise and warn his patient is closely connected with the need for the patient’s consent to submit, under anaesthesia, to invasive surgery...The advice is the foundation of the consent. This is why it is so important’.<sup>98</sup> It is in this sense that Lord Walker’s judgement is underdeveloped, albeit ethically aware.

In contrast, Lord Hoffman delivers the most conservative judgement of the House. Miola is correct in stating ‘if anything, he was less tolerant of the ethical issues underpinning the case’.<sup>99</sup> Lord Hoffman’s tone is generally dismissive throughout. For Lord Hoffman, ‘the damage was defined in terms of the strictly legal physical aspect and not the loss of dignity caused by the absence of an autonomous choice being made’.<sup>100</sup> When then noting ‘[t]he remaining question is whether a special rule should be created by which doctors who fail to warn patients of risks should be made insurers against those risks’,<sup>101</sup> he goes on to dismiss this argument by noting ‘the risks that may eventuate will vary greatly in severity and...[i]n any case, the cost of litigation over such cases would make the law of torts an unsuitable

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<sup>96</sup> Miola, *Symbiotic* (n1) 77. This can be seen when Lord Walker states ‘I agree with Lord Steyn and Lord Hope that [Ms Chester] ought not to be without a remedy, even if it involves some extension of existing principle ... Otherwise the surgeon’s important duty [to advise, warn and to obtain consent] would be drained of all its content’ ((n22) at [101]).

<sup>97</sup> (n22) at [92].

<sup>98</sup> *ibid* at [93].

<sup>99</sup> Miola, *Symbiotic* (n) 74.

<sup>100</sup> *ibid*. This is despite him noting that ‘[t]he argument for [the relaxation of traditional principles] is that it vindicates the patients right to choose for herself’ ((n22) at [33]).

<sup>101</sup> *ibid* at [33].

vehicle'.<sup>102</sup> This shows Lord Hoffman was not willing to discuss the ethical issues in the case in any detail. This is despite Ms Chester 'seeking compensation for the lack of adherence to ethical principle of autonomy rather than any physical damage caused'.<sup>103</sup> Furthermore, this argument above employs arguments of *policy* (arguments concerned with social goals, and economic or political situations<sup>104</sup>) to argue against the *ethical principle* of respect for autonomy. Whilst judges deploying arguments of policy in general is problematic,<sup>105</sup> that he uses arguments concerned with *social goals* to dismiss an ethical principle concerned with *rights and obligations* is even more questionable.<sup>106</sup> More firmly, it trivialises the principle of respect for autonomy; one implication of this judgement is '[t]he price for loss of dignity or autonomy...appeared to be a slightly insignificant inconvenience which was not to be taken too seriously'.<sup>107</sup> This is clearly not the case for Ms Chester; the better moral argument is one in which the law protects patients autonomy, and in light of these principles, the legal facts should be changed accordingly.<sup>108</sup> Thus, Lord Hoffman's judgement is ethically unsophisticated.

Similarly, whilst recognising the ethical issue in the case<sup>109</sup>, Lord Bingham notes:

The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. I do not for my part think that the law should seek to reinforce that right by providing for the payment of potentially large damages by a defendant whose

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<sup>102</sup> ibid at [34].

<sup>103</sup> Miola, *Symbiotic* (n1) 74.

<sup>104</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 22 (hereafter *TRS*).

<sup>105</sup> As Lord Scarman notes in *Sidaway*, 'courts are concerned with legal principle: if policy problems emerge, they are best left to the legislature' ((n21) at 887). See also Dworkin, *TRS* (n104) 84-86. For the more detailed definitions of principle and policy that shall be used in this thesis, see section 3.2.2., below.

<sup>106</sup> Dworkin, *TRS* (n104) 92-93; 96.

<sup>107</sup> Miola, *Symbiotic* (n1) 75.

<sup>108</sup> Guest, *How to Criticise* (n74) 3 (online).

<sup>109</sup> Lord Bingham states that 'Mr Afshar was however subject to a further, important, duty: to warn Ms Chester of a small (1%-2%) but unavoidable risk ... The existence of such a duty is not in doubt. Nor is its rationale: to enable adult patients of sound mind to make for themselves decisions intimately affecting their own lives and bodies' ((n22) at [5]).

violation of that right is not shown to have worsened the physical condition of the claimant.<sup>110</sup>

Lord Bingham refers to the patient's right to be appropriately warned, but refers to this as a legal and social, but not an ethical, right. In this judgement 'the ethical component was therefore identified but not engaged with. This approach is inimical to the original proposition of the right of the patient to be fully informed, in order to make her own decision, was paramount'.<sup>111</sup> In not promoting the principle of respect for autonomy, or at least dealing responsibly with the ethical principles after they were identified, Lord Bingham's treatment of the ethical issues in the case is inconsistent. Whilst the ethical nature of judicial decision-making is recognised, further ethical discussion is absent from Lord Bingham's judgment.

In contrast to these approaches, 'the consideration and primacy given to autonomy by Lords Steyn, Hope and Walker eclipses...perhaps even that of Lord Scarman in *Sidaway*'.<sup>112</sup> Lord Steyn's judgement highlights the principle of respect for autonomy as the key driver to the case.<sup>113</sup> Because of this, Lord Steyn takes a more proactive stance on behalf of the courts. He notes 'surgery performed without the consent of the patient is unlawful. *The court is the final arbiter of what constitutes informed consent*'.<sup>114</sup> Both issues are neatly bound up when he states '[i]n modern law, medical paternalism no longer rules and a patient has a right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery'.<sup>115</sup>

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<sup>110</sup> (n22) at [9].

<sup>111</sup> Miola, *Symbiotic* (n1) 74.

<sup>112</sup> Miola, *Symbiotic* (n1) 75.

<sup>113</sup> He notes that '[t]he starting point is that every individual of adult years and sound mind has a right to decide what may or may not be done with his or her body' ((n22) at [14]).

<sup>114</sup> (n22) at [14]. Indeed, Lord Steyn accepted Lord Woolf's test in *Pearce*; see *ibid* at [15]. Given the analysis of *Pearce* above, it is to be welcomed. However, although the test was accepted, the House of Lords 'did little to explicate its application. Furthermore, the case concerned causation rather than the standard of care. Since a breach of duty was accepted, any comments were *obiter* and give only limited guidance on how the test will be applied in practice' (Maclean, *Sidaway to Pearce* (n23) 122).

<sup>115</sup> (n22) at [16].

However, Lord Steyn then highlights ‘there is no direct English authority permitting a modification of the approach to the proof of causation in a case such as the present’.<sup>116</sup> Miola analyses this scenario by noting ‘English law would not allow the ethical principles identified and examined by Lord Steyn to be given primacy. Rather, Lord Steyn would have to choose between the ethics and the settled law’.<sup>117</sup> This does not capture the situation in enough detail. As Lord Steyn highlights himself, at the time of the case there was no *direct authority* on the issue. However, it was *not* the case that English Law *would not allow* the ethical principles to be given primacy. Lord Steyn went on to state -‘[o]n the other hand, there is the analogy with *Fairchild v Glenhaven Funeral Services Ltd*...which reveals a principled approach to such a problem’,<sup>118</sup> and ‘[a]t the very least, *Fairchild* shows that where justice and policy demand it, a modification of causation principles is not beyond the wit of a modern court’.<sup>119</sup> Lord Steyn then states ‘I have come to the conclusion that...[h]er right to autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles’.<sup>120</sup> In this judgement ‘Lord Steyn was openly, and unequivocally, prioritising the *philosophy behind the law* above its substantive rules’.<sup>121</sup>

Likewise, Lord Hope’s judgment is, at least, very ethically aware. His Lordship notes that ‘[c]ommon...to all the speeches in *Sidaway* was a recognition of the fundamental importance that must be attached to the right of the patient to decide whether he will accept or reject the treatment which is being proposed by the doctor’.<sup>122</sup> Further, he also notes:

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<sup>116</sup> ibid at [23].

<sup>117</sup> Miola, *Symbiotic* (n1) 76.

<sup>118</sup> ibid at [23]; *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32; [2002] UKHL 22. For the facts of this case see (n22) at [23].

<sup>119</sup> (n22) at [23]. This is despite noting ‘[t]he *Fairchild* case is, of course, very different from the facts of the present case. A modification of the causation principles as was made in *Fairchild* will always be exceptional. But it cannot be restricted to the particular facts of *Fairchild*’ (ibid).

<sup>120</sup> ibid at [24].

<sup>121</sup> Miola, *Symbiotic* (n1) 76 (emphasis in original).

<sup>122</sup> ibid at [54]. Further, see his discussion of the recognition of the principle of respect for autonomy in both *Sidaway* and *Canterbury*, at [52]-[53].

The duty was owed to [Ms Chester] so that she could make her own decision as to whether or not she should undergo the particular course of surgery which he was proposing to carry out. *That was the scope of the duty, the existence of which gave effect to her right to be informed before she consented to it. It was unaffected in its scope by the response which Miss Chester would have given had she been told of these risks.*<sup>123</sup>

Lord Hope thus recognises the principle of respect for autonomy, and the interplay between this principle and the duty of the doctor. Moreover, Miola comments Lord Hope is in fact more forceful in his acceptance of the principle of respect for autonomy than the other judges. As the italicised part of the quote shows, ‘Lord Hope held that if the autonomy of patients was to be considered paramount, the issue of causation could only be seen as irrelevant’<sup>124</sup>. Lord Hope goes on to state:

The function of the law is to protect the patient’s right to choose. If it is to fulfil that function it must ensure that the duty to inform is respected by the doctor. It will fail to do this if an appropriate remedy cannot be given if the duty is breached and the very risk that the patient should have been told about occurs and she suffers injury.<sup>125</sup>

Therefore, in seeing the concept of law primarily through the function of the principle of respecting autonomy, and thus concluding the legal fact of causation is irrelevant in light of the fundamental importance of these principles, Lord Hope’s judgement is ethically sophisticated when viewed this way.<sup>126</sup>

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<sup>123</sup> ibid at [55] (emphasis added).

<sup>124</sup> Miola, *Symbiotic* (n1) 77.

<sup>125</sup> (n22) at [56].

<sup>126</sup> See Lord Hope’s reference to the article by Michael A Jones, ‘Informed Consent and Other Fairy Stories’ (1999) 7 (2) Medical Law Review 103, who highlights succinctly the difference between the nature of negligence and informed consent. Professor Jones notes that ‘non-disclosure of risks is judged by reference to the tort of negligence, which looks to the nature of the doctors duty to the patient rather than the validity of the patients consent (Ibid 110) ‘to what would otherwise be a trespass’ (n22) at [57].

Also important is there are points at which Lord Steyn and Lord Hope deal with different sources of medical ethics discourse. First, Lord Steyn states ‘it is necessary to identify precisely the protected legal interests at stake. A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes’.<sup>127</sup>

The most important purpose here is ‘[i]t also ensures that due respect is given to the autonomy and dignity of each patient.’<sup>128</sup> In defining these concepts, Lord Steyn quotes Ronald Dworkin in *Life’s Dominion*,<sup>129</sup> regarding the meanings of autonomy and dignity. Lord Steyn here ‘utilised unofficial medical ethics’<sup>130</sup> to define and accept the conceptions of these concepts. Nonetheless, given there is no further discussion or analysis of Dworkin’s arguments, there is ‘insufficient structure’ to Lord Steyn’s interaction with this analysis, as he is simply using ethical discourse to further his own ends in an unreflective way.<sup>131</sup>

Further, Lord Steyn goes on to note his judgement ‘ought to come as no surprise to the medical profession which has to its credit subscribed to the fundamental importance of a surgeon’s duty to warn a patient in general terms of significant risks: Royal College of Surgeons: “Good Surgical practice” (2002) chap 4, guidelines on consent’.<sup>132</sup> This

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<sup>127</sup> (n22) at [18].

<sup>128</sup> ibid.

<sup>129</sup> Ronald Dworkin, *Life’s Dominion: An Argument about Abortion and Euthanasia* (HarperCollins 1993). That passage is as follows: ‘we must try to find another, more plausible account of the point of autonomy ... The most plausible alternative emphasises the integrity rather than the welfare of the choosing agent; the value of autonomy on this view, derives from the capacity it protects: the capacity to express one’s own character—values, commitments, convictions and critical as well as experiential interests—in the life one leads. Recognising an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent—but, in any case, distinctive—personality. It allows us to lead our lives rather than being led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to life structured by his own values’ (ibid 224).

<sup>130</sup> Miola, *Symbiotic* (n1) 76.

<sup>131</sup> ibid 84. Maclean makes a similar point when he notes that ‘[w]hile the move towards the reasonable patient standard is at least symbolically important for patient autonomy, it does nothing to explain the concept or indeed its implications. In *Chester, v Afshar*, [Lord Steyn] adopted a liberal version of autonomy relying primarily on Professor Ronald Dworkin’s approach. However, in *Sidaway*, their Lordships had attempted, somewhat unconvincingly, to balance the patient’s right to autonomy with the importance of allowing doctors to exercise clinical judgement’ (Maclean, *Sidaway to Pearce* (n23) 126).

<sup>132</sup> (n22) at [26].

engagement with the ‘semi-formal sector of discourse’<sup>133</sup> again is valuable, as it provides a ‘reference point for the medical profession rather than the court’.<sup>134</sup> However, Lord Steyn devotes a mere four lines to address the issue at the end of his judgement. Further, he appeals to the Royal College’s guidelines as opposed to the GMC’s or BMA’s. These points make it clear this engagement with medical ethics as a concept could have been more considered, and the intended engagement was still with ethical principles;<sup>135</sup> ‘while there is a belated interaction with semi-formal and unofficial medical ethics, there is insufficient structure to the meeting’.<sup>136</sup>

In contrast, Lord Hope engages with unofficial discourse to identify two key ways the law can impact upon the medical professional. Lord Hope notes that Professor Michael A Jones in his article ‘Informed Consent and other Fairy Stories’

observed that the law cannot play a direct role in setting out detailed rules by way of guidance to doctors, but that it can have a powerful symbolic and galvanising role and that this is its major strength. The message was that he was seeking to convey was that, while the case law provided little guidance to doctors and even less comfort to patients, litigation on informed consent could provide a stimulus to the broader debate about the nature of the doctor-patient relationship.<sup>137</sup>

Here Lord Hope engages with unofficial medical ethics to further strengthen his decision. This also led the way for Lord Hope to deal with the issue of whether it should be left to the law or medical ethics to enforce the duty on the part of the doctor. Lord Hope notes Professor Jones’s preferred solution ‘would be found if the iterative process between case law and professional guidance were to lead to the creation of a more substantive “right” to truly

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<sup>133</sup> Miola, *Symbiotic* (n1) 76.

<sup>134</sup> *ibid* 79.

<sup>135</sup> *ibid*.

<sup>136</sup> *ibid* 84.

<sup>137</sup> (n22) at [58]

informed consent for patients'.<sup>138</sup> Lord Hope is here advocating a more proactive approach on the part of the courts. In creating this right, medical ethics would have to follow suit, creating the stimulus highlighted in the above quote. This line of reasoning shows a degree of appreciation for the respective roles of law and ethics,<sup>139</sup> making his judgement a considered and responsible one.

### **3.2.2. Misidentification of the nature of arguments: principle and policy**

Unlike the discussion of *Sidaway* above, what is meant here is at times certain Law Lords define the nature of their arguments differently to the definitions that shall be used in this thesis. These definitions at their most basic are as follows. ‘Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right’,<sup>140</sup> alternatively, an argument that uses principles uses standards that are to be applied because they are demanded by justice, fairness, or another aspect of morality.<sup>141</sup> In contrast, ‘[a]rguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole’.<sup>142</sup> In some circumstances, certain Law Lords define their arguments of principle as arguments of policy.

More importantly it shall be shown in the next chapter, through a discussion of the character of moral principles, these definitions are the right ones to use. If the foregoing point is accepted, then a number of consequences follow. First, there are sound principles of political morality arguing against judicial decisions based on policy.<sup>143</sup> Second, it again makes it difficult to analyse the judges’ reasoning in the case, and particular judgements begin to look less ethically sophisticated. Whilst there is an identification and promotion of ethical

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<sup>138</sup> ibid.

<sup>139</sup> Miola, *Symbiotic* (n1) 78-79.

<sup>140</sup> Dworkin, *TRS* (n104) 82.

<sup>141</sup> ibid 22.

<sup>142</sup> ibid 82. See further ibid 90-91.

<sup>143</sup> ibid 84. See further ibid 81-84; 91-92.

principles, there is still a lingering sense this project is not followed through completely. Thus, something analogous to Miola's idea that 'an effective relationship between law and ethics, such as that regarding risk disclosure, can only been seen as fortuitous in the way that it has developed'<sup>144</sup> is pertinent here; whilst judges recognise the ethical nature of judicial decision-making, there is an absence of an appropriate decision-making framework so that judges are able to rely on their convictions in applying moral principles and medical ethics to come to a legally and ethically robust decision. It will suffice here to show how the nature of the Law Lords' arguments have *potentially* been misunderstood.

Looking at Lord Steyn's judgement, it appears at times as though he (according to the definitions above) misidentifies the nature of his arguments. Though he states 'where justice and *policy* demand it, a modification of causation principles is not beyond the wit of a modern court',<sup>145</sup> in stating the claimant's *right* of autonomy needs to be prioritised and that a *principled* solution was available, Lord Steyn is appealing to fundamental *ethical principles* (individual aims as opposed to collective goals) to justify a modification to the principles of causation. Put another way, Lord Steyn believed arguments of ethical substance should prevail over arguments of fit with previous cases, and the weight of fundamental principles was such to 'allow an overall judgement that trades off an interpretation's success on one type of standard against its failure on another'.<sup>146</sup> Thus, Miola is correct in stating 'Lord Steyn was openly, and unequivocally, prioritising the *philosophy behind the law* above its substantive rules'.<sup>147</sup> Indeed, Lord Steyn at least recognises the ethical nature of judicial

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<sup>144</sup> Miola, *Symbiotic* (n1) 210.

<sup>145</sup> (22n) at [23] (emphasis added).

<sup>146</sup> Ronald Dworkin, *Law's Empire* (Hart 1986) 239. See Dworkin's discussion of dimensions of interpretation at *ibid* 230-232.

<sup>147</sup> Miola, *Symbiotic* (n1) 76 (emphasis in original). See also how, after reviewing the Australian case of *Chappel v Hart* [1999] 2 LRC 341, he notes '[a]t the very least, however, this Australian case reveals two fundamentally different approaches, the one favouring a firm adherence to traditionalist causation techniques, *the other a greater emphasis on policy and corrective justice*' ((n22) at [21]) (emphasis added). It is clear Lord Steyn believes his argument to be in the latter category. But his argument in its nature is not; for as we have seen above, his Lordship has sought to rely on *ethical principles* to justify his position, not policy arguments and

decision-making, and despite misidentifying the nature of his arguments at various points, does rely on the soundness of his convictions in applying moral principles.

Again, at times Lord Hope makes explicitly principled arguments, yet misidentifies these arguments' nature. He first notes 'I would prefer to approach the issue which has arisen here as raising an issue of *legal policy* which a judge must decide'.<sup>148</sup> Yet, directly after this, he states 'I start with the proposition that the law which imposed the duty to warn on the doctor *has at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on.*'<sup>149</sup> But from this passage it is clear he is not relying on policy arguments (in the sense defined above) *at all*, but ethical and evaluative *principles* (in the sense defined above) to justify his position. In addition, we can see further his promotion of the principle of respect for autonomy in the following passage:

To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in cases where it may be needed most...I would find that result unacceptable. *The function of the law is to enable rights to be vindicated* and to provide remedies when duties have been breached. Unless this is done, the duty is a hollow one, stripped of all its practical force and devoid of all content. It will have lost its ability to protect the patient *and thus to fulfil the only purpose which brought it into existence.*<sup>150</sup>

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corrective justice. This is also seen when discussing and using Professor Tony Honore's arguments in his commentary on *Chappel*. For example, Honore notes that '[a]ll the High Court has therefore done [in *Chappel v Hart*] is give legal sanction to underlying moral responsibility for causing injury of the very sort against the risk of which the defendant should have warned her' (Tony Honore, 'Medical Non-Disclosure: Causation and Risk: *Chappel v Hart*' (1999) 7 Torts LJ 1, 8 (emphasis added)). Here, Honore looks to rely explicitly on moral principles and moral argument. But then again, we see a misidentification of the nature of Honore's arguments when Lord Steyn notes that 'he was also right to say that policy and corrective justice pull powerfully in favour of vindicating the patient's right to know' ((n22) at [22]). Given that Honore himself notes that his arguments are moral ones, it is pertinent to ask exactly where the policy arguments in the foregoing discussion are.

<sup>148</sup> (n22) at [85] (emphasis added).

<sup>149</sup> ibid at [86].

<sup>150</sup> ibid at [87] (emphasis added).

This quote is worth noting in full, as Lord Hope states immediately after ‘[o]n policy grounds therefore I would hold that the test of causation is satisfied in this case’.<sup>151</sup> Again, Lord Hope has misidentified the nature of his arguments. The italicised portions of the quote show a repeated emphasis of a rights-based argument that has nothing to do with policy considerations. There are simply no policy based arguments in the foregoing quote, nor in the other quotes that show how Lord Hope has based his argument on ethical principles. Therefore, for Lord Hope to say that his conclusion *is* based on policy arguments is wrong, according to the definitions given above.

### **3.3. General conclusion**

Many positives can be pulled out of the decision in *Chester*. The principle of respect for autonomy was again highlighted by all the Law Lords. In addition the majority view, in particular Lord Steyn and Lord Hope, use fundamental principles to underpin their arguments, and engage in a degree of ethical analysis to justify their legal conclusions. There is also a canvassing of unofficial medical ethics and academic opinion involving moral argument to inform Lord Hope and Lord Steyn’s judgement, making it ethically somewhat considered. Further, ‘for the first time, we can see medical ethics interacting with the law and vice versa’.<sup>152</sup> Last, it can reasonably be said *Chester* ‘finally heralds the effective arrival into English law of Lord Scarman’s approach’.<sup>153</sup> However, this case is not to be uncritically welcomed with open arms.

Indeed, though Lord Hope notes ‘[c]ommon however to all the speeches in *Sidaway* was a recognition of the fundamental importance that must be attached to the right of the patient to decide whether he will accept or reject the treatment’,<sup>154</sup> there still are lingering elements of

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<sup>151</sup> ibid.

<sup>152</sup> Miola, *Symbiotic* (n1) 79.

<sup>153</sup> ibid 84.

<sup>154</sup> (n22) at [85].

the *Sidaway* approach in *Chester* given only a bare majority decided for Ms Chester, with Lord Hoffman ‘even less tolerant of the ethical underpinnings of the case’.<sup>155</sup> In addition, to temper the point above, medical ethics as a concept could be further critically discussed by the courts to come to an ethically robust decision. Although there is some interaction with unofficial and semi-official discourse, this is belated in manner. Thus, whilst ethical principles are recognised, the wider picture of the concept of medical ethics is not.<sup>156</sup> This issue is compounded by the frequent misidentification by the judges of the nature of their arguments and decisions.

Overall in analysing *Sidaway* and *Chester*, the points identified at the beginning of the section are still pertinent. The ethical issues judges identify do not receive as much sustained analysis as they should do. In addition, the development of the relationship between medical law and ethics in the informed consent scenario is fortuitous.<sup>157</sup> Finally, and most importantly, there is a need for an appropriate judicial decision-making framework that recognises the ethical nature of judicial decision-making and provides confidence to judges in relying on their convictions in applying moral principles and medical ethics so as to come to a legally and ethically sound decision.

#### **4. Developments since *Symbiotic***

This chapter shall now show developments in case law surrounding informed consent since *Symbiotic* lend further weight to the argument that the positive development of the relationship between law and ethics surrounding this topic is fortuitous.<sup>158</sup> The section shall

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<sup>155</sup> Miola, *Symbiotic* (n1) 74.

<sup>156</sup> ibid 84.

<sup>157</sup> ibid 210.

<sup>158</sup> ibid. Again, though space precludes a detailed discussion, looking at the development of ethical guidance surrounding the issue of informed consent also lends weight to the argument that the relationship between law and ethics regarding this topic is fortuitous. The GMC’s previous detailed guidance on consent, *Seeking Patients’ Consent: The Ethical Considerations* (ethical guidance, 1998) whilst perhaps viewing autonomy as a means to an end, nonetheless is to be commended for two reasons in particular. They are; first that the standards

show the courts misunderstand the ethical nature of judicial decision-making, and have not fully grasped how to implement the principle of respect for autonomy. Though an analysis of *Chester* shows an ethically considered prioritisation of the principle, *coupled with developments in case law*, this analysis shows courts are inconsistent in their use of different conceptions of the same concept. These developments highlight although judges might be trying to promote patient autonomy, they are not doing so in an ethically sophisticated manner. This in turn therefore lends further weight to the need for a framework that can facilitate the desired outcomes noted above.

#### **4.1. Case law**

In his selection of cases, Miola is making a representative (as opposed to empirical) claim. He states '[t]he chapters do not profess to be a comprehensive analysis of the case law as only a few cases are considered and only enough to give a representative idea of how the courts treat medical ethics'.<sup>159</sup> From this, it is reasonable to infer Miola is claiming the best way to see what is occurring in these cases is that courts frequently abrogate decision-making responsibility to medical ethics, but in the area of informed consent, the interaction between law and ethics works. However, as part of this representative analysis, where there is an interaction with certain conceptions of the concept of autonomy (for example, Lord Steyn in

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set for doctors are in fact very stringent; and second that it emphasises a considered, defensible view of autonomy as requiring not just more information, but facilitating understanding by doctors by requiring interaction and communication (Miola, *Symbiotic* (n1) 81; F&M, *One Step Forward* (n29) 495). However, the GMC's new detailed guidance, *Consent: Patients and Doctors Making Decisions Together* (ethical guidance, 2008), in contrast 'may serve to undermine the very points—commitment to dialogues, personalisation of care, and information provision—that had placed the GMC's requirements so far above the law in its treatment of patients as individuals' (F&M, *One Step Forward* (n29) 496). For further discussion, see Miola, *Symbiotic* (n1) 79-83, and F&M, *One Step Forward* (n). In relation to this thesis, this is something judges need to be aware of. This in turn points to the need for an appropriate decision-making framework being provided that recognises not just the ethical nature of judicial decision making, but also provides a framework for judges to appraise both pertinent moral principles and medical ethics, and subsequently rely on the soundness of their convictions to apply these.

<sup>159</sup> Miola, *Symbiotic* (n1) 15. See also how Miola notes 'I knew that ... it was important to look at cases, as they represented the only accurate way of observing the legal-ethical interaction in practice. However, what cases should I choose? How could I do so without being criticised for cherry-picking the case that proved my point, and ignoring those that did not? I decided that the key was the House of Lords. Therefore, each chapter in that section considered an area of law that contained a case in the House of Lords' (Miola, *Why I Wrote* (n14) 53).

*Chester*) there is no sustained consideration as to why this conception is preferable. The problem is in not setting out explicitly why a particular conception is preferable, this lays down no future guidance as to *how* the principle of respect for autonomy is to be prioritised and implemented. This leaves open the possibility of future courts using an inconsistent conception of the same concept. Importantly, this conception has the possibility to be ethically unsophisticated. Also, as there is no sustained consideration of which conception of respect for autonomy is ethically preferable, the potential for ethically unsophisticated inconsistencies *goes unnoticed*. The foregoing all lends weight to the idea that courts do not understand the ethical nature of judicial decision-making.

These problems are exemplified in *Al Hamwi*. This case highlights the problems of simply equating more information with more autonomy, as opposed to protecting patients' rights by emphasising the value of communication and shared decision-making. Those problems are; first, if there is less emphasis on the communication aspect as a means of respecting patient autonomy, as opposed to the volume of information imparted, the focus immediately becomes unilateral in nature again. The doctor's conduct is thrown into the spotlight, the result being the attempt on the part of the courts to emphasise this is the *patient's* decision to make is insincere in nature. Second, there is a danger that in simply imparting volumes of information to patients, they could again be left to their own decisions.<sup>160</sup> Finally, it is also telling there is only one passing reference to *Chester*, and no reference to the views expressed therein<sup>161</sup>. Indeed, Miola notes this case 'raises questions about just how far the law will take its commitment to autonomy with respect to risk disclosure'.<sup>162</sup>

In *Al Hamwi*:

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<sup>160</sup> F&M, *One Step Forward* (n29) 496.

<sup>161</sup> (n31) at [83].

<sup>162</sup> Miola, *Autonomy Rued OK?* (n33) 108.

Mrs Al Hamwi, who did not speak much English and wanted to undergo amniocentesis, was left, after counselling, under the impression that there was a 75% chance of harming the foetus. She thus refused her consent and gave birth to a child with a genetic abnormality that would have been detected by the test.<sup>163</sup>

Most important is Mrs Al Hamwi claimed the North West London Hospitals NHS Trust (through their Consultant Obstetrician, Miss Kerslake) failed to properly explain the risks of amniocentesis. This resulted in Mrs Al Hamwi declining to have the test, rather than accepting it, as she would have done.<sup>164</sup>

The court rejected this claim.<sup>165</sup> Simon J found ‘Miss Kerslake may have taken particular, but not inappropriate, care to give information about the choices available to the Claimant’.<sup>166</sup> He also found ‘[i]t seems to me unlikely that both [the midwife] and Miss Kerslake failed to follow their usual practice of handing the Information Leaflet to their patients; and I find that they did so in this case’.<sup>167</sup> It was agreed by expert witnesses this leaflet (“Amniocentesis Information”) was an appropriate means of informing a patient of the risks of amniocentesis.<sup>168</sup>

However, ‘[w]hat is clear, though, is that at some point the information regarding the risk of miscarriage was not understood. Indeed, Mrs Al Hamwi had specifically sought diagnostic tests, but, after meeting with Miss Kerslake, she had changed her mind’.<sup>169</sup> Given this, it might be thought the *value* of the information and its communicative aspect, as opposed to merely the volume, would have been subjected to scrutiny by the judge. However, this did

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<sup>163</sup> ibid. For the detailed background to this case, see (n31) [1]-[22]. See also Miola, *Autonomy Rued Ok?* (n33) 108-110.

<sup>164</sup> (n31) at [3]. Mrs Al Hamwi also claimed that her GP, Dr Johnson, in failing to refer her promptly to an obstetrician after the diagnosis of pregnancy, was negligent. This was because Mrs Al Hamwi was denied the opportunity of a different diagnostic test, and time to avail herself of that opportunity (*ibid*).

<sup>165</sup> The court also rejected Mrs Al Hamwi’s claim of negligence against her GP.

<sup>166</sup> (n31) at [67].

<sup>167</sup> *ibid* at [53].

<sup>168</sup> *ibid* at [17]. For the actual information as to what the leaflet contained, see *ibid* at [17].

<sup>169</sup> Miola, *Autonomy Rued Ok?* (n33) 111.

not occur. And it is at this point that the dangers of simply imparting volumes of information to patients are realised.<sup>170</sup>

Simon J initially noted ‘I approach this case on the basis that a clinician must take reasonable care to give a warning which is adequate in scope, content and presentation’<sup>171</sup>. However, he went on to further state:

The Checklist [Miss Kerslake kept] provides powerful evidence that the Claimant was given appropriate counselling on Amniocentesis...I have concluded that Miss Kerslake *imparted* accurate information during the consultation and that, in particular she *conveyed* the necessary information as to the risks inherent in the amniocentesis test.<sup>172</sup>

Additionally, he rejected the suggestion that

the clinician’s duty is to *ensure* that the information given to the patient is understood. In my view that is to place too onerous an obligation on the clinician. It is difficult to see what steps could be devised to ensure that a patient has understood, short of a vigorous and inappropriate cross-examination...Clinicians should take reasonable and appropriate steps to satisfy themselves that the patient has understood the information which has been provided; but the obligation does not extend to ensuring that the patient has understood.<sup>173</sup>

From these quotes a common theme emerges: it is more important the information has been *imparted* than it has been communicated effectively. Indeed, that Simon J believed Miss

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<sup>170</sup> ibid 111; F&M, *One Step Forward* (n29) 496.

<sup>171</sup> (n31) at [43].

<sup>172</sup> ibid at [59] (emphasis added). The checklist contained various headings, which when ticked meant the patient was informed of these matters. Those headings included: risk of miscarriage, risk of pre-term delivery, risk of infection, risk of cells not growing, sometimes unable to obtain sample, and time results expected, amongst other matters (ibid at [30]). For a full list of headings see ibid at [30].

<sup>173</sup> ibid at [69] (emphasis in original).

Kerslake had taken reasonable steps to ensure the patient understood the information, despite not elaborating on what these steps were, nor questioning the fact Miss Kerslake had not investigated why Mrs Al Hamwi changed her mind, shows these reasonable steps (whatever they may be) are quite easy to satisfy.<sup>174</sup> Further, the use of a checklist regarding the dangers of amniocentesis might lead to a more rigid, formalistic approach to the provision of information. That Simon J found the checklist was a good indicator the evidence given was appropriate is worrying in this respect. The implication of these quotes is Mrs Al Hamwi was effectively left to her own decision.<sup>175</sup>

These consequences lead to two important related points. First, the direct quote immediately above sets out a statement of principle, using the definitions given. It argues that on the conception of respect for autonomy used, this aspect of morality means it is not morally obligatory the concerned clinician *ensures* the patient understands the information that has been given. Put in terms of the rights a patient has, according to this conception of respect for autonomy, this dimension of morality does not secure an individual a right to ensure the information has been imparted to them in ways in which they can understand. However, given the highlighted consequences of this position, Simon J has not understood the consequences of his ethical argument, despite presenting one. This leads to the further inference this ethical principle was set out without any real thought as to its implications or consideration of what this position really means.

Second, in comparison with the conception of respect for autonomy put forward by Lord Steyn in *Chester*, the two conceptions are inconsistent. Lord Steyn defined the principle of respect for autonomy in terms of protecting the capacity to express one's own character-

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<sup>174</sup> Miola, *Autonomy Rued Ok?* (n33) 111-112.

<sup>175</sup> F&M, *One Step Forward* (n29) 496.

values through the views, choices and actions that they take.<sup>176</sup> This is a more nuanced view of respect for autonomy, of which a consequence would be to ensure that the patient has understood the information provided. But in *both* cases, there is no sustained analysis of why each particular conception has been chosen, and why either conception is ethically preferable. In failing to provide this direction, *Chester* leaves open the possibility of an inconsistent application of different conceptions of the same concept, some of which are ethically unsophisticated. Moreover, these inconsistencies and consequences are not recognised or dealt with by the courts. The foregoing issues point towards the conclusion that when looked at together, *Chester* and *Al Hamwi* show the courts do not fully understand the ethical nature of judicial decision-making, or how to implement the principle of respect for autonomy in a consistent, structured manner.

Overall therefore, Mrs Al Hamwi's autonomy was not protected. That Mrs Al Hamwi seemingly did not understand the information given to her,<sup>177</sup> and ultimately made a decision she would not have made had she understood the information reinforces this point. This goes on to show the disconnect between the courts *thinking* they are protecting patient autonomy, but in fact not doing so in an ethically sophisticated manner, and actually having *adverse* consequences in reality.<sup>178</sup>

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<sup>176</sup> Dworkin, *Life's Dominion* (n129) 224.

<sup>177</sup> Of which Simon J was quite dismissive; he stated that '[a] patient may say she understands although she has not in fact done so, or has understood part of what has been said, or has a clear understanding of something other than what has been imparted. It is a common experience that misunderstandings can arise despite reasonable steps to avoid them' ((n31) at [69]).

<sup>178</sup> F&M, *One Step Forward* (n29) 496. See also Miola's further analysis in Miola, *Autonomy Rued Ok?* (n33) 112-113. This case is also interesting for the way that it refers to both formal and unofficial medical ethics. Indeed, Simon J initially recognises the high standard set by the GMC in *Seeking Patients Consent*, referring to this as '[u]seful guidance' and noting that '[t]he counselling should be tailored to the individual patient' ((n31) at [45]). See also his reference to the fact that he believed that Miss Kerslake had *satisfied* the GMC's detailed guidance, at (n31) [67]. Given that the stringent nature of the previous GMC detailed guidance was highlighted at footnote 158 above, and the formalistic approach to conveying information in this case, his assertion is questionable. See also his reference to unofficial medical ethics at [44], (referring to *Turnbull's Obstetrics*, a standard textbook on obstetrics) and also (if it can be interpreted as such) at [39]-[40], referring to expert witness evidence regarding Islamic law and abortion. See finally his discussion of Miss Kerslake's own contribution to unofficial medical ethics, at [49]-[52].

This problem is further compounded by other developments in case law. For example that it was noted in *Atwell v McPartlin*<sup>179</sup> the doctor is allowed to ‘adopt an overbearing or bullying attitude in order to secure compliance’<sup>180</sup> with a particular course of treatment shows there might still be a tension between giving prominence to autonomy and deferring to clinical judgement on the part of the courts. This puts patients in a potentially no win situation; in one scenario, patients can simply be left to make their own decision on the basis of information not understood. Alternatively, doctors are free to adopt an excessively paternalistic attitude to secure compliance with a treatment they think in the best interest of patients.<sup>181</sup> In addition to this, it was noted in *Birch* that:

Was it necessary for the [doctor] to go further and to inform Mrs Birch of comparative risk...? No authority was cited to this effect but in my judgment there will be circumstances where...the duty to inform a patient of the significant risks will not be discharged unless she is made aware that fewer, or no risks, are associated with another procedure.<sup>182</sup>

This decision and reasoning is to be welcomed, given it is ‘the first English case where the duty to disclose alternative treatments was central to the finding of liability and is an example of a judge being clearly prepared to look beyond the traditional one dimensional focus of the duty of disclosure’.<sup>183</sup> However, Cranston J does further note ‘[t]he difficulty is in delineating, in general terms, the circumstances in which the duty arises to inform of

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<sup>179</sup> [2004] EWHC 829.

<sup>180</sup> *ibid* at [60].

<sup>181</sup> Maclean, *From Sidaway to Pearce* (n23) 126-127.

<sup>182</sup> (n34) at [74].

<sup>183</sup> Heywood, *Alternative Treatments* (n35) 31.

comparative risks’,<sup>184</sup> and therefore left *this* issue unresolved, analogously to Lord Steyn in *Chester*.

Therefore, in concluding this section, Miola is making a representative claim that the area of informed consent is one in which the relationship between ethics and law is positive. However, developments in case law since *Symbiotic* have shown this positive relationship is (as Miola acknowledges) fortuitous in nature, and presents certain problems, due to a lack of sufficient structure on the part of judges and their discussions. Although the law is more *symbolically* respectful of patient’s autonomy, in fact the law has adopted an ethically “thin” view of autonomy, which potentially allows doctors to either leave patients to their decisions or adopt an overbearing attitude to pressure them into accepting certain treatments. It would be legally and ethically better if there was a greater focus on the process leading up to the disclosure of risk, and viewed as a continuous process in the doctor-patient relationship rather than as an isolated event, of which the outcomes are paramount. This would promote the richer view of autonomy highlighted at various points above. Indeed, as it has been shown how risk perception is quite subjective in nature, a test which focuses upon outcomes in relation to risk disclosure will be inherently uncertain.<sup>185</sup> Thus, this is an area where the relationship between law and ethics needs more structure to it. One way to achieve this is by providing judges with an appropriate decision-making framework that recognises the ethical nature of decision making, so as to provide confidence to judges in relying on their

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<sup>184</sup> (n34) at [74]. Indeed, it might also be said that Cranston J again leaves patients to their decisions, when he notes the ‘obvious rationale [for consent] is patient autonomy and respect for the reality that *it is the patient who must bear any consequences if a risk transforms itself into a reality*’ ((n34) at [72] (emphasis added)).

<sup>185</sup> Maclean, *From Sidaway to Pearce* (n23) 127-129. Indeed, this view gains support from recent ethical guidance. See, for example, *Consent: Patients and Doctors Making Decisions Together* (n158) where it states doctors ‘should see getting [patient’s] consent as an important part of the process of discussion and decision making, rather than as something that happens in isolation’ (*ibid* 5). In addition to this, the BMA in its *Consent tool Kit* (ethical guidance, 2009) also notes that ‘[c]onsent is a process, not a one-off event, and it is important that there is a continuing discussion to reflect the evolving nature of treatment’ (*ibid*, card 2, para 1). See also *ibid*, card 2, para 4. Finally, the BMA also notes ‘[t]he quality and clarity of the information given is the paramount consideration. Consent forms area evidence of a process, not the process itself’ (*ibid*, card 2, para 3).

convictions in applying moral principles and medical ethics, to come to a responsible conclusion.

This chapter shall now go on to look at the areas where Miola's research can be developed. It shall contend judges *can* take a more proactive role regarding the resolution of the issues above. In doing so, it shall show how the discussions in this thesis are complementary to Miola's work. This will then allow an overall conclusion to be reached as to whether the law needs to take the forefront in relation to arbitrating between competing ethical conclusions and principles, and thus instigate a new, better symbiosis than the one that currently exists.

## **5. How this thesis Complements Miola's work**

Given this thesis is using Miola's work as a point of departure, it is important to interpret his investigation into '*how* the courts have conceptualised and utilised medical ethics in the cases before them'. Miola draws from this the conclusion that '[a]t times, medical ethics is seen as nothing more than "professional etiquette" not to be interfered with. At others, judges will instinctively abrogate decision-making responsibility to medical ethics as soon as they identify the ethical issue in a case'.<sup>186</sup>

However, this is part of Miola's larger conclusion: 'medical law and ethics can be seen to have combined to have allowed more, rather than less, discretion for the conscience of individual medical practitioners'.<sup>187</sup> Further, '[i]n the absence of hierarchy or categorisation of ethical discourse, the law is essentially complicit in the fragmentation, and indeed its general abrogation of responsibility means that it has at times become little more than a fragment of discourse'.<sup>188</sup> Last, 'both the law and medical ethics presume that the other is regulating behaviour, and do not see the need to do so themselves, and thus...no regulation

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<sup>186</sup> Miola, *Symbiotic* (n1) 9 (emphasis in original).

<sup>187</sup> *ibid* 209.

<sup>188</sup> *ibid* 213.

occurs'.<sup>189</sup> Miola states it is 'imperative that future courts and committees actually recognise the problem that exists'.<sup>190</sup>

Thus, Miola is sustained and explicit in identifying that judges do abrogate responsibility, and take a deferential stance towards the medical profession, even where the issue is ethical in nature. He is also sustained and explicit in setting out the negative consequences of such a stance. However, he is *not* sustained and explicit (though it is mentioned) in analysing and showing how judges do not have to abrogate responsibility and can take a more proactive stance in cases with an inherently ethical content.<sup>191</sup> Indeed, Miola notes himself, *Symbiotic* 'was about the "problem" rather than the cure, and it never pretended to be otherwise'.<sup>192</sup>

It therefore becomes clear that a complementary project to Miola's work is feasible. As Miola notes, he has identified and highlighted the problem. Further, he highlights there is a *possibility* that courts could take a more proactive attitude in dealing with medical law cases with an inherently ethical content. This thesis will complement Miola's work by explicitly showing theoretically the courts have the *ability* to realise this possibility of taking a more proactive stance, and can deal with the ethical issues that arise in a particular case in a confident, responsible manner, and *how to* realise this possibility. Whilst Miola's solution is focussed upon the legislative, policy level, this thesis shall concentrate explicitly on the judiciary and provide a framework for arguments of principle to deal with the various aspects of complex cases.<sup>193</sup>

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<sup>189</sup> ibid 214.

<sup>190</sup> ibid 216.

<sup>191</sup> See *Symbiotic* (n1) 8-9, 11-15 (in the context of discussing *Bolam* and *Bolitho*), and 216-219.

<sup>192</sup> Miola, *Why I Wrote* (n15) 54.

<sup>193</sup> This idea is further backed up by what can be called the "orientation" of Miola's work. Throughout Miola's work, although one focus is upon court decisions and how judges utilise "medical ethics" in the broad sense, the analysis is undertaken with a view as to what the consequences are/would be for a medical professional. See, for example, his discussion of the impact of the various events of the "medical ethics renaissance" in chapter 3 of *Symbiotic*. But as has been shown above (and by Miola himself), medical ethics clearly has a more pervasive and complex interaction and influence of and with sources that only indirectly affect the medical professional,

The significant issues in this thesis are therefore, theoretically, *can* courts deal with the inherent ethical issues in cases such as *Sidaway* and *Chester* in a confident, responsible manner. Further, if they can, *how* can courts deal with these issues, given the inconsistent use of the same concept highlighted above. There is an important related discussion which asks whether judges *ought* to be, or *should* be, deferential to the medical profession. Such a discussion is outside the scope of this thesis. This discussion already assumes what this thesis is trying to prove; that courts *do* have the ability to take a more proactive stance in relation to the resolution of the inherent ethical issues in certain cases.<sup>194</sup>

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such as the law. The consequences of the arguments of this thesis for medical professionals are therefore an *indirect* concern, as opposed to being a direct concern, like Miola.

<sup>194</sup> For an interesting argument that courts *should not* take a more proactive stance in relation to the resolution of inherent ethical issues, due to a ‘disparity between the aspirations for law’s role in this area and the consequences that flow from how it actually functions in practice’ see Kenneth Veitch, *The Jurisdiction of Medical Law* (Ashgate 2007) (hereafter *Jurisdiction*) (*ibid* 150). Veitch believes that a discrepancy exists between what he calls an interventionist approach advocated by medical lawyers and what actually occurs in practice, due to institutional constraints that limit the court’s functions in regard to dealing with complex ethical issues in cases (*ibid* 9). Veitch analyses in detail the institutional exigencies that influence the courts in many important cases with an ethical content. He contends that these aspects of legal reasoning contribute to the courts not being able to fully and adequately deal with the ethical issues in such cases. Moreover, this conclusion of how these institutional constraints might (for example) impact upon how moral conflicts are initially constructed and then managed, are obscured by the traditional type of analysis, in which judge’s decisions are analysed in terms of their merits and deficiencies ethically (*ibid* 1-5). This leads Veitch to conclude that ‘[t]he operation of these institutional exigencies, as they are called here, has a number of significant effects, one of which is to undermine the claim that some academic medical lawyers make that the courts are places where the controversial ethical issues in this area can be addressed and the community’s values declared’ (*ibid* 129). However, each of the arguments Veitch puts forward are variations on a particular theme; what Veitch terms ‘the expropriation of conflict’ (*ibid* 50). That is, ‘law operates to stifle and transform conflict into a form that it can manage’; [i]n other words, all political conflict that comes to law immediately loses its political character because law precludes “the freedom to contest the terms in which conflict is cast”’ (*ibid* 134). In contrast, Derek Morgan and Robert Lee highlight many positive reasons for why the courts should take a more proactive stance. They highlight ‘the ability of law to provide a forum within which such matters may be addressed ... This lays a particularly heavy burden ... especially on courts which are then called up to examine the nature of these regulatory responses, and, it must be added, their obverse, legislative silence. This responsibility may be seen and may be keenly sought in what we have called “stigmata” cases. These are those cases in which... the courts will be used as an arm of regulation in moral politics. This will require that they develop an explicit moral framework to their decision making’ (Robert G Lee & Derek Morgan, ‘Regulating Risk Society: Stigmata Cases, Scientific Citizenship and Biomedical Diplomacy’ (2001) 23 Sydney L Rev 297, 315-316 (footnotes omitted). See further *ibid* 306, 311, 316-317. See also Robert G Lee & Derek Morgan ‘In the Name of the Father? Ex Parte Blood: Dealing with Novelty and Anomaly’ (1997) 60 MLR 840. Finally, it might also be noted for clarity that even *after* providing judges with a judicial decision-making framework and showing how they *can* take a more proactive stance it is not *necessarily* the case that the best way judges can *then* deal responsibly with the ethical issues in a case is by being less deferential to the medical profession. It might be thought that a responsible way to deal with the inherently ethical issues in a case is by, after ethical analysis and conclusion, deferring to the medical profession. However, this conclusion would still seem to be reached as a result of the decision-making framework provided. It seems as though Jonathan Montgomery is getting at *something* like this in his article *Law and the Demoralisation of Medicine* (Jonathan Montgomery, ‘Law and the Demoralisation of Medicine’ (2006) 26 (2) Legal Studies 185).

Alternatively, it can be said whilst Miola is looking at the *discourse itself*, and potential bodies as remedies to the problem, this thesis is looking at correct approaches judges can take to the ethical issues in such cases. This thesis looks at ways to rectify this particular problem, other than Miola's suggestion at the end of his book. It is in this sense that the two projects are complementary.

## **6. Conclusion**

In concluding, the strands of this chapter need to be collected. The central research question of this thesis shall then be set out explicitly. The work to be undertaken in the next chapter shall then be outlined.

This chapter first highlighted the three-element analysis presented by José Miola in *Symbiotic*. The chapter then examined more specifically two important cases surrounding the area of informed consent/risk disclosure; *Sidaway* and *Chester*. Elements of judicial deference to the medical profession and medical ethics were highlighted, as was whether judges in those particular cases had come to an ethically nuanced, responsible decision. It was shown although courts were becoming more proactive in dealing with ethically complex issues, the ethical issues judges identify do not receive as much sustained analysis as they should do. In addition, it was also shown the development of the relationship between medical law and ethics in the informed consent scenario occurred by chance as opposed to choice. The analysis of the developments in case law since *Symbiotic* confirmed this, and showed that courts are inconsistent in their use of different conceptions of the same concept. Given all this, it was then shown how this thesis would complement and build upon Miola's research, by showing explicitly the theoretical basis on which the courts can (and if so *how* to) take a more proactive role in relation to the resolution of ethical issues in cases like *Sidaway* and *Chester*.

Overall then, throughout the discussion of Miola's work, the analyses of *Sidaway* and *Chester*, and developments since, the chapter has been implicitly looking at what role moral principles play in relation to the stance judges do and can take in cases like *Sidaway* and *Chester*. Therefore, the key link between a discussion of the above issues and the starting point for a theoretical explanation of how judges can take a more proactive role in the resolution of inherent ethical (and legal) controversies, is by looking explicitly at what role moral principles play in the type of cases this chapter been looking at. Because of this, next chapter shall look explicitly at the question "What role do moral principles play in hard cases?".

However, this question is part of the larger central research question of this thesis. It is clear a legal theory that both fits and justifies what currently judges are doing, and can be used as a normative tool to critique their legal approaches needs to be developed. In addition, a bioethical theory is needed that corresponds to and is thoroughly integrated with the legal theory so both are mutually complementary. This bioethical theory also needs to provide a framework for how judges can go about dealing with the ethical issues that arrive in controversial cases in a responsible manner. The central research question of this thesis can therefore be formulated as follows:

"Can an appropriate decision-making framework be provided to judges that recognises the ethical nature of judicial decision-making so as to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics to come to a legally and ethically responsible decision?"

## **Chapter 2**

### **1. Introduction**

This chapter will look to identify the role moral principles play in helping judges decide cases like *Sidaway v Bethlem Royal Hospital Governors*<sup>1</sup>, and *Chester v Afshar*.<sup>2</sup> These sorts of cases are known as hard cases. The previous chapter established a central research question that needs to be answered. However, in order to fully answer this, the more specific research question “What role do moral principles play in hard cases?” needs to be answered, despite already being well explored. Many of the negative effects of judicial deference to the medical profession in cases involving inherently *ethical* matters were highlighted in the previous chapter. Given this, it was established the key starting point for an explanation as to how judges can take a more proactive role in the resolution of the inherent ethical and legal controversies in such cases is by looking at what role moral principles play in the resolution of these issues. Further, in providing a detailed explanation of the role moral principles play and the characteristics they have, it shall be shown that it is identified by many prominent legal theorists that when judges decide hard cases, they rely on the *soundness* of their own convictions in applying moral principles.<sup>3</sup>

This analysis also reveals an interesting paradox with the findings in the previous chapter; judges apparently rely on the soundness of their own convictions in applying moral principles, but are *unwilling* to employ these convictions to engage with medical ethics in cases with an inherently ethical content. In answering how moral principles are relied upon, this could provide further weight to the conclusion that for certain reasons, judges are

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<sup>1</sup> [1985] AC 817.

<sup>2</sup> [2004] UKHL 41.

<sup>3</sup> Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 124 (hereafter TRS).

deferring ethical issues to the medical profession in medical law cases, when in fact they can take a more proactive role.<sup>4</sup>

As noted explicitly in the previous chapter, it is also clear in order to answer this central research question an integrated and mutually complimentary framework to analyse current legal and ethical approaches by judges is needed, to critically depict what currently occurs in medical law cases having an inherently ethical content. It is essential this framework is detailed enough to provide a normative tool to be able to critique current judicial approaches and suggest ones for the future. The framework needs to be able to show *how* the normative potential of law and bioethical theory may be used to attain the resolution of controversy.<sup>5</sup> This framework will then show how judges should be more proactive in recognising the ethical nature of judicial decision-making and coming to a legally and ethically responsible decision. This analysis and direction, in turn, should provide confidence to judges to rely on their convictions in applying moral principles and medical ethics.

Therefore, having outlined the importance of figuring out what role moral principles play in hard cases, this chapter shall analyse two competing explanations of the characteristics of

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<sup>4</sup> José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) 9 (hereafter *Symbiotic*). Another way to frame the issues discussed in chapter 1 is these moral principles and medical ethics discourses are currently used as mere deferential ‘exclusionary reasons’ (Joseph Raz, *Practical Reason and Norms*, (Hutchinson 1975) 40) within judicial decisions. ‘An *exclusionary reason* is a second order reason to refrain from acting for some reason’ (Raz, *ibid* 39) (emphasis in original).

<sup>5</sup> Andrew Halpin, ‘The Methodology of Jurisprudence: Thirty Years Off the Point’ (2006) 19 *Can J L & Jurisprudence* 67, 92 (hereafter *Thirty Years*). Indeed, as adverted to in chapter 1 (at footnote 194) Jonathan Montgomery recognises the interlink between the importance of a sound theoretical base, an analysis of role that moral principles play in hard cases, and the approach that judges should take in medical law cases with an inherently ethical content. He notes ‘[t]he question of what approaches judges should take depends very much on their understanding of the relationship between law and healthcare practice ... Whether and how this matter depends on an analysis of the desired connection between law and morality’ (Jonathan Montgomery, ‘Law and the Demoralisation of Medicine’ (2006) 26 (2) *Legal Studies* 185, 199). In this chapter, the focus will be on ascertaining which *legal* theory to use. In regards to the bioethical theory, this thesis takes as its starting point the four-principles theory of Tom L Beauchamp and James F Childress (hereafter B&C) in their book *Principles of Biomedical Ethics* (7<sup>th</sup> edn, OUP 2013 (hereafter *PBE*)), and subsequently seeks to reinterpret this theory. This is to remedy its weaknesses and to fully integrate it with the favoured legal theory, so that it is mutually supportive. For this reinterpretation, see chapters 4&5, and for the integration of the legal and bioethical theories, see chapter 6. All references in this chapter to *PBE* will be to the 7<sup>th</sup> edition of that book, unless otherwise stated.

moral principles: Matthew Kramer's theory of 'modest Incorporationism'<sup>6</sup> and Ronald Dworkin's theory of law (more specifically the 'adjudicative principle of integrity'<sup>7</sup>).

Professor Kramer's theory is a version of positivism he has defended on a number of different occasions.<sup>8</sup> For Kramer, 'the incorporation of moral principles into a legal system's array of norms [as a response to the problems presented in hard cases] is contingent rather than inevitable'.<sup>9</sup> This means on Kramer's account, moral principles are initially "external" to "the law" in that they are not necessarily part of judicial decision-making. They are then incorporated into the law so as to become and function as legal norms. For example, if judges were to rely on medical ethics discourse in cases with an inherently ethical content, the moral principles enshrined within such discourse would, according to Kramer's theory, be recognised as legal norms.<sup>10</sup>

In contrast, Dworkin contends 'we cannot understand legal argument and controversy except on the assumption that the truth conditions of propositions of law include moral considerations'.<sup>11</sup> On Dworkin's account moral principles are bound up with judicial decision-making, in that it ('how judges should identify and enforce people's legal rights'<sup>12</sup>) involves deciding whether a particular proposition of law is true or not, with evaluative

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<sup>6</sup> Matthew H Kramer, 'Throwing Light on the Role of Moral Principles in the Law: Further Reflections' (2002) 8 Legal Theory 115, 130 (hereafter, *Throwing Light*). It must also be noted that Kramer uses a number of synonyms to highlight the ambit of his theory of Incorporationism (*ibid* 124). Those include his theory being a 'moderate Incorporationist theory' (*ibid* 124) and also being 'mildly Incorporationist' (*ibid* 132). For purposes of clarity we shall use the term of 'modest Incorporationism' (*ibid* 130).

<sup>7</sup> Ronald Dworkin, *Law's Empire* (Hart 1986) 225.

<sup>8</sup> For example, See Matthew H Kramer 'How Moral Principles Can Enter into the Law' (2000) 6 Legal Theory 83 (hereafter *Moral Principles*); Matthew H Kramer, 'Of Final Things: Morality as One of the Ultimate Determinants of Legal Validity' (2004) 24 Law and Philosophy 47 (hereafter *Of Final Things*); Matthew H. Kramer, *Where Law and Morality Meet* (OUP 2004) chapters 1-4 (hereafter *WLMM*); Matthew H Kramer, 'Why the Axioms and Theorems of Arithmetic are Not Legal Norms' (2007) 27 OJLS 555 (hereafter *Why The Axioms*); Matthew H Kramer, 'Contents versus Existence-Conditions: A Brief Reply to John Morss' (2008) 53 AM J Juris 101 (hereafter *Contents*); Matthew Kramer, 'Moral Principles and Legal Validity' (2009) 22 Ratio Juris 44.

<sup>9</sup> Kramer, *Throwing Light* (n6) 116.

<sup>10</sup> *ibid* 115-116.

<sup>11</sup> Ronald Dworkin, *Justice in Robes* (Belknap Press of Harvard University Press 2006) 234, (hereafter *JIR*).

<sup>12</sup> Ronald Dworkin, 'Ronald Dworkin Replies' in Justine Burley (ed) *Dworkin and His Critics: With Replies by Dworkin* (Blackwell 2004) 382 (hereafter *Dworkin Replies*).

considerations *necessarily* featuring amongst the truth conditions of propositions of law.<sup>13</sup> Dworkin believes the concept of law to be an interpretive concept; ‘[a] proposition of law is true...if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law treated as true in contemporary legal practice’.<sup>14</sup> As Dworkin focuses upon the question of people’s rights, this provides an important contrast with Kramer. The question of whether a particular moral principle belongs to the existing body of “law” becomes unimportant for Dworkin, with him noting his theory does not (and need not) fit into this particular way of viewing law.<sup>15</sup> For example, if judges were to rely on medical ethics discourse in cases with an inherently ethical content, according to Dworkin’s theory, the moral principles enshrined in such discourse would simply figure as pertinent moral principles in the truth conditions of that particular proposition of law, and would not be enshrined with the status of legal norms (like Kramer’s theory).

Therefore, there are two competing explanations regarding the role of moral principles in hard cases. It thus is important to work out what effects the theoretical distinctions between both positions have on the characteristics of the moral principle itself. If one theory cannot adequately explain how judges can take a more proactive attitude by using moral principles, then this theory must be discounted, as it cannot fulfil the aims set out above.

This chapter will show Kramer’s own arguments regarding the circumstances of hard cases can be used to highlight that modest Incorporationism is inadequate for these particular purposes. The ‘Incorporationist criterion’<sup>16</sup> can only be preserved at the cost of making that criterion so abstract it cannot give much, if any, critical direction to judges in resolving

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<sup>13</sup> Dworkin, *JIR* (n11) 5.

<sup>14</sup> ibid 14.

<sup>15</sup> Dworkin, *TRS* (n3) 293. See also Dworkin, *JIR* (n11) 238-239.

<sup>16</sup> Kramer, *Throwing Light* (n6) 138.

arguments about what the law requires.<sup>17</sup> There are also a number of other detrimental effects with such an abstract criterion; most notably it may undermine the notion of a convention itself.<sup>18</sup> Kramer's two stage process of moral principles existing "externally" to "the law" and then being incorporated is not an accurate depiction of legal practice, and does not have to occur. This goes some way to showing Dworkin's adjudicative principle of integrity should be preferred out of the two.

In showing Dworkin's theory is preferable in relation to the resolution of 'normative debates',<sup>19</sup> in hard cases, this also strengthens the argument that the courts have the ability to realise the possibility of taking a more proactive stance in relation to the resolution of the inherent ethical issues in cases like *Sidaway* and *Chester*. As evaluative considerations necessarily feature as part of the truth conditions of propositions of law, whilst judges may sometimes need to refer explicitly to medical ethics discourse,<sup>20</sup> judges can appeal to principles of personal and political morality as fundamental as is necessary to show that a particular proposition is true.<sup>21</sup> Judges can appeal to such principles, for not only does Dworkin's theory of law accurately capture the practices of judges in hard cases and the role moral principles play, but justifies these practices as well.<sup>22</sup> This also leads on to the

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<sup>17</sup> E Phillip Soper, 'Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute' in Marshall Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth 1984) 19 (hereafter *Obligation*).

<sup>18</sup> Dworkin, *JIR* (n11) 193.

<sup>19</sup> Soper, *Obligation* (n17) 18. This is meant in the sense of providing direction about how moral principles are to be used to determine which propositions of law are true, not 'disagreement about what [the law] should be' (Dworkin, *Law's Empire* (n7) 7).

<sup>20</sup> For example, either to provide guidance to the medical professional regarding the relationship between their ethical and legal duties (for example, by referencing the formal sector's (GMC's) guidance on consent and how this relates to their legal duty) or to be informed by the unofficial sector of discourse so as to responsibly and confidently discuss conceptions of different concepts, settle on one conception and explain why (Miola, *Symbiotic* (n4) 6-7; 83-84).

<sup>21</sup> Dworkin, *JIR* (n11) 52. See, for example, Dworkin's discussion of 'justificatory ascent' (*ibid* 53) in *JIR* (n11) 52-57. See also chapter 3 where it is argued the value of integrity is best understood along the lines of "coherence with equality". The particular proposition in question must be consistent, mutually explanatory with, and non-anomalous to the fundamental principles of equality that underpin the legal system as a whole.

<sup>22</sup> This latter issue will be discussed more extensively in chapter 3, where it will be shown that integrity is the value we should see the concept of law through, as integrity accords better with the fundamental demands of principle made by the centrally important principle of 'equality of respect' (Stephen Guest, 'Integrity, Equality and Justice' (2005) 3 (233) *Revue Internationale De Philosophie* 335, <[http://www.ucl.ac.uk/~uctlsfd/papers/integrity\\_equality\\_and\\_justice.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/integrity_equality_and_justice.pdf)> 6 (online) accessed 27<sup>th</sup> June 2014).

conclusion that Miola may have misconceived the pertinent issue. The issue is *not* which principles enshrined in medical ethics discourse can we use and bring into “the law” (in some external sense) to come to an ethically responsible decision, but which principles, by virtue of their necessary status in the truth conditions of propositions of law, can we apply to come to a legally and ethically responsible decision in hard cases, which may be *reinforced* by referral to medical ethics discourse.

The chapter will then finally look at a second theoretical distinction between Dworkin and Kramer’s theories of law. Whilst ‘Dworkin has long affirmed that there is a uniquely correct answer to every legal question or virtually every legal question that might arise in any particular jurisdiction’<sup>23</sup>, by contrast Kramer contends that there can be ‘hard cases with no uniquely correct solutions’.<sup>24</sup> These differences again force a choice between the two theories. More specifically, since Dworkin’s theory can take account of Kramer’s objections and, as Dworkin contends, there are right answers to hard cases, this alleviates problems highlighted in Miola’s three-element analysis of the relationship between medical law and ethics at the start of chapter one.

However, despite these relevant ‘germane point[s] of dissimilarity’<sup>25</sup> between modest Incorporationism and the adjudicative principle of integrity, what further motivates this discussion is Kramer’s claim that ‘a modest Incorporationist thesis is peculiarly suitable for the accomplishment of the purpose which Incorporationism was devised to fulfil: *viz.*, the purpose of fending off some of Dworkin’s...attacks against legal positivism which were

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<sup>23</sup> Matthew H Kramer, ‘When is There Not One Right Answer?’ (2008) 53 Am J Juris 49, 49 (hereafter *One Right Answer?*).

<sup>24</sup> Kramer, *WLMM* (n8) 37.

<sup>25</sup> Matthew H Kramer, ‘On Morality as a Necessary or Sufficient Condition for Legality’ (2003) 48 Am J Juris 53, 71 (hereafter *On Morality*). The term relevant here means relevant for the scope of our investigation. Space precludes a thorough investigation into certain points of dissimilarity (*ibid*) but nonetheless, as will become clear throughout the chapter, both approaches are remarkably similar in practice.

focused on the role of moral principles as adjudicative touchstones in hard cases'.<sup>26</sup> Whilst Dworkin has reasoned that the point of his original critique has been missed,<sup>27</sup> the intriguing point here is instead of missing the point of Dworkin's original critique, Kramer in fact explicitly critiques Dworkin by contending 'the moral principles that judges often cite to justify their legal decisions...are also legal principles'.<sup>28</sup> Kramer is able to make such a claim as he accepts the argument that 'Dworkin fails to distinguish between disagreements over the contents of various criteria, and disagreements over their applications...Though some disputes are undoubtedly of the former type, many others are of the latter type'.<sup>29</sup> The cost of this riposte shall be analysed. We shall see modest Incorporationism has to come an extremely long way towards Dworkin's adjudicative principle of integrity in order to compensate for his attack. Yet, these theoretical similarities of supposedly "clashing" camps are important, for we can then be confident as to the role moral principles play in helping

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<sup>26</sup> Kramer, *Throwing Light* (n6) 129.

<sup>27</sup> Dworkin, *JIR* (n11) 234. That original critique was (as outlined earlier) that 'we cannot understand legal argument and controversy except on the assumption that the truth conditions of propositions of law include moral considerations' (Dworkin, *JIR* (n11) 234).

<sup>28</sup> Dworkin, *JIR* (n11) 233. At this point, it can be noted this is more beneficial than misunderstanding the nature of the argument that is being made, as is the case, for example, with Brian Leiter. Leiter contends that 'Dworkin [has] simply described the rule of recognition for those legal systems ... in which there is a conventional practice among judges of deciding questions of legal validity by reference to moral criteria' (Brian Leiter, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence (2003) 48 Am J Juris 17, 27 (hereafter *Hart/Dworkin Debate*). He notes that 'the only possible challenge Dworkin's theory could present to Hart's is if the former's particular jurisprudence of Anglo-American legal systems were deemed correct, but could not be accounted for within the framework of Hart's general jurisprudence. In particular the question for Hart's positivism is whether it can make sense of the phenomenon of judges treating some principles as legally binding, not in virtue of their pedigree, but simply in virtue of their content' (*ibid* 24). Leiter further contends 'if Hart is right, then Dworkin's theory is ... merely an exercise in particular jurisprudence: Dworkin simply described the rule of recognition for those legal systems ... in which there is a conventional practice among judges of deciding questions of legal validity by reference to moral criteria' (*ibid* 27) (emphasis in original). To support this inference, Leiter notes that '[i]n arguing that legal positivism can make room for the possibility of legally valid "principles"... Hart made two claims ... [the latter being most important] that there is nothing in the positivist notion of a Rule of Recognition that precludes content based tests of legal validity ... which might account for those principles which are legally binding but lack a pedigree' (*ibid* 24). But again, Leiter has made the mistake of thinking that Dworkin's critique makes an 'essentially taxonomic point: that the moral principles judges often cite to justify their legal decisions ... are also legal principles and that taxonomic positivists are therefore wrong to separate legal from moral principles in the way they do' (Dworkin, *JIR* (n11) 233). This again misses the point of Dworkin's original critique, which was to show that in legal practice, particularly in instances of theoretical disagreement, 'we cannot understand legal argument and controversy except on the assumption that the truth conditions of propositions of law include moral considerations' (*ibid* 234), or to put it another way, 'every conclusion about what the law is, necessarily involves evaluative considerations' (Andrei Marmor, *Interpretation and Legal Theory* (2<sup>nd</sup> edn, Hart, 2005) 27).

<sup>29</sup> Matthew H Kramer, 'Legal Positivism and Objectivity' (2006) 5 (2) APA Newsletter on Philosophy and Law 9, 12 (emphasis in original).

judges decide hard cases. It will also be highlighted where relevant that because of these theoretical similarities, it is very likely that both Dworkin's and Kramer's theories will come to the same outcome in practice.<sup>30</sup>

## **2. Charting the history of modest Incorporationism**

To begin, it is necessary to outline modest Incorporationism in detail. Kramer's Incorporationism is as follows:

Incorporationism consists in the following thesis: it can be the case, though it need not be the case, that a norm's correctness as a moral principle is a sufficient condition for its status as a legal norm in this or that jurisdiction. Albeit the role of moral correctness as a sufficient condition for legal validity is not inherent in the concept of law, it can be operative under the basic criteria for law ascertainment in any particular legal regime. Incorporationism maintains that moral principles regularly regarded by judges and other officials as legally determinative in this manner are indeed legal norms, notwithstanding that they have perhaps never been laid down in explicit sources such as legislative enactments or judicial rulings. When legal officials do engage in a practice of treating the moral soundness of norms as a sufficient condition for the norm's legal authoritativeness, they have thereby incorporated moral

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<sup>30</sup> It may also be questioned as to why this chapter will not look at 'Exclusive Legal Positivism' (Kramer, *Moral Principles and Legal Validity* (n8) 45). It may seem a more interesting comparison to Dworkin's theory of law because 'exclusive legal positivists contend that the very nature of law is inconsistent both with the role of moral principles as legal norms and with the role of such principles as criteria for validating legal norms' (*ibid* 46). However, '[t]hey do not deny ... that judges can be obligated to apply moral principles, only that their being obligated to do so does not entail that such principles are law' (Scott J Shapiro, 'On Hart's Way Out' (1998) 4 *Legal Theory* 469, 483). These comments are remarkably similar to Dworkin's commitments. That is, that when moral principles are relied upon, they are relied upon as moral principles, not that everything that figures among certain truth conditions should be counted as belonging to a distinct set of rules or principles called legal (Dworkin, *JIR* (n11) 234). Indeed, Dworkin has commented that 'I suppose that if I had to choose I would opt for exclusive [ ] positivism, though my heart isn't in it' (*ibid* 239). This is bar obviously each theory's underlying ideas as to 'the point of legal practice' (Shapiro, *On Hart's Way Out* (n30) 505, footnote 67). Whilst this point is not examined in great detail here, suffice to say the more interesting question and comparison here, given the scope of the chapter and thesis, is what the effect is on the moral principles characteristics when they become incorporated to the law so as to become legal norms (Kramer, *Moral Principles and Legal Validity* (n8) 45).

principles into their system—even before some or all of the applicable principles have received explicit recognition.<sup>31</sup>

Kramer seeks to refine this thesis by adhering to a doctrine of modest Incorporationism: '[modest] Incorporationist theory submits that, even in legal systems where moral correctness does amount to a sufficient condition for legal validity, it cannot amount to such a condition in most cases. Only in hard cases do any Incorporationist criteria...become activated'.<sup>32</sup>

These definitions also 'echo a number of passages in [Kramer's] previous expositions of Incorporationism'.<sup>33</sup> As these passages will help clarify the role of the Incorporationist doctrine in hard cases, it is necessary to also note these. These passages include the notion that:

By regularly adverting to the fundamental requirements of morality as the foundation for their choices of dispositive norms in hard cases, the officials engage in an Incorporationist practice that absorbs all genuine precepts of morality into the law regardless of whether those precepts have been discretely identified and designated as such. That blanket absorption through the justificatory orientation of the officials is the cardinal way in which they treat moral principles as laws.<sup>34</sup>

However, there is a complex interlink with previous precedential cases:

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<sup>31</sup> Kramer, *Why The Axioms* (n8) 556.

<sup>32</sup> Kramer, *Throwing Light* (n6) 124. Kramer rejects a 'robust Incorporationist stance' (Kramer, *Throwing Light* (n6) 124), whereby, 'a robust Incorporationist ... is keen to stress that the processes of law-ascertainment in any given regime might render moral worthiness the lone sufficient condition for legal validity' (Kramer, *WLMM*, (n8) 25), on the basis of 'not purely ... conceptual analysis but also on an empirical assumption' (Kramer, *Throwing Light* (n6) 124), which leads to the 'onset of crippling irregularity' (Kramer, *WLMM* (n8) 31). For further arguments see Kramer, *Throwing Light* (n6) 124-30; Kramer *On Morality* (n25) 76-81; Kramer, *WLMM* (n8) 26-35. See also Jules Coleman's extensive critique of Kramer's distinction between a modest and robust Incorporationist thesis in Jules L Coleman, 'Constraints on the Criteria of Legality' (2000) 6 Legal Theory 171, 178 footnote 17 (hereafter *Constraints*).

<sup>33</sup> Kramer, *Moral Principles and Legal Validity* (n8) 49.

<sup>34</sup> Kramer, *Of Final Things* (n8) 96. For further elaboration, see Kramer, *ibid* at 94-5; Kramer, *WLMM* (n14) 71-75, 90-91. What is interesting and will become important later is the notion of a 'justificatory orientation' (Kramer, *Of Final Things* (n8) 96).

The moral principles absorbed into the law by the Incorporationist criteria...do directly determine the content of the law, even though their content determining effects are subordinate to the Court's rulings. The subordination of any such effects consists in their susceptibility to being displaced by the Court's judgements, but that susceptibility is activated only within the confines of the judgements themselves and their precedential impacts. There is no across-the-board displacement; there are only piecemeal displacements.<sup>35</sup>

Further, 'though each of the true principles of morality is subject to being superseded as a law for hard cases, by a precedent setting invocation of some alternative touchstone, each of those principles remains a part of the law until it is so superseded'.<sup>36</sup>

Finally, to present a comprehensive picture as possible, it is also worthwhile noting Kramer's discussions of Incorporationism have laid down a complex test for the status of any norm as a law within any particular jurisdiction. An existent norm  $N$  is among a legal system's laws if and only if each of the following two conditions is satisfied:

- (i)  $N$  itself is regularly treated by the system's officials as a justificatory basis for adjudicative decisions, or  $N$  derives from a provenance that is regularly treated by officials as a general source for binding of binding bases for adjudicative decisions.

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<sup>35</sup> Kramer, *Of Final Things* (n8) 90. Kramer also discusses this notion in relation to 'misapplications of the Incorporationist criteria' (*ibid* 91). He notes 'the official's misapplications of the incorporationist criteria in hard cases do not alter the general fact that those criteria endow the correct principles of morality with the status of laws for such cases. Yet, insofar as the misapplications have precedential force, they effect specific alterations in the law. Any such misapplication displaces some moral precept that is optimal for addressing hard cases of some type, and substitutes it for an inferior precept which has thereby gained the status of a law for addressing hard cases of that type' (*ibid* 91).

<sup>36</sup> *ibid* 91. For further elaboration on the 'multiplicity and rankings' (*ibid* 88) of the 'modestly Incorporationist ... Rule of Recognition' (*ibid* 90) in the context of Rebutting Kenneth Himma's arguments, see Kramer, *ibid* 91-93.

- (ii) Either  $N$  is a product of one or more of the system's authoritative law generating organs, such as a legislature or a court or a constitutional assembly; or it is free floating.<sup>37</sup>

## **2.1. One initial criticism**

Kramer's refinements to this complex doctrine provide a degree of clarity. However, even at this stage, one preliminary point may be raised. It concerns the substance of disagreements occurring in hard cases. As Kramer is a positivist, what John Gardner calls the 'distinctive proposition of "legal positivism"'<sup>38</sup> becomes important; 'in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where its merits in the relevant sense include the merits of its sources)'.<sup>39</sup> The reason for the contingency of the incorporation of moral principles is because Kramer adheres to the idea law ascertainment is a matter of convention. Such conventions are formed *only* by the attitudes and behaviour of legal officials and others involved in the legal process. Kramer believes this is so, and that judges are engaged in the application of conventional criteria even in certain hard cases. This is in response to Dworkin's argument that as judges disagree over which criteria to use to ascertain what the law is in a particular scenario, and conventions involve convergence, these law-ascertaining

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<sup>37</sup> Kramer, *Why The Axioms* (n8) 557 (footnotes omitted). This test appears in the same formulation in Kramer, *Contents* (n8) 101. Also, this test is a slightly modified version of the same test to be found in *On Morality* (n25) at 70-71. Finally, Kramer also elaborates upon the term 'free floating' (Kramer, *Why the Axioms* (n8) 557). He notes that 'the term "free floating" indicates that  $N$  is not the product of a contemporaneous formally authoritative institution such as a foreign legal system or a sporting association or Harvard University' (*ibid* 557, footnote 9). For a further discussion on this specific point, see Kramer, *On Morality* (n25) 70-74; Kramer, *WLMM* (n8) 38-43. The notion of the 'contemporaneous authoritative institution' (Kramer, *Why The Axioms* (n8) 557) is interesting and will become important later in relation to the conduct towards the principles established by such institutions.

<sup>38</sup> John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 Am J Juris 199, 199 (hereafter *Myths*). Kramer discusses this, and declares that 'Gardner opts for a much more restrictive conception of jurisprudential positivism' (Matthew H Kramer, 'On the Separability of Law and Morality, (2004) 17 Can J L & Jurisprudence 315, 319). However, he does note that 'Gardner's thesis is certainly a positivist tenet' (*ibid*). Thus, it is clear that he accepts this. This is all that is important for our purposes, as here we are not concerned with the question 'should we go further and agree with Gardner that it captures the whole of the positivist message?' (*ibid*), simply the acceptability of such a position.

<sup>39</sup> Gardner, *Myths* (n38) 201.

criteria cannot be conventional, and must *necessarily* include evaluative considerations. Kramer responds by highlighting a distinction regarding disagreement concerning criteria; the distinction between disagreeing over the application of criteria (whether the rule applies in a certain instance), and disagreement about the content of the criteria itself (disagreement about the very rules of the convention). Kramer contends that Dworkin fails to recognise this distinction, and believes that many more disagreements that arise are over the application of a certain criteria, though he does admit that some disputes are over the content of certain criteria.<sup>40</sup>

However, this creates a problem, heightened by the very substance of the disagreements in hard cases. Kramer acknowledges ‘Dworkin’s prime purpose in adducing an array of hard cases...is to...[highlight] theoretical disagreements—disagreements of a sort that supposedly cannot be acknowledged by legal positivists’.<sup>41</sup> For example, ‘suppose the judges on a particular court accept as a matter of convention that they must follow the past decisions of higher courts, but disagree about whether they must follow their own past decisions’.<sup>42</sup> Whilst this can be seen as an instance of theoretical disagreement, in that there is no convention upon such a matter, it could be restated as an instance of criterial disagreement over matters of application as opposed to content. However, because the substance of the

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<sup>40</sup> Kramer, *Legal Positivism and Objectivity* (n29) 12; Dworkin, *JIR* (n11) 191. See Kramer’s discussion of the latter type of disagreement in *Legal Positivism and Objectivity* (n29) 12-13.

<sup>41</sup> Matthew H Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (OUP 2003) 135 (hereafter *IDLP*).

<sup>42</sup> Dworkin, *JIR* (n11) 191. This problem is still pertinent despite Kramer’s belief of the ‘frequently overriding salience of content independent considerations of consistency within the various areas of the common law. To be sure, the ascription of great importance to these content-independent considerations by officials in common law liberal democracies is undoubtedly on moral reasons ... their recourse to non Incorporationist criteria for ascertaining the common law is based on some moral principles that would be validated as legal norms by an Incorporationist Rule of Recognition. Nevertheless ... the status of moral principles as a justificatory platform for the adoption of non-Incorporationist criteria is very different from their status as laws that are validated as such because of their contents. Insofar as moral principles occupy the former status ... they preclude occupation of the latter status’ (Kramer, *WLMM* (n8) 34, footnote 14). This passage is similar to Dworkin’s admission that ‘any judge who proposes to change existing doctrine must take account of some important standards that argue against departures from established doctrine, and these standards are also for the most part principles’ (Dworkin, *TRS* (n3) 37). See also Dworkin’s discussion of the distinction between a strict and relaxed doctrine of precedent in *Law’s Empire* (n7) 24-29.

disagreement is of a fundamental nature, it still would need to be resolved by the application of non-conventional principles of political morality. Therefore, in order for Kramer to show in hard cases legal systems rest on an Incorporationist criterion, Kramer's notion of such a criterion would need to be so abstract to take account of such deep disagreements to the point it would become trivial.<sup>43</sup> Though Kramer may proclaim '[w]hat the officials are required to do under the Incorporationist criteria in their Rule of Recognition is determined not by the beliefs about the extensions of those criteria, but the objective extensions themselves'<sup>44</sup>, this criterion becomes 'of little practical use in resolving critical arguments about what "the law" requires'.<sup>45</sup> It can be reasonably inferred that, in order to restate the theoretical disagreement as one of criterial disagreement, the criterion above would have to roughly take the form that disputes as to whether to follow precedent are to be settled by looking at whether, overall, it is morally proper to do so.<sup>46</sup> Thus, even if it was accepted such a criterion existed, it would not provide any real use as a normative tool to suggest *how* judges should take a more proactive role in relation to medical law cases having an inherently ethical content, and how they should apply moral principles and medical ethics to deal with the legal and ethical issues arising in a responsible manner.

These arguments also lead onto the related unwanted conclusion that the content of the convention is of such abstraction that the practices for justifying outcomes of particular cases could be radically divergent, yet still be counted as conventional, due to the sheer abstractness of the convention itself. Indeed, almost any legal practice could be counted as

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<sup>43</sup> Dworkin, *JIR* (n11) 191-193.

<sup>44</sup> Kramer, *Of Final Things* (n8) 94.

<sup>45</sup> Soper, *Obligation* (n17) 19.

<sup>46</sup> Dworkin, *JIR* (n11) 192.

conventional.<sup>47</sup> This in turn does not, nor would it, make the task easier for judges to rely upon this criterion. Finally, and more forcefully:

the strategy eviscerates the idea of convention itself. A convention exists only when each person acts in a certain way because others are acting in that way as well; a convention makes the appropriateness of behaviour dependent on the convergent behaviour of others...But it is implausible to think that any judge's conviction that he ought to decide cases in a [morally appropriate] way depends on the convergent behaviour of others. A judge would think that he should decide in a proper way whatever other judges do or think. What is the alternative? Deciding [immorally]?<sup>48</sup>

Whilst these latter two claims are contentious, they do give reason for doubting Incorporationism as a model that can guide judges.<sup>49</sup> Kramer's theoretical explanation regarding the role moral principles play in hard cases does not accurately capture what occurs in relation to disagreements in hard cases. Further, no direction is or can be given to judges regarding how they should apply moral principles to take a more proactive role in the resolution of controversial issues in case law involving (for example) informed consent. It therefore seems these social norms 'satisfy positivistic requirements in a purely formalistic way'.<sup>50</sup> These arguments shall be probed further in the latter stages of this chapter.

Still, it must be noted Kramer does acknowledge there can be instances of theoretical disagreement. This, however, causes more problems for Kramer's theory. For if he is willing to acknowledge in principle the distinction between disagreements over content and application, Kramer needs a theory or way to distinguish between when disagreements are of a theoretical nature, or when they are disagreements over application of a single convention.

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<sup>47</sup> ibid 193.

<sup>48</sup> ibid 193-194.

<sup>49</sup> Halpin, *Thirty Years* (n5) 92.

<sup>50</sup> Shapiro, *On Hart's Way Out* (n30) 487.

Because Kramer is willing to entertain the possibility of both types of disagreement occurring, it may be very hard, even theoretically, to draw the distinction between criterial disagreements and theoretical disagreements. This is true even if Kramer was to say his theory is nonetheless operative in all circumstances and does not need another method to distinguish when disagreements are of a particular nature.<sup>51</sup> Thus because of this difficulty, Kramer's modest Incorporationism is ineffective as a tool to show *how* judges should be more proactive in coming to an ethically and legally responsible decision by applying moral principles in cases with an inherently ethical content. By Kramer's own admissions, his theory still leaves matters unclear. This account of moral principles, whereby they are external to "the law" and then incorporated so as to become legal norms does not show appropriately how courts have the ability to realise the possibility to be more proactive in cases like *Sidaway* and *Chester*.

To recap, Kramer's theory of Modest Incorporationism has been set out. Potential problems with Kramer's theory which need addressing and clarifying have also been highlighted. This chapter shall now go on to look at the theoretical similarities between Kramer and Dworkin in regards to the characteristics of moral principles in hard cases.

### **3. Modest Incorporationism's characterisation of laws, legal norms and moral principles**

Having outlined modest Incorporationism, a comparative analysis between it and Dworkin's theory is necessary. The similarities provide a detailed explanation as to the role moral principles play in helping judges decide such issues with which both agree. Therefore, we can be confident that we are providing the best explanation of how to use moral principles to come to a legally and ethically proactive and responsible decision in hard cases. The

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<sup>51</sup> Dworkin, *Law's Empire* (n7) 354.

differences in theory are also important, as a closer look at each theory ascertains which theory is a better reflection of legal practice, and which theory is more useful as a normative framework for providing a basis for judges to take this more proactive stance in inherently ethical cases. Finally it will be highlighted via the similarities in theory how far modest Incorporationism has to come towards Dworkin's adjudicative principle of integrity, but will also show the relevant 'germane point[s] of dissimilarity'<sup>52</sup> between Kramer's arguments and Dworkin's. These distinctions shall be explored thematically.

### **3.1. Peremptoriness**

The first theme is peremptoriness. Peremptoriness here is defined as the ability for rules (including laws and legal norms) to act as *exclusionary* reasons, *requiring* us to act in a certain way; these rules interpose themselves between persons and the various reasons there are for acting one way or another.<sup>53</sup> As Kramer believes 'the role of law [is] an institution that establishes source-based standards for the purpose of steering conduct',<sup>54</sup> Kramer implicitly endorses the notion laws and *ordinary* legal norms 'partake of peremptoriness'.<sup>55</sup> Further evidence and a key contrast with moral principles is highlighted when Kramer seeks to counter the problem that 'when officials adhere to an Incorporationist Rule of Recognition, the legal norms which they ascertain are not reasons for the decisions they reach. Instead they reside wholly in the Rule of Recognition itself'.<sup>56</sup> Kramer notes '[w]e ought not to be surprised that the moral principles invoked to fill the gaps in the source based law are

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<sup>52</sup> Kramer *On Morality* (n25) 71.

<sup>53</sup> Kramer, *Throwing Light* (n6) 117; Dworkin, *JIR* (n11) 204; J E Penner, *McCoubrey & White's Textbook on Jurisprudence* (4<sup>th</sup> edn, OUP 2008) 120) (emphasis in original). See also Raz's formulation in footnote 4 above. It must also be noted here that although Shapiro makes a distinction between Raz's use of 'exclusionary reasons' (Raz, *Practical Reason and Norms* (n4) 40) and Hart's use of 'peremptory reasons' (Scott J Shapiro, 'Law, Morality and the Guidance of Conduct', (2000) 6 Legal Theory 127, 164) (see Shapiro's discussion, *ibid* 163-167), Kramer treats the distinction as dubious (Kramer, *Throwing Light* (n8) 118-120). The concepts shall be treated as synonymous throughout the chapter.

<sup>54</sup> Kramer, *Throwing Light* (n8) 134.

<sup>55</sup> Kramer, *WLMM* (n8) 23

<sup>56</sup> *ibid* 36. Kramer also notes 'Shapiro contends that the distinction is of the upmost importance because of the basic role that is ascribed to law ... the role of presenting people with norms that can guide and direct their conduct' (*ibid* 19).

*different from any ordinary legal norm*, in that they are *incapable* of serving as reason-creating-guides for people's conduct'.<sup>57</sup>

A number of additional functions of this *nonguiding* legal norm (meaning that moral principle which has been incorporated into the law, in contrast to an ordinary legal norm or law laid down by, say, statute)<sup>58</sup> are then elaborated on. These are 'described...as that of "terminating disputes" and "achieving closure" and "resol[ving]the points at issue"'.<sup>59</sup> As well as this, it is also noted that 'when moral precepts are applied to the facts of hard cases within a [modestly] Incorporationist regime, they perform both a heuristic function and a confirmatory function'.<sup>60</sup> Despite Kramer's Incorporationist commitments, these functions are similar to the functions of principles that Dworkin speaks of.<sup>61</sup>

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<sup>57</sup> ibid 36 (emphasis added).

<sup>58</sup> Kramer, *Throwing Light* (n8) 134.

<sup>59</sup> ibid 131

<sup>60</sup> ibid 132. That is, 'although the moral precepts when formulated might fulfil a heuristic function, they do not constitute any decision-determining reasons (beyond those constituted by the instruction in the Rule of Recognition requiring judges to dispose of hard cases on the basis of moral requirements). Still, the judges draw upon such precepts not for the purpose of receiving or furnishing any reason-creating guidance but for the purpose of terminating disputes. Very much because the situations that bring about hard cases are situations in which there does not exist any adequate source-based legal guidance on some or all of the relevant points of contention, the top priority of judges when handling such cases is to resolve the points at issue. Instead of somehow generating reasons-for-action where none beyond those generated by the Rule of Recognition is available, the moral principles that enable the resolution of disputes are simply means of achieving closure. Rather than *providing* guidance, their dispute terminating effects *substitute* for guidance' (Kramer, *WLMM* (n8) 36- 37) (emphasis in original).

<sup>61</sup> Dworkin, *TRS* (n3) 22-31. Of similarity here is the notion that '[a] principle like "No man may profit from his own wrong" does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction but does not necessitate a particular decision' (ibid 26) and that '[a]ll that is meant, when we say that a particular principle is a principle of our law is the principle is one which officials must take into account, if it is relevant, as a consideration inclining in one direction or another' (ibid). To further strengthen the argument, it might also be noted these functions are very similar to those of 'general principles' (Sir Neil MacCormick, *Institutions of Law* (OUP 2007) 29 (hereafter, *IofL*)) that Sir Neil MacCormick elaborates upon. See his discussion in *IofL*, ibid 28-30. What is of similarity here is MacCormick's notion that 'principles can be excluded from consideration by a decision maker who is charged with applying rules of absolute application, or limited in effect to a greater or lesser degree in the case of rules of strict application' (ibid 29-30). Further, MacCormick notes 'principles are, like the values in question, pervasive' and are 'norms that bear on decision making in almost any circumstance' (ibid 29). This comes very close to the position that facts are part of moral judgements about the moral status of those facts (Stephen Guest, 'How to Criticise Ronald Dworkin's Theory of Law' (2009) 69 (2) Analysis 1 <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how\\_to\\_criticize\\_ronald\\_dworkins\\_theory\\_of\\_law.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how_to_criticize_ronald_dworkins_theory_of_law.pdf)> 3 (online) accessed 27<sup>th</sup> June 2014 (hereafter *How to Criticise*)) in the sense that the continuous presence of principles is given prominence in MacCormick's account. It must be noted here nothing in the present argument turns on the distinction between policies and principles that Dworkin gives (see *TRS* (3n) 22-23, 82-83) nor on the formulation that MacCormick gives out of rejection of Dworkin's 'stipulative definition' (Sir Neil

We can therefore be confident that moral principles do not function in *exactly* the same way as laws/rules/ordinary legal norms in relation to their providing exclusionary reasons in hard cases (though as we shall see in the discussion of applicability-conditions, moral principles may be able to provide *partially* exclusionary reasons). So, if a judge was to rely on the guidance provided by the GMC in a case involving informed consent, this would mean the moral principles in that guidance would not function so as to *require* a particular decision one way or the other, but would add weight to the line of argument that these principles support (if they are valid and the overall more coherent case can be made using these principles).

However, despite such similarities, the one relevant basic difference remains apparent; for Kramer ‘such principles have been incorporated into the law’<sup>62</sup> on the basis of the Incorporationist criterion, whereas Dworkin explicitly denies any such notion is needed.<sup>63</sup> Therefore, the broader debate concerning “on what theoretical basis can judges take a more proactive role in recognising the ethical nature of judicial decision-making and coming to a legally and ethically responsible decision?” is answered differently depending upon the commitments of each theory. Bringing these arguments together, as modest Incorporationism is an ineffective tool for the purposes immediately above, given it does not provide an adequate reflection of legal practice in certain circumstances nor any normative guidance, and Dworkin’s theory of law is particularly appropriate for these purposes, we can be confident Dworkin’s theory of law provides the best legal theoretical explanation as to how judges might take a more proactive approach in cases like *Sidaway* and *Chester*.

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MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1978) 259). See MacCormick, *Legal Reasoning and Legal Theory*, *ibid* 259-264.

<sup>62</sup> Kramer, *Of Final Things* (n8) 47.

<sup>63</sup>Indeed, MacCormick also says much the same thing (MacCormick, *IofL* (n61) 29). He notes ‘[d]iscretion involves appeal to a person’s judgement in a way that merely applying a rule provided its operative facts are satisfied does not ... Since it is good to be fair, good to be wise, good to be efficient, good to be reasonable, we can recognise these concepts as naming “values”... Around each we are able to cluster some normative generalizations whose observance helps us secure the value in question ... They are what we commonly call “principles” or indeed, “general principles”’ (*ibid* 28-29).

### **3.2. Provenance conditions**

The second theme is provenance conditions,<sup>64</sup> meaning where moral principles originate from, so as to be applicable in a hard case. One main theme throughout Kramer's writings is his emphasis on moral principles being 'free floating';<sup>65</sup> 'Incorporationism maintains that moral principles regularly regarded by judges and other officials as legally determinative are indeed legal norms, notwithstanding that they have perhaps never been laid down in any explicit sources such as legislative enactments, or constitutional provisions or administrative regulations'.<sup>66</sup> The reason for Kramer's emphasis on provenance conditions is because of his Incorporationist commitments. Kramer needs to look explicitly at the free floatingness of moral principles to answer the larger question of their availability to become *legal* norms.<sup>67</sup>

When Dworkin's idea of where principles originate from is compared, Dworkin notes 'a proposition of law is true if it flows from principles of personal and political morality generally treated as true in contemporary legal practice'.<sup>68</sup> This leads to two interesting points concerning the characteristics of moral principles, and the role they play in hard cases on Dworkin's account. First, Dworkin relies upon moral principles as part of an interpretive fact used to justify a proposition of law;<sup>69</sup> 'facts figure...in the "interpretive" account of law but only because they are embedded in moral judgements about the moral status of those facts'.<sup>70</sup> Because of this, the question of provenance does not need to be answered in the way it does

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<sup>64</sup> Kramer, *Why The Axioms* (n8) 557.

<sup>65</sup> ibid. See the discussion in *WLM* (n8) at 70-76.

<sup>66</sup> Kramer, *Why The Axioms* (n8) 556.

<sup>67</sup> Kramer, *Throwing Light* (n6) 116.

<sup>68</sup> ibid 14. This is similar to what Dworkin notes in *TRS* (n3), where he states that '[t]he origin of these ... legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and public over time' (ibid 40).

<sup>69</sup> Nicos Stavropoulos, 'Interpretivist Theories of Law' in Edward N. Zalta (ed) *Stanford Encyclopaedia of Philosophy* (Fall 2008 edition) <<http://plato.stanford.edu/archives/fall2008/entries/law-interpretivist/>> accessed 21<sup>st</sup> August 2011 (hereafter *Interpretivist*).

<sup>70</sup> Guest, *How to Criticise* (n61) 3 (online).

for Kramer, as facts do not constrain moral judgements (as they are part of them) and are not significant in themselves.<sup>71</sup>

Second, the related question regarding the availability of moral principles is subsumed within a larger question of justification for Dworkin. This gives a clear structure to Dworkin's argument. Because Dworkin treats the concept of law as an interpretive concept, this means he must come up with a theory of interpretation himself, as a plausible 'interpretation of the higher order practice of using interpretive concepts'.<sup>72</sup> His theory of interpretation is that of constructive interpretation.<sup>73</sup> This idea is important in relation to the role of moral principles in hard cases in two senses. First, in trying to impose purpose on law in order to make it the best possible example of what it can be,<sup>74</sup> principles will become available when they have relevance in the process of constructively trying to interpret the law to attain the correct resolution of a particular outcome. However, this final interpretation will again be a moral judgement.<sup>75</sup> Thus, moral principles are relevant here in being offered as the 'best interpretation of other propositions of law generally treated as true'.<sup>76</sup>

Further, as legal practice is interpretive, it 'does not simply exist but has value[.] It serves some interest or purpose or enforces some principle—in short [ ] it has some point'<sup>77</sup>. The

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<sup>71</sup> ibid.

<sup>72</sup> Dworkin, *Law's Empire* (n7) 49.

<sup>73</sup> ibid 52. See *A Matter of Principle* (OUP 1985) part 2; *Law's Empire* (n7), chapter 2; *JIR* (n11) chapter 1; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) chapters 7&8 (hereafter *JFH*). Elements of Dworkin's theory of constructive interpretation are implicit in *TRS* (n3), chapter 4. There has been a lot of criticism regarding Dworkin's notion of constructive interpretation. For example, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 213- 225; MacCormick, *IofL* (n61) 296- 297, 301. The validity of this methodology shall be looked at more extensively in chapters 3, 5 and 6.

<sup>74</sup> Dworkin, *Law's Empire* (n7) 52.

<sup>75</sup> Dworkin, *JIR* (n11) 14.

<sup>76</sup> ibid.

<sup>77</sup> Dworkin, *Law's Empire* (n7) 47. What makes a certain social practice interpretive is 'a complex "interpretive" attitude ... an attitude that has two components. The first is the assumption that the practice ... does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short, that it has some point—that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of [that social practice]—the behaviour it calls for or the judgements it warrants—are not necessarily or exclusively what they have always been taken to be but are

value Dworkin conceptualises for law is integrity. This makes further demands on the use of principles so that the law is seen as morally coherent as possible.<sup>78</sup> By arguing for a plausible value, and how that value makes sense of our practices, something important is therefore learned about the nature of law and the way that principles should be used if we wish to produce a moral outcome in the resolution of disputes.<sup>79</sup>

Overall, moral principles become available because of the interpretive commitments of Dworkin's theory of law. This is in contrast to Kramer. Since Kramer sees the incorporation of moral principles into the law as contingent, the question of the origin of moral principles and their availability to be incorporated is one that must be answered explicitly, by looking at the characteristics of the principle itself (as well as its ability to resolve the case concerned). Kramer seeks to do this by giving an essentially negative connotation, showing why the principles of morality are not like foreign laws or associations' rules.<sup>80</sup> This is the provenance condition of the moral principle. The specific characteristics of the moral principle and the broader overall debate concerning the theoretical basis of a more proactive judicial role are altered and answered differently depending upon the commitments of each theory.

However, it is clear both theories are in agreement at a more general level that moral principles are used where they are able to resolve the case at issue, and that judges rely on the soundness of their convictions in applying moral principles. This common idea is captured and highlighted similarly, but explained in different ways by Kramer's and Dworkin's theories of law. Thus, we can be confident about the *general role* moral principles play in hard cases. However, it is important to highlight the potential negative implications of the

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instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point' (*ibid*).

<sup>78</sup> *ibid* 176. The idea that constructive interpretation and the value of integrity are interpretively best seen through the value of coherence forms one of the main arguments that is established in chapter 3, and is also used to integrate both the legal and ethical theories in chapter 5.

<sup>79</sup> Guest, *How to Criticise* (n61) 4-8 (online); Stavropoulos, *Interpretivist* (n69).

<sup>80</sup> Kramer, *On Morality* (n25) 72. See the discussion in *WLMM* (n8) 39-44.

notion of being able to incorporate moral principles because they are free floating and the idea of only giving due respect to parallel systems of authority.<sup>81</sup> These implications lead to a rejection of the Incorporationist theory based on its incapacity as a tool to provide a theoretical explanation and demonstration as to how judges can take a more proactive role in the resolution of the inherent ethical and legal controversies in hard cases.

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<sup>81</sup> Kramer, *WLMM* (n8) 39. That is, the way that Kramer speaks of the idea that norms of other authoritative systems are given due respect, as opposed to being incorporated into a particular legal systems body of laws (Kramer, *WLMM* (n8) 39) must be rejected in a normative context. Kramer states there is a difference between incorporated moral principles and the rules of the other authoritative systems and sporting associations, in that the latter's rules are in the deliberate control of persons other than the judges in the legal system in question. This is in distinction to those incorporated moral principles, whose meaning and implications are not within the deliberate control of anyone outside of the legal system. Therefore, (Kramer contends) we can accurately say that when we apply those rules and laws of other systems of authority occasionally, we are not incorporating them into our system, but showing them due respect. This is in contrast to the incorporation of moral principles into the legal system in question (Kramer, *WLMM* (n8) 38-39). However, it might be said the ethical guidance as produced by the GMC establishes a parallel system of authority for doctors, as this system shares similarities with both the 'rules of sporting associations and the laws of foreign jurisdictions' (*ibid* 39). This is because, like the latter rules, such ethical guidance does 'lie entirely within the deliberate control of people other than the officials in the legal system *L* where the [ethical guidance is invoked]' (*ibid* 39). Further to this, such an authoritative aspect of the GMC's guidance can be seen in *Good Medical Practice*, where although it is noted that the content in *Good Medical Practice* 'is guidance, not a statutory code' (General Medical Council, *Good Medical Practice* (ethical guidance, 2006) 5), the guidance continues by noting that '[s]erious or persistent failure to follow this guidance will put your registration at risk' (GMC, *ibid*). So, for Kramer, if a judge was to rely on guidance provided by the GMC in a case involving informed consent, this would mean the standards in the GMC guidance would be being given due respect as opposed to incorporated into the existing body of law. Regardless of the inconsistencies with the implications of earlier arguments discussed (in that the judge thereby incorporates the principles existing within the guidance, but only gives due respect to the guidance itself (a very convoluted way of putting the matter)), the point here is that if this is the case, although Kramer is using the distinction above to differentiate moral principles from such rules and laws, the implications of 'showing due respect' (Kramer, *WLMM* (n8) 38-39) do not go far enough as a model to critically engage with medical ethics discourse (Miola, *Symbiotic* (n4) 9), something that may necessarily need to be done in certain cases to come to a legally and ethically responsible decision. Admittedly, whilst Kramer may say that we may be able to engage with the principles underpinning the guidance itself (as has already been noted) (Miola, *Symbiotic* (n4) 9), the reference to these ethical principles is in context with trying to critically engage with the norms that the authoritative system that exists alongside the legal system has laid down (Kramer, *WLMM* (n8) 39). This seems to be in a direct tension with Kramer's notion of 'due respect' (Kramer, *WLMM* (n8) 39), given the sharp distinction Kramer draws between a legal system and other systems of authority as running parallel to each other (Kramer, *WLMM* (n8) 39). The GMC is given a statutory mandate and statutory powers to establish a system of authority, under the Medical Act 1983, *an act of our legal system*. That is, 'the GMC [has a] statutory role as the guardian of ethical guidance to the medical profession' (Miola, *Symbiotic* (n4) 217). That the two are so closely interlinked shows why the law should be able to do more than simply give 'due respect' (Kramer, *WLMM* (n8) 39) to the GMC's principles. At least, given the requirements of Dworkin's theory, we are able to engage in such a practice, due to the demands of his interpretive methodology.

### **3.3. Applicability-conditions**

The final category that needs to be looked at is ‘applicability-conditions’.<sup>82</sup> What is meant here is the characteristics of how, why and what circumstances a moral principle is applicable in hard cases. Much of the applicability-conditions of Kramer’s nonguiding legal norms have been highlighted already in the discussion relating to their peremptoriness. The discussions are interlinked because these nonguiding legal norms are involved in “‘terminating disputes’...‘achieving closure’ and ‘resol[ving]the points at issue’”.<sup>83</sup>

There is one important particular contrast between Kramer and Dworkin in relation to *how* and *why* a moral principle is applicable in hard cases. Although Kramer readily accepts the moral principles incorporated under an Incorporationist Rule of Recognition cannot act as exclusionary reasons at all,<sup>84</sup> Dworkin contends that ‘principles have a dimension of weight and give agents nonconclusive reasons for action. Valid principles...may conflict and their resolution is based on the aggregate weight of the principles on either side of the argument’.<sup>85</sup>

It can be inferred from this quote Dworkin sees principles as providing *partially* exclusionary reasons. Though it can be questioned how much prominence Dworkin would give to this view, as Dworkin does not endorse the idea that the law’s role is to steer conduct by establishing source-based standards for this purpose,<sup>86</sup> this is not to say the matter is of no concern to Dworkin.

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<sup>82</sup> Kramer, *Throwing Light* (n6) 118

<sup>83</sup> ibid 131.

<sup>84</sup> Kramer, *WLMM* (n8) 36-37.

<sup>85</sup> Shapiro, *On Hart’s Way Out* (n30) 478. Further to this, see Dworkin, *TRS* (n3) 35.

<sup>86</sup> Shapiro, *On Hart’s Way Out* (n30) 505, footnote 67; Kramer, *Throwing Light* (n6) 134. This is despite Shapiro incorrectly believing that Dworkin’s main commitment to the point of legal practice is to justify state coercion (Shapiro, *On Hart’s Way Out* (n30) 505, footnote 67). The better position is that since Dworkin sees the practice of the law as being pervasively argumentative, his methodological requirement that legal theory involve itself in normative argument is clearly more prominent than his own attempt to clarify the scheme of normative argument for law as being one concerned with justifying state coercion. The justification of state coercion is better seen as a feature of normative argument, which Dworkin considers it necessary to engage in,

Concern with principles providing partially exclusionary reasons can be seen in Dworkin's discussions of Raz's conception of authority. In seeking to rebut Raz's main contention that 'nothing can count as law if citizens must use moral judgement to identify its content',<sup>87</sup> Dworkin shows a statute with moral content still nonetheless 'has normative consequences for those disposed to accept its authority. They now have an additional reason to reflect carefully on the moral quality of everything they do...they would not be making a conceptual mistake if they said they were behaving differently out of deference to the authority of the new law'.<sup>88</sup> This point is commonsensical, and indeed mirrors Kramer's argument that 'restrictions on the scope of a peremptory reason are fully compatible with its nature as such a reason'.<sup>89</sup> However, Dworkin's discussion of whether moral principles provide exclusionary reasons is bound up within his broader argument that moral considerations can (and necessarily do) figure in the criteria for identifying true propositions of law.<sup>90</sup> Therefore, one of the broadest debates in legal theory impacts upon the debate concerning the theoretical basis on how judges can take a more proactive role in recognising the ethical nature of judicial decision-making and coming to a legally and ethically responsible decision. It also leads to differing explanations as to the characteristics of moral principles in hard cases

as opposed to it being *the* methodological feature of Dworkin's position (Halpin, *Thirty Years* (n5) 76-77). This is further reinforced when we look at Dworkin's comment in *Law's Empire* that although 'we might understand law better if we could find a similar abstract description of the point of law most legal theorists accept so that their arguments take place on the plateau it furnishes ... [n]either jurisprudence nor my own arguments later in [*Law's Empire*] depend on finding an abstract description of that sort' (Dworkin, *Law's Empire* (n7) 93).

<sup>87</sup> Dworkin, *JIR* (n11) 206-207. I am wary here of using Dworkin's quote to summarise Raz's position, as it seems to have been rightly claimed by Leiter that in "*Thirty Years On*", chapter 7 of *JIR* (n11), most of Dworkin's discussion is based upon misstatements of Raz's position (Leiter, *Hart/Dworkin Debate* (n28) 26, footnote 32). Nonetheless, we can see that Dworkin at least represents this issue here correctly, when looking at Raz's conception of authority.

<sup>88</sup> Dworkin, *JIR* (n11) 206-207.

<sup>89</sup> Kramer, *WLMM* (n8) 23. See also Leslie Green, *The Authority of The State* (Clarendon Press, 1988) 36- 42. See also MacCormick's discussion of 'Standards in Rules' In *IofL* (n61) 30-31. The discussion highlights one main advantage of enacting rules with built in standards, that being that the rule in question can be treated as a rule of strict or absolute application without risking the occurrence of decisions that depart vastly from those that would be satisfactory of a person of informed common sense (MacCormick, *ibid* 30). Finally, see Raz's comments himself on the notion of scope restriction in relation to exclusionary reasons in Raz, *Practical Reason and Norms* (n4) 35-45. Indeed, see also Shapiro's comment in *Law, Morality and the Guidance of Conduct* (n53) 164, footnote 77.

<sup>90</sup> Dworkin, *JIR* (n11) 198-199.

regarding their applicability-conditions and peremptoriness, and the reasons *behind* their peremptoriness.

To return to Kramer's contention that the incorporated moral principles are not exclusionary reasons,<sup>91</sup> it is also clear for Kramer that the 'justificatory orientation is the crucial condition for the existence and contents of the modestly Incorporationist criteria in [the officials'] Rule of Recognition'.<sup>92</sup> This justificatory orientation is a sustained regular practice of appealing to the general requirements of morality as the basis for choosing the norms with which judges resolve hard cases.<sup>93</sup> Further, those moral principles that judges cite are a means of giving expression to the requirements of the modestly Incorporationist Rule of Recognition.<sup>94</sup> It can be deduced from these statements there is an element of weight in relation to these principles.<sup>95</sup> However, this notion of weight must be distinguished from the way it is used by Dworkin. This notion of weight for Kramer takes on a more trivial sense than the way in Dworkin uses it. This stems from those moral principles not being able to serve as reason-creating guides, since they do not add any reasons-for-action to the reasons that already exist as a result of the criteria in the Rule of Recognition itself.<sup>96</sup> This is opposed to the Dworkin's contention that '[i]f a judge believes principles he is bound to recognise point in one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly'.<sup>97</sup> We can also see that 'an Incorporationist legal system['s] *Rule of*

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<sup>91</sup> Kramer, *WLMM* (n8) 36-37.

<sup>92</sup> Kramer, *Of Final Things* (n8) 90.

<sup>93</sup> ibid. Further, it is contended that some moral propositions are objectively correct, independent of what anyone thinks about them (ibid 82). This notion of 'moral objectivity' (ibid 82, footnote 11) will become important throughout the thesis.

<sup>94</sup> Kramer, *Throwing Light* (n6) 132.

<sup>95</sup> Dworkin *TRS* (n3) 26. Closely related to both notions of weight is the important point that 'the notion of "weight"... is a metaphorical notion which can mislead precisely in the way in which it appeals to a quality of material objects in which it is objectively measurable' (MacCormick, *Legal Reasoning and Legal Theory* (n61) 155-156).

<sup>96</sup> Kramer, *WLMM* (n8) 18. Indeed, Kramer notes in *Throwing Light* (n6) that '[i]n my earlier article I unreservedly acknowledged the correctness of Shapiro's astute observation that the moral principles validated under an Incorporationist Rule of Recognition do not constitute any reasons-for-action beyond those constituted by the Incorporationist criteria themselves' (Kramer, *Throwing Light* (n6) 130).

<sup>97</sup> Dworkin, *TRS* (n11) 35.

*Recognition settles everything in advance*'.<sup>98</sup> Thus, the dimension of weight only becomes applicable when a judge appeals to those moral principles as an aid to applying the modestly Incorporationist Rule of Recognition in a particular case,<sup>99</sup> as opposed to making ‘a proposition of law true in virtue of an interpretive fact’.<sup>100</sup>

The distinction can be summed up by noting facts are significant in themselves for Kramer given his positivist commitments, as opposed to not being so for Dworkin.<sup>101</sup> It is in this sense the dimension of weight becomes trivial. Putting this all together, if a judge was to rely on guidance provided by the GMC in a case involving informed consent, this would mean for Kramer, the moral principles in that guidance would not function so as to *require* a particular decision one way or the other. They are a means of giving expression to the requirements of the modestly Incorporationist Rule of Recognition. Nor would these moral principles add any further exclusionary reasons to the modestly Incorporationist Rule of Recognition. They are simply there to fill gaps in the source-based law. These moral principles would be incorporated into “the law” so as to aid the application of this Rule of Recognition. It is in this trivial sense these moral principles would add weight to the line of argument they support. In contrast, this would mean for Dworkin the moral principles in that guidance would not *necessitate* or completely require a particular decision one way or another. However, these moral principles can still have normative implications and act as partially exclusionary reasons. This is because they may figure in the truth conditions of a true proposition of law, that proposition providing the most coherent interpretation of other true propositions of law. It is in virtue of this interpretive fact that moral principles would add a non-trivial weight to the line of argument they support.

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<sup>98</sup> Kramer, *WLMM* (n8) 21 (emphasis added).

<sup>99</sup> Kramer, *Throwing Light* (n6) 131.

<sup>100</sup> Stavropoulos, *Interpretivist* (n69)

<sup>101</sup> Guest, *How to Criticise* (n61) 3 (online).

This comparison highlights the characteristics and function of the moral principle are different in relation to broader commitments of either theory. In concluding, under this theme the broader commitments of both modest Incorporationism and Dworkin's theory of law have the biggest impact upon the characteristics of the role that moral principles play in hard cases. Because of this, as has been adverted throughout the discussion, it then becomes important to determine which theory is law is more favourable over the other.

### **3.4. Overall conclusion**

In concluding overall, the foregoing comparative evaluation has shown the similarities between Dworkin's and Kramer's theory of law. For example, both Kramer and Dworkin believe moral principles are continuously present, or pervasive, in the resolution of hard cases, and are arguments which incline in one direction or another.<sup>102</sup> In addition, though both theories differ in their specific explanation as to the provenance conditions of moral principles, the fact Kramer also regularly speaks of how the 'justificatory orientation is the crucial condition for the existence and contents of the modestly Incorporationist criteria',<sup>103</sup> shows both theorists believe judges rely on the soundness of their convictions in applying moral principles.<sup>104</sup> However, depending on the theoretical viewpoint, the judge's reliance on the soundness of her convictions in applying moral principles comes into play at different points and for different reasons.

This evaluation is important for two further reasons. First, in trying to theoretically explain how judges can take a more proactive approach in cases like *Sidaway* and *Chester*, it shows

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<sup>102</sup> Dworkin, *TRS* (n3) 26; Kramer, *Throwing Light* (n6) 132. See further how it was noted earlier in setting out the doctrine of modest Incorporationism that '[b]y regularly advert[ing] to the fundamental requirements of morality as the foundation for their choices of dispositive norms in hard cases, the officials engage in an Incorporationist practice *that absorbs all genuine precepts of morality into the law regardless of whether those precepts have been discretely identified and designated as such*'. That blanket absorption through the justificatory orientation of the officials is the cardinal way in which they treat moral principles as laws' (Kramer, *Of Final Things* (n8) 96) (emphasis added).

<sup>103</sup> Kramer, *Of Final Things* (n8) 90.

<sup>104</sup> See also, explicitly, Dworkin, *TRS* (n3) at 124, and *Law's Empire* (n7) at 261-262.

we can be confident regarding the roles moral principles play when judges decide hard cases. Second, it has also highlighted the relevant basic difference between Dworkin and Kramer's theories. Whilst the similarities of the roles moral principles play in hard cases has been highlighted, the explanation *for* those roles, and the larger debate of the theoretical basis of how judges can take a more proactive role to come to a legally and ethically responsible decision in hard cases is answered differently by Kramer and Dworkin *because* of the 'germane point[s] of dissimilarity'<sup>105</sup> that have been shown in the foregoing discussion. Thus when coupled with the arguments previously noted against Kramer, this shows the more plausible framework for the operation of moral principles in hard cases, and the normative potential of the law and bioethical theory to obtain the resolution of controversy<sup>106</sup> is Dworkin's theory.

Further, the paradox between the findings in the last chapter and the current one can now be made explicit. It has been identified in this chapter that two theories with fundamental opposing divisions agree that judges rely on the soundness of their moral convictions in applying moral principles. Chapter three shall establish this further. But in contrast, it was highlighted in Miola's three-element analysis, and in the discussion of *Sidaway* and *Chester* in the last chapter that for judges '[a]t times, medical ethics is seen as nothing more than "professional etiquette" not to be interfered with. At others, judges will instinctively abrogate decision-making responsibility to medical ethics as soon as they identify the ethical issues in a case'.<sup>107</sup> The central research question attempts to dissolve this paradox by showing this abrogation is unnecessary. A theoretical explanation of the basis of legal practice, integrated with sophisticated ethical theory demonstrates how judges can come to a legally and ethically responsible decision in hard cases.

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<sup>105</sup> Kramer, *On Morality* (n25) 71.

<sup>106</sup> Halpin, *Thirty Years* (n5) 92.

<sup>107</sup> Miola, *Symbiotic* (n4) 9. In relation to *Sidaway*, see chapter 1 point 3.1.1., "Misidentification of the nature of arguments" and *Chester* point 3.2.2., "Misidentification of the nature of arguments".

Finally, this leads us to another important point of the last section. That is the highlighting of certain ideas and commitments by Kramer that can be used to further critique his theory to show it is inadequate for the purposes set out. This task will now be undertaken, before turning to another point of difference between Kramer and Dworkin.

#### **4. Modest Incorporationism: further problems with Kramer's own admissions**

It was highlighted above that for Kramer the role of law in his modest Incorporationism is as an institution that establishes standards which are source-based for the purpose of guiding conduct.<sup>108</sup> It is reasonable to conclude from this that Kramer sees 'the law's primary function...[as being] to motivationally guide the conduct of judicial officials via its secondary rules [here, by the modestly Incorporationist Rule of Recognition]'.<sup>109</sup> However, 'guidance by a rule presupposes at least a high degree of conformity'.<sup>110</sup> This notion has led to a number of criticisms of Incorporationism. First, due to the *level and scale* of disagreement of officials (as opposed to the *substance* of those disagreements) and the divergence of officials' decisions in hard cases, there does not in fact exist a modestly Incorporationist Rule of Recognition, as there is no relevant convergence of behaviour.<sup>111</sup> Further, Incorporationism merely shows us that judges can be *committed* to the same rule, and are not actually *guided* by the same rule.<sup>112</sup>

Kramer seeks to counter these objections by contending that if the justifications by the officials themselves and the patterns of official justifications are examined, then this shows how officials whose decisions may be in disagreement may still be adhering to the

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<sup>108</sup> Kramer, *Throwing Light* (n6) 134.

<sup>109</sup> Shapiro, *On Hart's Way Out* (n30) 492. Motivational guidance is defined as follows: '[t]o be motivated to conform to a legal rule by the rule itself is to believe that the rule is a legitimate standard of conduct and to act on that belief' (*ibid* 490).

<sup>110</sup> *ibid* 484.

<sup>111</sup> Kramer, *Throwing Light* (n6) 136.

<sup>112</sup> Shapiro, *On Hart's Way Out* (n30) 484. This is in the sense that Kramer can show 'only that there has been a concerted effort by all parties to try and conform to the [Incorporationist criterion]' (*ibid*).

Incorporationist Rule of Recognition;<sup>113</sup> ‘the existence of the Incorporationist criterion in a modestly Incorporationist Rule of Recognition does not depend on the emergence of a formulation to which all officials subscribe. Instead, it depends on a practice of justification in which the Incorporationist criterion is immanent as a shared presupposition’.<sup>114</sup> But, this leads Kramer’s theory into more problems, in that if the practice is construed as interpreting a particular criterion, that criterion is extremely abstract.

This is reinforced by a number of points made in Kramer’s writings. Bound up with this practice of justification is the notion that criticism ‘will descend upon the [c]ourt in the aftermath of hard cases, irrespective of the outcomes that were reached’.<sup>115</sup> This statement supports the idea that we may be able to count any legal practice as conventional<sup>116</sup> and thus ‘these social norms satisfy positivistic requirements in a purely formalistic way’.<sup>117</sup> If judges are going to be critiqued *regardless* of the outcome of their case, this implies the range of reasons that potentially can be invoked to dispose of the case is great. Therefore, if we wish to formulate a convention that captures the whole range of these reasons, it is likely that the convention will have to become increasingly broader to capture the relevant “convergent” behaviour, until ultimately it gives no specific direction as to how to apply moral principles to resolve hard cases. This is despite Kramer noting that ‘in hard cases with no uniquely correct solutions, [modestly] Incorporationist officials will be acting in accordance with their Rule of Recognition so long as the moral principles which they invoke and the outcomes which they favour are within the range of acceptable principles and outcomes’.<sup>118</sup>

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<sup>113</sup> Kramer, *Throwing Light* (n6) 136- 139.

<sup>114</sup> *ibid* 138.

<sup>115</sup> Kramer, *Of Final Things* (n8) 87. Although Kramer discusses this in the context of the American Supreme Court, we can apply this to the decisions of the Supreme Court as it operates within the English legal system, and also many Court of Appeals cases. This statement is certainly true of cases like *Sidaway* and *Chester*.

<sup>116</sup> Dworkin, *JIR* (n11) 193.

<sup>117</sup> Shapiro, *On Hart’s Way Out* (n30) 487.

<sup>118</sup> Kramer, *WLMM* (n8) 37.

What further supports this critique is Kramer's idea that an Incorporationist Rule of Recognition exists if there is a practice of justification in which the Incorporationist criterion is shared and presupposed by judges.<sup>119</sup> Kramer rejects the idea that there is a conventional criterion which treats a principle's moral correctness as sufficient for legal validity which is applicable in *all* cases, as opposed to hard ones.<sup>120</sup> This rejection is on the explicit basis that 'the scheme of governance which [such a Rule of Recognition] underpins is devoid of the operational regularity that characterises any genuine system of law'.<sup>121</sup> This is due to the widespread divergences in people's moral outlooks and answers to moral questions in large, complex societies.<sup>122</sup> However, Kramer notes this will still occur within a modestly Incorporationist regime.<sup>123</sup> It is these very points which render the idea of 'a practice of justification in which the Incorporationist *criterion* is immanent as a shared presupposition',<sup>124</sup> liable to the charge that in hard cases, for such a criterion to be *shared* at all, it has to be of such abstraction as to be able to class any potentially justifiable course of conduct as conventional; controversy is controversy regardless of the range of cases over which it occurs, and even then, the range of controversy does not tell us about how often such controversy may occur.<sup>125</sup> Whilst Kramer tries to counter this by contending his rejection of robust Incorporationism is at the level of application,<sup>126</sup> Kramer is only able to reject the doctrine at such a level by again adhering to such an abstract criterion that trivialises positivism in the ways commented before.

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<sup>119</sup> Kramer, *Throwing Light* (n6) 138.

<sup>120</sup> ibid 124.

<sup>121</sup> ibid 142.

<sup>122</sup> ibid 124.

<sup>123</sup> ibid 142.

<sup>124</sup> ibid 138 (emphasis added).

<sup>125</sup> Kramer, *Throwing Light* (n6) 136; Dworkin, *JIR* (n11) 193.

<sup>126</sup> Kramer, *Throwing Light* (n6) 142.

Following this line of argument through, as judges adjudicate on hard cases in which criticism will be administered regardless of the outcome of the case,<sup>127</sup> the more plausible proposition is one which judges rely on non-conventional principles of political and personal morality and their ‘own moral and political convictions’,<sup>128</sup> as opposed to a conventional practice to dispose of hard cases.

Kramer is however correct to note, in line with his positivist commitments, that such convictions need not be moral in tenor.<sup>129</sup> However, leaving aside the fact that as the scope of investigation is limited to cases with an inherently ethical content like *Sidaway and Chester* (and thus it is far more likely that judges who use their own convictions to rely on moral principles for the sake of terminating disputes are going to use convictions which are moral in tenor<sup>130</sup>), if Kramer does wish to contend that in some circumstances there can be a consensus

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<sup>127</sup> Kramer, *Of Final Things*, (n8) 87.

<sup>128</sup> Dworkin, *JIR* (n11) 256.

<sup>129</sup> Kramer, *IDLP* (n41) 147. Kramer further seeks to argue against the idea that the positivist account of law is invalidated by the distinction between a consensus of conviction and a consensus based upon convention (Kramer, *IDLP* (n41) 146). He notes that ‘as soon as we move down into the details of American legal institutions ... the Dworkinian approach becomes strained. Though it is not utterly inconceivable that American judges harbour independent moral convictions about each of the complex layers and ramifications in their Rule of Recognition, the likelihood of such a state of affairs is vanishingly small’ (Kramer, *IDLP* (n41) 151). Further, Kramer notes that ‘[a]t most, then, the Dworkinian model is only a partial alternative to the conventionalist model as an interpretation of the American legal system ... Dworkin’s approach can claim credibility at the abstract level, but virtually no plausibility whatsoever at the somewhat more detailed level. Thus, even if we concede, *arguendo*, that Dworkin’s protestantism is superior to conventionalism as an account of the general contours of American legal officials’ endeavours, we have every reason to think that conventionalism will be needed in order to account for much of the texture of those endeavours’ (Kramer, *IDLP* (n) 151) (emphasis in original). This argument misses the key tenet in Dworkin’s writings. That is the notion that criterial concepts cannot account for the concept of law, and that the law, in its doctrinal concept, functions as an interpretive concept (Dworkin, *JIR* (n11) 12). Thus, once we do away with the notion of a judge’s Rule of Recognition (Kramer, *IDLP* (n41) 151) and look at the implications of seeing law as an interpretive concept (Dworkin, *JIR* (n11) 151), the view that a consensus based on conviction exists at a detailed level (Kramer, *IDLP* (n41) 151) becomes far more plausible. Further, Kramer’s own arguments are instructive here. He states that ‘the officials who participate in running the American legal system do not answer [a moral question] by reference to their fellow officials beliefs. They aptly regard [a moral question] as a moral criterion, in the application of which they have to make moral judgements’ (Kramer, *IDLP* (n41) 160). This argument complements Dworkin’s nicely, where he notes in reply to the notion that a judge is simply deciding on the basis of his own convictions, that in fact a judge may rely upon the *soundness* of his own belief, and thus need not rely on the soundness of any *particular* belief in this way. However, ultimately, he must rely on the substance of his own judgment at some point, so as to be able to make a judgement at all (Dworkin, *TRS* (n3) 123-4). It must also be noted that these arguments are as pertinent when applied to the English system of law as opposed to the American system of law.

<sup>130</sup> In addition to this, given that a larger aim of this thesis is to look at bioethical principles and the roles they can and should play within judicial decision-making, this matter (of convictions being non-moral in tenor) does

of conviction, though those convictions need not be moral in tenor,<sup>131</sup> then his critique that Dworkin fails to understand the distinction between disagreements over application of certain criteria and the content of criteria has disappeared. We are left with a theory that has to potentially give up its conventionalist stance to allow for the facts of hard cases, facts to which Kramer himself adverts. More importantly, the main tenet of his theory, the Incorporationist criterion, has all but disappeared. Finally, even if it was to be conceded there could be some legal systems or authoritative decisions which are grounded on convictions that are not moral in tenor,<sup>132</sup> what would this system look like and operate in practice? As

Guest notes:

It is difficult to see how one could “ground” a legal argument by using a principle of, say, racial “purity”, based on hate, prejudice, mistake, mere repetition of the views of others, cosmological “truths”, weird psychology, and so on. Could you coherently determine whether a racially “pure” citizen had been “prejudiced” by the incorrect application of such principles? It makes neither rational nor moral sense.<sup>133</sup>

Last, other arguments Kramer makes show another potentially more serious problem that threatens his Incorporationism. Kramer is so prepared to show officials may be adhering to the Incorporationist criterion, even if they misidentify the correct moral principles in a particular case,<sup>134</sup> he seems at one point to abandon the notion that a sufficient condition for a norm to be considered as a legal norm is its correctness as a moral principle. He notes in

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not present a particularly large problem. That is because, as the thesis is dealing with bioethical principles, these principles, and thus convictions, are by necessity moral.

<sup>131</sup> Kramer, *IDLP* (n41) 147-148.

<sup>132</sup> Kramer, *IDLP* (n41) 147-148

<sup>133</sup> Stephen Guest, ‘The Role of Moral Equality in Legal Argument’ in François Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (Juta & Co., 2005) <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the\\_role\\_of\\_moral\\_equality\\_in\\_legal\\_argument.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the_role_of_moral_equality_in_legal_argument.pdf)> 21, footnote 34 (online) accessed 21<sup>st</sup> August 2011. See further Dworkin’s discussion of the grounds and force of law in *Law’s Empire* (n) 108-113 and his more recent discussion of ‘Evil Law’ in *JFH* (n73) at 410-415.

<sup>134</sup> Kramer, *WLMM* (n8) 71.

replying to the charge that ‘the officials’ Rule of Recognition is Incorporationist only in its content and not in its effects’,<sup>135</sup> that:

legal officials who persistently choose the wrong moral principles when coming to grips with hard cases might nonetheless be invoking some set of principles with substantial regularity...In any event, so long as the courts achieve a significant measure of uniformity in their invocations of norms for hard cases, there will be a fact of the matter concerning the norms which the sundry courts are generally disposed to apply in such cases.<sup>136</sup>

What seems to matter here is the *effect* of the Incorporationist Rule of Recognition, but at the cost of its *content*. Kramer now seems to be emphasising that there will be *some* incorporation of moral principles that judges will be disposed to follow, simply because there is a regular practice of these principles being invoked.<sup>137</sup> Kramer seems to be allowing for moral principles to be incorporated into the law *solely* on the basis of their regular invocation, as opposed to being concerned with their content.<sup>138</sup> But ‘[w]hatever might be established empirically about [ ] norms...nothing normative would follow directly from this finding’.<sup>139</sup> We need to look at the content of that principle, not just how regularly that principle has been used. This is arguably a more serious problem than modest Incorporationism resting upon a trivial abstract convention.<sup>140</sup>

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<sup>135</sup> ibid 72.

<sup>136</sup> ibid 72-73.

<sup>137</sup> ibid 72-73.

<sup>138</sup> ibid 72-73.

<sup>139</sup> B&C, *PBE* (n12) 418.

<sup>140</sup> Kramer, *Throwing Light* (n6) 138. Note again however how Kramer states that ‘the implications of the Incorporationist criterion in the specified rule of recognition are not determined by what the officials think when they adhere to that criterion. Its extension is fixed not by their beliefs about its extension, but by the facts of morality. Whether or not the officials make any correct judgements of application when they resort to their moderately Incorporationist criterion, their acceptance of it has endowed the true principles of morality with the status of laws that are brought to bear on the controversies in hard cases. Perhaps those laws seldom get activated suitably, but they are applicable laws all the same’ (Kramer, *WLMM* (n8) 73) (footnote omitted). But, if it is the case that moral principles can be incorporated into the law by being morally correct (regardless of

Thus, even if we concede judges are guided by the same criterion,<sup>141</sup> this still runs Kramer into trouble in relation to other aspects of his theory. The comments intended to rebut the claims that a modestly Incorporationist Rule of Recognition cannot exist highlight the sheer abstractness of the criterion on which such a regime has to be based. This trivialises positivism by eliminating the idea of a convention itself, making legal reasoning indistinct, and being so abstract so as to encompass any morally justifiable course of action as conventional, no matter how radically divergent from other practices.<sup>142</sup> More specifically, Kramer is so adamant in defending his theory of law at all costs that the arguments he himself uses lead to some striking conclusions. Most notable is that Kramer's theory collapses into Dworkin's. Alternatively, his positivistic stance can only be saved by abandoning his conventionalist stance, which is the basis of his modest Incorporationism. Finally, separately from all this, Kramer comes close to denying that a norms' correctness as a moral principle is a sufficient condition for it to be incorporated into "the law", and all that is required instead is a regular procedure of invoking some set of moral principles.<sup>143</sup> Therefore, if judges are to be provided with a decision-making framework to come to a legally and ethically responsible decision in cases like *Sidaway* and *Chester*, Kramer's theory of law cannot be used.

This chapter shall finally go on to look at the second theoretical distinction between Kramer's and Dworkin's theories of law. That is, Dworkin contends every hard case has a right answer, whereas Kramer asserts there are some hard cases with no single correct resolution. It shall also be highlighted how Dworkin's contention that there is a single right answer in hard

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how regularly they are invoked) or by being (possibly) morally incorrect, but regularly averted to, then it sees unclear just which moral principles are *not* incorporated when hard cases do arise. If it is the case that all moral principles "slip through the net" and are incorporated, regardless of their status, then this seems to again trivialise Kramer's thesis in an important way (in that the test for how to incorporate moral principles in hard cases might not be needed) or at least (again) bring it very close to Dworkin's theory of law.

<sup>141</sup> Shapiro, *On Hart's Way Out* (n30) 484.

<sup>142</sup> Dworkin, *JIR* (n11) 193.

<sup>143</sup> Kramer, *Throwing Light* (n) 115; Kramer, *WLMM* (n8) 72-73.

cases<sup>144</sup> alleviates a number of problems highlighted in Miola's three-element analysis in the previous chapter. An overall conclusion to the chapter shall then be provided, which will begin to set out the more positive reasons why Dworkin's theory of law proves a better framework to integrate with a bioethical theory to form a mutually complementary framework that is able to provide a theoretical explanation of how courts have the ability to realise the possibility of taking a more proactive role in coming to a legally and ethically responsible decision in hard cases with an inherently ethical content. This will lead on to the investigations to be conducted in chapter three of this thesis.

## **5. One right distinction?**

If Kramer's arguments concerning right answers and hard cases are valid, then this threatens to undermine Dworkin's adjudicative principle of integrity. This is important, because if there are problems with both Kramer's and Dworkin's theories of law, we cannot use either to provide the best explanation of how to use moral principles to come to a legally and ethically proactive responsible decision in inherently ethical hard cases. Many of the negative effects of judicial deference to the medical profession in cases involving inherently ethical matters identified in the previous chapter may not be remedied.

Again, this distinction concerns the notion that 'Dworkin has long affirmed that there is a uniquely correct answer to every legal question or *virtually* every legal question that might arise in any particular jurisdiction'.<sup>145</sup> By contrast, Kramer contends there can be 'hard cases with no uniquely correct solutions'.<sup>146</sup> The cases he has in mind are explained in his article, *When is There Not One Right Answer?*<sup>147</sup> The problems involve 'moral vagueness',<sup>148</sup>

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<sup>144</sup> Dworkin, *TRS* (n3) 279.

<sup>145</sup> Kramer, *One Right Answer?* (n23) 49 (emphasis added).

<sup>146</sup> Kramer, *WLMM* (n8) 37.

<sup>147</sup> (2008) 53 Am J Juris 49.

<sup>148</sup> Kramer, *One Right Answer?* (n23) 51.

resulting potentially in a ‘sorites paradox’,<sup>149</sup> and ‘[i]ncommensurability and value pluralism’.<sup>150</sup> Regarding the latter, Kramer’s solution is that ‘[f]ully consistent with [Dworkin’s] thesis is the spectre of inescapable wrongness; sometimes, the uniquely correct response to a moral problem lies in opting for the lesser of the two wrongs’.<sup>151</sup> In addition, it is also noted ‘[w]hat is crucial here is that conflicting moral obligations will remain operative regardless of whether there is a determinately correct choice to be made between them’.<sup>152</sup> These situations threaten to undermine Dworkin’s notion of there being one right answer to a particular case. However what is being considered are ‘aspects of moral situations’.<sup>153</sup> Thus, whilst it may *look* problematic for Dworkin at this point, the sting can be taken out of many of Kramer’s issues.

Indeed, at least with regards to the problem of incommensurable values, both Kramer’s and Dworkin’s potential solutions look remarkably similar. Incommensurability occurs when there are two moral duties or principles, neither of which is more important than the other, and they are not of equal importance. This leads to no uniquely correct answer in this particular scenario.<sup>154</sup> Though space precludes a detailed discussion, first, Kramer notes that his conception of moral objectivity is very close to Dworkin’s,<sup>155</sup> ‘[a]s should be plain, the scale of the determinacy or indeterminacy in the moral realm is a moral matter’.<sup>156</sup> Second,

<sup>149</sup> ibid 52.

<sup>150</sup> ibid 56. However, here, as a clarificatory note, it should be noted that what Kramer is highlighting is actually the moral conflict arising from value pluralism, not value pluralism in and of itself, as value pluralism can simply be seen as a ‘structural issue’ which is ‘about how many moral values moral theory must deal with’. (Elinor Mason, ‘Value Pluralism’ in Edward N. Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Spring 2011 Edition) <<http://plato.stanford.edu/entries/value-pluralism/>> accessed 17<sup>th</sup> June 2011).

<sup>151</sup> Kramer, *One Right Answer?* (n23) 63.

<sup>152</sup> ibid 66

<sup>153</sup> ibid 56. Given however that Dworkin contends (and this thesis will further show) how law is a branch of morality (Dworkin, *JIR* (n11) 34), this distinction is not as sharp as Kramer seems to make out; it is noted here as Kramer insists on the distinction, though he implicitly notes Dworkin’s view of law as part of morality when he states that Dworkin ‘believes that the uniquely correct legal answer in every case is the uniquely correct moral response to the problem raised by the case (in light of the institutional history within which the case arises)’ (Kramer, *One Right Answer?* (n23) 49).

<sup>154</sup> Kramer, *One Right Answer?* (n23) 63.

<sup>155</sup> Kramer, *WLMM* (n8) 73, footnote 18

<sup>156</sup> Kramer, *One Right Answer?* (n23) 51.

he states '[i]ncommensurability as understood here is a property of moral ontology rather than purely of moral epistemology. That is, it consists in a mind independent state of unrankability rather than in an epistemic incapacity to detect rankings that nonetheless obtain'.<sup>157</sup>

Thus, the way to deal with problem Kramer introduces is by looking at Kramer's own moral ontology. This is similar to Dworkin's in that moral objectivity is a matter of moral argument, but is also different as Kramer subscribes to 'conflicts between moral duties...[in] a plurality of ethical values'.<sup>158</sup> Both these strands provide the positive argument Kramer needs to make this declaration of indeterminacy, as opposed to uncertainty.<sup>159</sup> Kramer goes on to state '[a] defender of Dworkin will have to maintain either that the conflicts among the values are always ultimately illusory or that those conflicts are always ultimately generative of a determinate overall moral relation between the two courses of conduct under consideration',<sup>160</sup> and further 'notwithstanding that uncertainty and complexity are distinct from incommensurability, anyone who suggests that those phenomena are never accompanied by incommensurability is straining credulity'.<sup>161</sup>

However, in relation to Kramer's claim there are fundamental conflicts between moral duties, given his adherence to moral objectivity being a matter of moral argument, one way to argue against this is to show there are good moral reasons why this way of describing moral conflict is inapposite. Such a task is undertaken in chapter five, when discussing B&C's ethical theory more explicitly. Second, in relation to his contention of "straining credulity", it seems

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<sup>157</sup> ibid 63. The difference between ontological and epistemic aspects of moral objectivity for Kramer is as follows; ontological aspects 'are dimensions of objectivity that pertain to the nature and existence of ethical standards and relationships and properties, while ... [epistemic aspects] are facets of objectivity that pertain to rational agents' judgements about those standards and relationships and properties' (Matthew H Kramer *Moral Realism as a Moral Doctrine* (Wiley-Blackwell 2009) 15).

<sup>158</sup> Kramer, *One Right Answer?* (n23) 68.

<sup>159</sup> ibid 50. See further Dworkin, *JFH* (n73) 90-96.

<sup>160</sup> Kramer, *One Right Answer?* (n23) 64.

<sup>161</sup> ibid.

sufficient to ask *why* this is the case, As Dworkin notes ‘[n]o such argument is supplied only by citing the obvious fact that there are many values and that they cannot all be realised...For the question remains...which choice is nevertheless best?’.<sup>162</sup> Regardless, as noted above, values being ‘incommensurably counterbalanced does not amount to being negated’.<sup>163</sup> Therefore, if moral duties still operate in a particular scenario, and because moral facts cannot “just” be true (alternatively, they cannot be barely true), we *always need a reason* why a moral or legal proposition is true. It thus seems like a morally better scenario is one in which in the case we look to work through our apparent conflict by reinterpreting the values at play to resolve the dilemma, looking to come to a more responsible decision; we are looking to arrive at a greater integrated understanding of our moral and legal responsibilities. We cannot simply think that there is an incommensurable conflict at the beginning of our deliberations.<sup>164</sup> Further, as Dworkin notes, it might also be the case that it turns out the best interpretation of the pertinent values, and thus the best way to attend to the underlying moral responsibility, requires they conflict in a particular scenario. However, this would then mean the values have been reconciled in a different manner, rather than having to accept this as a fact-of-the-matter. There would be a deeper collaboration which shows conflict in certain scenarios.<sup>165</sup>

Kramer also discusses how the imprecision of many moral concepts may lead to a sorites paradox, and thus no right answer. A sorites paradox can be seen in the following example:

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<sup>162</sup> Dworkin, *JFH* (n73) 93.

<sup>163</sup> Kramer, *One Right Answer?* (n23) 66.

<sup>164</sup> Dworkin, *JFH* (n11) 114-115 ;119-120.

<sup>165</sup> *ibid* 120. Likewise, this also seems to capture Kramer’s argument against Dworkin that he equivocates on many senses of the term “right” when arguing against Isaiah Berlin’s notion of fundamental conflicts in value in *JIR* (n11) chapter 4 (Kramer, *One Right Answer?* (n23) 60-61). Kramer ultimately concludes that (for example) ‘governmental authorities can be both under a moral duty to do  $\phi$  and a moral duty to abstain from  $\phi$ -ing. What can never be the case of course is that the authorities can be both under a moral duty to  $\phi$  and morally at [liberty] to abstain from  $\phi$ -ing [as defined in the article]. A combination of such a duty and such a liberty right would indeed be *incoherent*. By contrast the combination of a moral duty to  $\phi$  and a moral duty to abstain from  $\phi$ -ing is *impeccably coherent*’ (Kramer, *One Right Answer?* (n23) 62) (emphasis added). But, if the scenario above is ‘impeccably coherent’, then again, this seems to make sense *because* the ‘conflict [is] a deeper collaboration’ (Dworkin, *JFH* (n11) 120).

Premise 1: As there is a 99.999% inherent risk of nerve damage during surgery, it is an unreasonable surgery to perform, even if the patient consents.

Premise 2: A surgery in which there is a 99.998% inherent risk of nerve damage is *still* an unreasonable surgery to perform, even if the patient consents.

If someone was to try and distinguish both these percentages of risk, it is a reasonable inference it would be morally arbitrary to do so. But, by repeated application of this latter premise, if someone was to try and pin down the point at which the surgery does *not* become inherently risky, they would proceed backwards until reaching 0%. There is no non-arbitrary line which could distinguish the point at which the surgery is not inherently risky. Therefore, within the distinction between an unreasonable/reasonable risk is a borderline area of imprecision. It is within this borderline area that there is no uniquely correct answer as to how instances of unreasonable/reasonable risk are to be classified.<sup>166</sup>

But, given both Kramer and Dworkin subscribe to the idea that moral objectivity is a matter of moral argument, both theories of law can deal with this problem in a similar style. As an overarching preliminary to this point, the writings of MacCormick provide a basic essential function of courts that both Kramer and Dworkin would agree on, even if they do not believe it to be *the* essential function. According to MacCormick '[t]he...function or point of courts and judges who staff them is the hearing and determining of issues for trial under law whenever a binding decision is required on a case competently brought to court'.<sup>167</sup> Kramer notes that 'in hard cases with no uniquely correct solutions, all the [modestly] Incorporationist officials will be acting in accordance with their Rule of Recognition so long

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<sup>166</sup> Kramer, *One Right Answer?* (n23) 51-52. Indeed, the issue of at what point the likelihood of an inherent risk of surgery becomes so great the patient must be informed of this risk, is one of the main issues surrounding consent and the debate of the nature of the reasonable patient test in practice. See Alasdair Maclean, 'From Sidaway to Pearce: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) 20 Medical Law Review 108, 116-127.

<sup>167</sup> MacCormick, *IofL* (n61) 55.

as the moral principles which they invoke and the outcomes which they favour are within the range of acceptable principles and outcomes'.<sup>168</sup> Similarly, in responding to '*The Challenge of Internal Skepticism*'<sup>169</sup>, Dworkin looks to counter the sceptics challenge, who, as an example, 'insists that the law of accidents...is so shot through with contradiction that no interpretation can fit more than an arbitrary and limited part of it'.<sup>170</sup> He notes we may have to come to a decision where we settle on a particular choice because although we believe the impulse behind each of the two competitive principles is attractive, one impulse behind a certain principle may be more powerful given the particular circumstances.<sup>171</sup> The finality for Kramer and Dworkin in both of the decisions here can be seen.

Kramer is also correct to note we cannot insist that a sorites paradox is an area of epistemic uncertainty if that moral principle is wholly *unknowable*, as it would have no normative purchase in real life.<sup>172</sup> Regardless of this, we still need to try to work through this conflict by reinterpreting the values at play to come to a more responsible (legal and moral) decision.<sup>173</sup>

It is only when we have come to the realisation at both a court and legislative level that it would be administratively impossible to reach certain decisions on the basis of individual factors, we must adopt some pragmatic solution, like Dworkin highlights above.<sup>174</sup>

Indeed, at least one case has arisen in English law where a problem was put forward resembling a sorites paradox, and an approach taken to the problem similar to that discussed above. In *Waverley Borough Council v Fletcher*<sup>175</sup>, the issue was who was rightly entitled to

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<sup>168</sup> Kramer, *WLMM* (n8) 37.

<sup>169</sup> Dworkin, *Law's Empire* (n7) 266.

<sup>170</sup> *ibid* 268.

<sup>171</sup> *ibid* 270- 271.

<sup>172</sup> Kramer, *One Right Answer?* (n23) 53-55.

<sup>173</sup> Dworkin, *JFH* (n11) 119-120.

<sup>174</sup> Dworkin makes a similar point to the one sketched out in 'Objectivity and Truth: You'd Better Believe It' (1996) 25 (2) *Philosophy & Public Affairs* 87, at 136- 138. It is also understood here that Kramer is not getting at competing principles, but what is better? Allowing the vagueness of certain moral concepts to render us incapable of coming to a legal decision? See also Dworkin, *TRS* (n3) 286-287.

<sup>175</sup> [1996] QB 334

a medieval brooch found nine inches beneath the surface of land; either the council, or the defendant who had used his metal detector to find the brooch.<sup>176</sup> It was good authority that if an object is found *on* as opposed to *under* the land, then the owner of that land must ‘manifest [ ] an intention to exercise control over a building and the things which may be upon or in it so as to acquire rights superior to those of a finder’.<sup>177</sup> However, it was also good authority that if an object was found *under* the land, then it was to be treated as part of the land itself.<sup>178</sup> So in the instant case, following this, the council would have the better claim. However, in *Waverley*, both counsel for Fletcher and the trial judge contended they

could see no reason in common sense why the better possessory claim should depend upon whether an object was found on or in ground. [Counsel] gave as one of a number of examples in support of his argument, a lost watch on a muddy path which might within a day or two become covered by a thin coating of mud. Why, [they] asked, should the landowner's claim be different and stronger when the watch finally, but only just, disappears from sight?<sup>179</sup>

Most importantly here Auld LJ responded by noting that:

As to borderline cases of the sort mentioned by [Counsel], *potential absurdities can always be found at the margins in the application of any sound principle. It is for the trial judge to determine as a matter of fact and degree on which side of the line, on or in the land, an object is found.*<sup>180</sup>

Thus, these aspects of moral situations do not trouble Dworkin's theory of law. Given this, Dworkin's contention there are right answers to hard cases alleviates a couple of problems

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<sup>176</sup> Thompson, *Modern Land Law* (4<sup>th</sup> edn OUP 2009) 9.

<sup>177</sup> *Parker v British Airways* [1982] QB 1004 at 1018, per Donaldson LJ.

<sup>178</sup> *ibid* at 1010.

<sup>179</sup> *Waverley* (n175) at 345A-B.

<sup>180</sup> *ibid* G (emphasis added).

highlighted in the course of Miola's analysis in the last chapter. Though Miola notes medical ethics is in a fragmented state which allows the conscience of the individual medical practitioner to fill the void left by the fragmentation of discourse,<sup>181</sup> on Dworkin's theory of law a true proposition is one which coheres best with those fundamental principles of political morality.<sup>182</sup> This means if there are certain principles *inconsistent* with that proposition that come from competing sources, or cannot be mutually explained by that proposition, such principles can be *set aside*, in the sense they no longer feature as part of the truth conditions of a particular proposition of law.<sup>183</sup> Therefore, rather than there being so many principles to cancel each other out, Dworkin's theory of law alleviates this problem by showing which principles are pertinent to the proposition in question.<sup>184</sup> Moreover, Dworkin's theory of law *does* give us a method, as far as judicial decision-making is concerned, for prioritising or choosing between different categories of discourse, as his interpretive methodology enables us to discuss which past political decisions and principles bear on the instant case, as integrity is both forward and backward looking.<sup>185</sup> Finally, all the foregoing points show Miola may have misconceived the pertinent issues in his three-element analysis, as detailed in chapter one. If we are to use Dworkin's theory of law, then the discussion might be more usefully cast as asking *not* which principles enshrined in medical ethics discourse can we use and bring into "the law" (in some external sense) to come to an ethically responsible decision, but which principles, by virtue of their necessary status in the truth conditions of propositions of law, can we apply to come to a legally and ethically

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<sup>181</sup> Miola, *Symbiotic* (n4) 216-217.

<sup>182</sup> Dworkin, *Law's Empire* (n7) 219, as discussed in chapter 3.

<sup>183</sup> The appropriate notion of "set aside" here does *not* mean that those principles once set aside are negated, if negated is taken in the sense that one value neutralises the meaning of another of those values. Such principles may continue to operate and be pertinent to other areas of law, or in other scenarios that may be quite similar in relation to the scenario or area in which they have been set aside (Kramer, *Of Final Things* (n8) 90; B&C, *PBE* (n12) 16).

<sup>184</sup> Such alleviation also occurs in relation to explicitly ethical principles on the basis of the reinterpretation of B&C's ethical theory, as undertaken in chapters 4, 5 & 6.

<sup>185</sup> Dworkin, *Law's Empire* (n7) 225. Again, that B&C's four-principles theory enables us to do this in relation to the ethical scenario (one scenario that can be set within the same network of value to Dworkin's theory of law however) shall be shown in chapter 6.

responsible decision in hard cases, which may be *reinforced* by referral to medical ethics discourse on the basis of our sophisticated ethical theory.

## **6. Conclusion**

In concluding, this chapter has looked to identify what role moral principles play in hard cases like *Sidaway* and *Chester*. It has shown a detailed picture can be built up regarding the role of moral principles (and their effects in practice) by looking at the opposing theories of modest Incorporationism and the adjudicative principle of integrity. This is important because it was highlighted in the conclusion to chapter one and at the beginning of this chapter that a key connection between the problems identified in the previous chapter and a starting point for a theoretical explanation as to how judges can take a more proactive role in hard cases with an inherent ethical content was by building up a detailed explanation as to the role of moral principles in hard cases. However, this chapter has also shown Kramer's and Dworkin's two theories are opposing, and there are important basic differences concerning each theory's broader commitments and explanations of legal practice. These differences at the more abstract level filter down and impact upon debates at more specific levels, including the discussion concerning the theoretical basis of how judges can take a more proactive role in recognising the ethical nature of judicial decision-making, and confidently coming to a legal and ethically responsible decision. Indeed, in some circumstances these differences filter down into differing explanations *for* the roles that moral principles play in hard cases.

Therefore, this chapter has also shown that in order to provide an interlinked, integrated legal and ethical framework to show how judges can be more proactive in recognising the ethical nature of judicial decision-making and coming to a legally and ethically responsible decision, then Kramer's theory of Incorporationism must be rejected. This account of moral principles, whereby they are external to "the law" and are then incorporated, does not show

appropriately how courts have the ability to realise the possibility of being more proactive in cases like *Sidaway* and *Chester*. These problems stem from the Incorporationist criterion itself, a criterion that has shown to be so abstract as to be of little use.<sup>186</sup> Moreover, Kramer is so obstinate in defending his theory of modest Incorporationism that arguments *he* actually uses runs his theory into further problems. Indeed, this seems to stem from a general problem of positivism in particular; ‘even if we look casually at the practice of law, we will observe that what counts as law within that practice frequently requires the deployment of normative argument, so it is unlikely that a methodology concentrating solely on a descriptive criterion will be able to perform the task set for it’.<sup>187</sup> Finally, the chapter then considered the second distinction between Dworkin and Kramer’s theory of law, concerning hard cases and right answers. It showed how Dworkin’s theory of law can largely take account of Kramer’s claims that in some circumstances there can be hard cases with no right answer.<sup>188</sup>

This chapter has also begun to outline Dworkin’s interpretive commitments and his interpretive theory of law. Though it has partially been shown why Dworkin’s theory of law is to be preferred, a more positive account of why law as integrity is the appropriate legal framework to be used needs to be provided. This will include showing the main strength of Dworkin’s theory is the suitability for the purposes of this thesis of elements Dworkin takes to be central in his interpretive theory. In postulating law as an interpretive concept, Dworkin

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<sup>186</sup> Dworkin, *JIR* (n11) 193.

<sup>187</sup> Halpin, *Thirty Years* (n5) 77. One large reason that this is a problem of positivism seems to stem from the general tendency of positivists to draw a too ready and sharp distinction between those cases which are classed as easy cases whereby the matter is of such uncontentiousness it comes to court ‘perhaps only to be settled’ (Matthew H Kramer, ‘Also Among the Prophets: Some Rejoinders to Ronald Dworkin’s Attacks on Legal Positivism’ (1999) 12 *Can J L & Jurisprudence* 53, 65) and those cases which are difficult cases in which a judge must undertake a thorough examination of the law as ‘the operative legal norms … become objects of contention’ (Kramer, *ibid*). Indeed, we are to take heed of MacCormick’s comments that ‘the answer to the question “What is a problem case?” is simple: it is a case in which a problem has been raised—and, one must add, not dismissed summarily by the judge or judges involved. Let us therefore differentiate “clear” from problematic cases essentially on this pragmatic basis. “Clear” is much preferable to “easy” since many areas of law are hugely complex … Even in cases in which no problems of law are raised by anyone can be formidably complex in the concatenations of fact and law involved in them. It is almost insulting to call them easy on the ground that the huge difficulties in handling them happen not to be topics of current controversy amongst legal theorists’ (Sir Neil MacCormick, *Rhetoric and the Rule of Law* (OUP 2005) 51) (footnote omitted).

<sup>188</sup> Kramer, *WLMM* (n8) 79.

argues the practice necessarily has some sort of point, or some value underlying that particular practice. Further, the interpretive account of law ‘encourage participants of practices not to “fix” meanings or purposes but to engage constructively in producing a moral outcome in the resolution of disputes’.<sup>189</sup> These elements are beneficial for the purposes of providing a theoretical explanation of how judges can come to a legally and ethically responsible and proactive decision in hard cases. For example, because a particular value is able to be postulated as underpinning a social practice (for Dworkin that value for law being integrity) we are able to use that particular value, and the demands that value makes in figuring out which propositions of law are true, as a reference point to integrate the particular ethical theory into a mutually reliant framework, and situate both theories in the same network of values, relative to one another.<sup>190</sup>

However, this account presupposes that Dworkin’s value of integrity is the appropriate value that we should see the concept of law through. Thus, a more thorough interpretive investigation as to whether integrity is the value we should see law through, and how to best understand the value of integrity and, more broadly, Dworkin’s idea of constructive interpretation, needs to be undertaken. These two areas of investigation shall form the main points of the next chapter. These investigations will continue to further dissolve the paradox identified in this chapter, and answer the central research question. They will allow us to further formulate and build up more explicitly and specifically the legal framework that can be integrated with the ethical framework, so as to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics to come to a legally and ethically responsible decision.

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<sup>189</sup> Guest, *How to Criticise* (n61) 4 (online).

<sup>190</sup> Indeed, this task is undertaken in chapter 6.

## **Chapter 3**

### **1. Introduction: Is law best seen through integrity or justice?**

This chapter will continue to build on the findings of the previous chapter and present a more positive account of why Dworkin's theory of law as integrity is the appropriate legal framework to answer the central research question set. It shall do so in the context of considering whether the concept of law should be seen through the value of justice or integrity<sup>1</sup> and interpretively assessing 'the moral weight of integrity'.<sup>2</sup> Though the previous chapter concentrated on the 'adjudicative principle of integrity',<sup>3</sup> the discussion here shall be widened to encompass integrity as a value in its fullest sense. Examination of this question is important for a number of reasons.

The previous chapter identified and examined the role moral principles play in hard cases. This discussion provided a suitable starting point for the theoretical explanation as to how courts have the ability to realise the possibility of recognising the ethical nature of judicial decision-making, and confidently coming to a legally and ethically responsible decision in cases with an inherently ethical content. More specifically, it was argued at the end of chapter one the main way judges are going to be able to perform this task adequately is through being provided with a theory which lays open the structure of judges' decisions<sup>4</sup> and is also able to explain 'what counts as good, strong, supportive evidence for a [moral] belief'.<sup>5</sup> This task was formulated in light of an analysis of José Miola's findings in *Medical Ethics and Medical*

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<sup>1</sup> Stephen Guest, 'How to Criticise Ronald Dworkin's Theory of Law' (2009) 69 (2) Analysis 1 <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how\\_to\\_criticize\\_ronald\\_dworkins\\_theory\\_of\\_law.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how_to_criticize_ronald_dworkins_theory_of_law.pdf)> 4 (online) accessed 27<sup>th</sup> June 2014 (hereafter *How to Criticise*)).

<sup>2</sup> *ibid* 1.

<sup>3</sup> Ronald Dworkin, *Law's Empire* (Hart 1986) 225.

<sup>4</sup> *ibid* 265.

<sup>5</sup> Susan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Blackwell 1992) 23 (hereafter *Evidence*) 1.

*Law: A Symbiotic Relationship*;<sup>6</sup> analysis of two important cases surrounding the area of informed consent/risk disclosure, *Sidaway v Bethlem Royal Hospital Governors*<sup>7</sup> and *Chester v Afshar*;<sup>8</sup> and analysis of developments in case law since *Chester*. This was all undertaken in chapter one.

The previous chapter further argued if a legal framework was to be provided as part of a mutually interlinked, integrated framework with an ethical theory to show *how* judges can be more proactive in recognising the ethical nature of judicial decision-making, then Matthew Kramer's theory of 'modest Incorporationism'<sup>9</sup> was inappropriate for such purposes. It also began to argue Dworkin's theory of law provided a better framework to analyse current legal approaches by judges, and once integrated with ethical theory, this co-dependent framework could be used as an explicitly normative tool in the sense of explaining how judges can confidently arrive at an ethically nuanced and sophisticated decision in legal cases with an inherent ethical content.<sup>10</sup>

The central research question of this thesis is:

"Can an appropriate decision-making framework be provided to judges that recognises the ethical nature of judicial decision-making so as to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics to come to a legally and ethically responsible decision?"

To foreshadow discussions later in this thesis, Tom L Beauchamp and James F Childress's (hereafter B&C's) four-principles theory will be taken as the starting point or paradigm of the ethical decision-making framework to be integrated with Dworkin's theory of law. But, in

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<sup>6</sup> José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) (hereafter *Symbiotic*)

<sup>7</sup> [1985] AC 817.

<sup>8</sup> [2004] UKHL 41.

<sup>9</sup> Matthew H Kramer, 'Throwing Light on the Role of Moral Principles in the Law: Further Reflections' (2002)

<sup>8</sup> Legal Theory 115, 130.

<sup>10</sup> Miola, *Symbiotic* (n1) 9. For Miola's 'designation of ethical content' (*ibid*) see footnote 7 in chapter 1.

order to best understand how B&C's and Dworkin's theories can be interlinked and integrated with one another, another more specific research question needs to be answered:

“How should B&C's four-principles approach influence cases with an inherently ethical content, when used as an example of Dworkinian principles in law?”

This question is relevant because if we wish to use Dworkin's theory of law as a normative tool in the sense above, a greater interpretive understanding is needed as to the underlying justificatory structure of Dworkin's theory. It is not until this interpretive understanding has been reached that we can progress to answering the more specific research question immediately above, which in turn will go towards answering the central research question set.

The task of gaining a greater understanding of Dworkin's theory of law shall be done by considering another, more specific question: ‘what role does coherence play in [Dworkin's] own account of law in *Law's Empire* and elsewhere?’<sup>11</sup> This question is important because integrity is best understood through the idea of coherence. This has many important consequences. The following two chapters will show the best interpretation of B&C's writings is also based on a coherentist structure. Therefore, if both Dworkin's theory of law and B&C's writings concerning moral justification are (at least structurally) similar, this has a number of distinct advantages. Given that we are looking at the normative *application* of the four-principles approach as an *example* of how principles form part of the law in a Dworkinian sense, B&C's theory being coherentist in nature has a strong degree of fit with Dworkin's theory. Furthermore, in addition to the arguments of substance regarding why coherence best expresses the idea of integrity, we also do well<sup>12</sup> to interpret Dworkin's theory this way *precisely* because of this coherence between the two theories. It shall be shown that,

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<sup>11</sup> Ronald Dworkin, ‘Ronald Dworkin Replies’ in Justine Burley (ed), *Dworkin and his Critics: With Replies by Dworkin* (Blackwell 2004) 381 (hereafter *Dworkin Replies*).

<sup>12</sup> Dworkin, *Law's Empire* (n3) 186.

on this model, if a particular course of action is justified by B&C's theory, in turn this should mean that the legal proposition that embodies that coherent moral principle, according to Dworkinian theory, should be true.<sup>13</sup>

It shall also be argued constructive interpretation is driven by coherence considerations, and as integrity is best understood through the characteristic of coherence, it is natural these two aspects of Dworkin's theory fit together. These ideas therefore shine a new light on Dworkin's argument that '[l]aw as integrity is...both the product of and the inspiration for comprehensive interpretation of legal practice'.<sup>14</sup>

The chapter will also show, using the case of *Tennessee Valley Authority v Hill* (hereafter, the snail darter case<sup>15</sup>) how arguments of integrity, via coherence, are attractive despite Stephen Guest's arguments that his theory of 'law as justice'<sup>16</sup> will bring us closer to the principle of 'equality of respect'<sup>17</sup> than any other theory of law.<sup>18</sup> Thus, the two main arguments that shall be established in this chapter are: integrity is the value that we should see law though; and constructive interpretation and integrity are best understood through the idea of coherence.

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<sup>13</sup> Jonathan Dancy, *Introduction to Contemporary Epistemology* (Blackwell 1985) 117 (hereafter *Introduction*). What is meant by saying that a proposition of law is "true" shall be analysed later in the chapter. Specifically, see point 2.1.2., "Coherence, truth, justification and Dworkin".

<sup>14</sup> Dworkin, *Law's Empire* (n3) 226.

<sup>15</sup> (1978) 437 US 153.

<sup>16</sup> Stephen Guest, 'Integrity, Equality and Justice' (2005) 3 (233) *Revue Internationale De Philosophie* 335 <[http://www.ucl.ac.uk/~uctlsfd/papers/integrity\\_equality\\_and\\_justice.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/integrity_equality_and_justice.pdf)> 6 (online) accessed 27<sup>th</sup> June 2014 (hereafter *IEJ*).

<sup>17</sup> *ibid* 7 (online).

<sup>18</sup> *ibid* 6 (online). Given the number of assumptions Guest makes, this shows clearly his argument to be "internal" in character. See *ibid* 1 (online). It should also be highlighted that a prominent version of positivism was argued against in the previous chapter.

## **2. Understanding integrity through coherence**

### **2.1. What does coherence require?**

First, an explanation of what is meant by coherence as a property of justification of a system of beliefs, and what sort of coherence theory is being discussed needs to be provided.<sup>19</sup> This provides a clear idea of what is involved when it is claimed that integrity is best understood through coherence, and relate the elements of coherence to Dworkin's theory of law.

#### **2.1.1. The essentials of coherentism and a conception of coherence itself**

The explication of a particular conception of the concept of coherence that follows is a relatively uncontroversial one, with the differences lying in the detail. Even at this preliminary stage it must be noted that space precludes a detailed discussion of the concept itself.<sup>20</sup> The conception of coherence discussed here shall use Laurence BonJour and Jonathan Dancy's discussions, as they share common elements, and combining both will give an overall better picture. Lastly, for exposition purposes, it is worth noting that coherentism is often seen in opposition to foundationalism.

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<sup>19</sup> Laurence BonJour, *The Structure of Empirical Knowledge* (HUP 1985) 88 (hereafter, BJ, SEK). Attention should also be drawn to a key caveat. Joseph Raz highlights that 'epistemic coherence-based explanations are not specifically legal ... [as a] decision which coheres best with all legal propositions one believes may cohere less well than all of one's believed propositions' (Joseph Raz, 'The Relevance of Coherence' in Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, (Clarendon Press 1994) 279 (hereafter, *Relevance*). In contrast to epistemic theories, 'constitutive coherence theories of law and adjudication ... claim that coherence makes legal propositions true or judicial decisions right' (*ibid* 279).

<sup>20</sup> However, for an interesting suggestion regarding how consistency is *not* a necessary condition of coherence and that coherence is best understood as simply "sticking together" see Stephen Pethick, 'Solving the Impossible: The Puzzle of Coherence, Consistency and Law' (2008) 59 (4) NILQ 395. Though this formulation cannot be investigated fully and does raise interesting points, it is worth noting Dworkin's point (in relation to moral beliefs) that '[f]latly contradictory convictions ... provide almost no filter [on our decision-making will] even when each is sincerely held, because the choice between them, on any particular occasion, will be determined not by principle, but by other, unfiltered influences (Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 107-108 (hereafter *JFH*)). Whilst this argument is not directly on point, it does seem that freed from the condition of consistency, something like this (at least as it relates to moral beliefs) would be an issue for Pethick's formulation.

### **2.1.1.1. Element 1: An asymmetrical and linear order of epistemic priority of justification versus a holistic, symmetrical and nonlinear relation of justification**

Foundationalism traditionally holds the direction of justification is linear and one way, flowing from those basic beliefs to the non-basic beliefs in the structure of justification. In contrast, the coherentist holds that fundamentally, justification moves ‘in some more complicated and multidirectional variety of a closed curve’.<sup>21</sup> Coherentism favours a systematic relation of justification, whereby it is the overall context of a coherent system in which beliefs gain their justification by being related inferentially to other beliefs. The key idea is the relation is one of mutual support. In contrast to foundationalism there is no relation of epistemic priority or linear dependence in the system, with the direction of argument flexible in accordance with which beliefs have been challenged in a particular situation.<sup>22</sup>

### **2.1.1.2. Element 2: The conception of the concept of coherence**

This holistic structure of justification is based on the concept of coherence, which itself has many elements and conceptions. Both Dancy and BonJour note at an intuitive level, a coherent set is one that, hangs, sticks, or fits together in a special way so that the system of beliefs is tightly structured as opposed to being conflicting and chaotic. Furthermore, ‘[i]t is reasonably clear that this “hanging together” depends on various sorts of inferential, evidential, and explanatory relations which obtain among the various members of a system of beliefs’.<sup>23</sup>

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<sup>21</sup> BJ, *SEK* (n19) 89-90.

<sup>22</sup> Dancy, *Introduction* (n13) 110; BJ, *SEK* (n19) 90-92. Bonjour also notes that ‘[t]he epistemic issue on a particular occasion will usually be merely the justification of a single empirical belief, or a small set of such beliefs... we may call this the *local* level of justification. But it is also possible, at least in principle to raise the issue of the overall justification of the entire system of empirical beliefs. We may call this the *global* level of justification’ (BJ, *SEK* (n19) 91) (emphasis in original).

<sup>23</sup> Dancy, *Introduction* (n13) 110; BJ, *SEK* (n19) 93.

1. *Consistency*. With many conceptions of coherence, it is uncontroversial consistency is a necessary condition for coherence, and inconsistency is a serious sort of incoherence. But coherence is obviously not to be equated with consistency itself. BonJour highlights two ways in which a set of beliefs may have no significant degree of coherence, yet be highly consistent. There may be probabilistic inconsistency, as contrasted with logical inconsistency. For example, a system of beliefs which contains the belief that P is true and the belief it is extremely improbable that P is true may be logically consistent, but is less coherent than a system which does not contain the two beliefs which result in this probabilistic inconsistency. This is not to say probabilistic consistency can be entirely avoided, as improbable things do happen. Although BonJour's description is content neutral, probabilistic inconsistency needs to be noted, as situations like this may commonly occur in the law. For example, a judge deciding the appropriate punishment for an offender may have a belief that the offender may re-offend, and also the belief that it is extremely improbable that the offender will re-offend. Thus, Bonjour notes the two initial conditions for coherence are as follows: '(1) A system of beliefs is coherent only if it is logically consistent. (2) A system of beliefs is coherent in proportion to its degree of probabilistic consistency'.<sup>24</sup> So our judge's system of beliefs would be more coherent if (for example) when sentencing an offender, the judge held both the belief that the offender was likely to re-offend, and that it was extremely probable this was the case.

2. *Mutual explanation/entailment*. Second, BonJour notes that although a particular set of beliefs may be free of contradiction, and thus perfectly consistent, more is needed

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<sup>24</sup> Dancy, *Introduction* (n13) 110; BJ, *SEK* (n19) 95. It might also be added by way of refinement here that Kenneth Kress distinguishes between '[c]onsistency at a time [and] ... Consistency over time' (Kenneth Kress, 'Coherence' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1996) 533, 540). Though the emphasis will be on the former in this thesis, the discussion will be interlinked with some analysis regarding consistency over time.

to generate the idea of coherence between beliefs that is needed: ‘coherence must involve some sort of positive connection among the beliefs in question, not merely the absence of conflict’. The beliefs need to have ‘effective contact’ with one another, with the relation being one of inference. Again, with the difference lying in the detail between different conceptions of coherence, the issue that divides coherentists is how pervasive and tight such inferential connections are supposed to be.<sup>25</sup>

At one end there is the idea of mutual entailment; the reciprocal relation holds whereby ‘every judgement entailed, and was entailed by the rest of the system’.<sup>26</sup> However, this is too strong for our purposes. Furthermore, understood traditionally, entailment is not a matter of degree. This seems to leave no room for the idea that as we improve our belief set, it in turn becomes more coherent. The point is ‘we need to give a good sense to the idea that justification can grow’.<sup>27</sup> Therefore, Dancy highlights an alternative account, whereby the connection is explicated in terms of mutual explanation. This is symmetrical in the required sense, and as explanations can improve in quality, this accounts for the growth of justification.<sup>28</sup>

In summarising all of this, BonJour notes two further conditions for coherence. They are:

- (3) The coherence of a system of beliefs is increased by the presence of inferential connections between its component beliefs and increased in proportion to the number and strength of such connections.
- (4) The coherence of a system of beliefs is diminished to the extent to which it is divided into

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<sup>25</sup> BJ, *SEK* (n19) 95-6.

<sup>26</sup> Percy Brand Blanshard, *The Nature of Thought* (Allen & Unwin 1939) 264.

<sup>27</sup> Dancy, *Introduction* (n13) 111.

<sup>28</sup> ibid 112. Nonetheless, this might be said to restate the use of entailment by Blanshard, as ‘for him, entailment only occurs within a system; and since the system determines the meanings of [propositions] *p* and *q*, it determines the strength of the link between *p* and *q* ... Explanation thus reveals entailment, in Blanshard’s sense’. (ibid) (emphasis in original).

subsystems of beliefs which are relatively unconnected to each other by inferential connections.<sup>29</sup>

So, for example, a set of propositions held by a judge which contained “this offence is a civil law offence”, “the standard of proof in UK civil law trials is the balance of probabilities” and “this is different from criminal law trials, in which the standard of proof is beyond all reasonable doubt” is more coherent than a set of propositions in which each individual proposition is irrelevant to one another and do not reinforce each other in the way above.<sup>30</sup>

3. *Explanatory connections.* Building on the previous point, ‘[e]xplanatory connections are not just additional inferential connections among the beliefs of a system...they are inferential connections of a particularly pervasive kind’. This is brought out through the idea of an anomaly, the distinctive significance being ‘they undermine the claim of the allegedly basic explanatory principles to be genuinely basic, and thus threaten the overall coherence of the system in a much more serious way’. Nonetheless, this is not to equate explanatory relations with coherence, as the pertinent sense of coherence is bound up with the idea of justification. Thus, a final condition for the conception of coherence is: ‘(5) The coherence of a system of beliefs is decreased in proportion to the presence of unexplained anomalies in the believed content of the system’. Last, BonJour notes, in a point extremely applicable to law, ‘achieving a high degree of coherence may involve significant conceptual change’.<sup>31</sup>

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<sup>29</sup> BJ, SEK (n19) 98.

<sup>30</sup> ibid 96.

<sup>31</sup> ibid 99-100. See Gerald Postema’s discussion of ‘integrity and regret’ (Gerald J. Postema, ‘Integrity: Justice in Workclothes’ in Justine Burley (ed), *Dworkin and his Critics: with replies by Dworkin* (Blackwell 2004) 296 (hereafter, *Workclothes*)), underlying which is a concern with anomalies in the past content on the legal system for very similar reasons noted above, at 296-297. See Dworkin’s discussion of mistakes in law, in Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) at 118-123 (hereafter *TRS*) which is also underpinned by

Although this is at best an intuitive grasp of one conception of coherence, it is sufficient for this thesis' purposes. One final caveat needs to be provided before we investigate whether integrity, best understood via coherence, fits with Dworkin's theory of law.

### **2.1.2. Coherence, truth, justification and Dworkin**

Whilst it shall be argued integrity is best understood through coherence, clarification is needed on a particular point, though it cannot be investigated fully due to constraints of space. These arguments do not seek to equate coherence *with* integrity. The issue is best summarised by Jeremy Waldron:

It is tempting to say that Dworkin's jurisprudence is a coherence theory of truth in the domain of legal propositions. That temptation should be resisted. Apart from anything else, the coherence demanded by integrity is just one dimension of legal truth...there is no evidence of his subscribing to the view that incoherence is an inevitable companion of falsehood.<sup>32</sup>

While in contrast, in *Law's Empire*, Dworkin notes one demand of integrity is 'a commitment to consistency in principle *valued for own sake*',<sup>33</sup> the point here is *regardless* of whether Dworkin's theory of law is correctly seen as a pure coherence theory of truth, one of the main claims in this chapter is simply to show integrity is *best understood* through the idea of coherence. The caveat here is the conception of coherence above is in Dworkin's theory bound up with a number of other issues.<sup>34</sup> Therefore, it shall be more appropriate to look at

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similar concerns as noted above, and Dworkin's response to Postema in *Dworkin, Dworkin Replies* (n11) 386-387.

<sup>32</sup> Jeremy Waldron, 'The Circumstances of Integrity' (1997) 3 Legal Theory 1, 6-7 (footnote omitted) (hereafter *Circumstances*). See also Gerald Postema's discussion of integrity, where it is noted '[m]ost importantly, integrity does not assume that coherence is desirable in itself such that the more coherent a set of principles ... the greater is the integrity of the practice in question' (Postema, *Workclothes* (n31) 295).

<sup>33</sup> Dworkin, *Law's Empire* (n3) 167.

<sup>34</sup> Indeed, I am inclined to agree with Waldron's conclusion, given Dworkin's recent analysis of truth and integrity in *Justice for Hedgehogs*. There, Dworkin notes '[w]e can rescue philosophical arguments about the nature of truth if we can understand truth as an interpretive concept' (Dworkin, *JFH* (n20) 173). Further, '[w]e

coherence in relation to justification, as opposed to truth. ‘A theory of justification identifies some characteristics that might be possessed by true beliefs. These characteristics are evidence of truth and not constituents of truth’.<sup>35</sup> The basic claim in relation to justification is a proposition of law is justified if it coheres with those principles of political and personal morality that provide the best interpretation of other justified propositions of law in

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must interpret all these concepts—the entire family of truth concepts—together, trying to find a conception of each that makes sense given its relations with others and given standard assumptions about the values of truth and truthfulness’ (*ibid* 174). More specifically, ‘[o]ur theory of moral responsibility must be an appropriately concrete specification of our theory of moral truth’ (*ibid* 180). Finally, Dworkin also states that an implication of formulating an abstract account of truth which would allow us to construct less abstract theories for a particular domain is that ‘[a] truth theorist might then claim that his favoured theory supplies the best application of that more abstract theory to one particular domain ... without thereby claiming that the same theory is also successful as an application of that abstract idea of truth to other domains’ (*ibid* 175). Therefore, on this account, a coherence theory of truth would be one candidate for truth in the domain of morality. However, a pure coherence theory of truth does not seem to fully capture the character of Dworkin’s interpretive arguments. Dworkin himself notes ‘the theory of moral responsibility I described in Chapter 6 [of *JFH*] would be a candidate application of the value theory to the more specific interpretive domain of morality’ (*ibid* 177). That theory is explicitly interpretive, and is discussed more in chapter 5 and is used to unite Dworkin’s theory of law with B&C’s ethical theory. Further, regarding the relationship between coherence and integrity, Dworkin’s recent writings in *Justice for Hedgehogs* shed further light on the relationship between coherence and the value of integrity, and casts doubt on the claim from certain theorists that treat integrity as synonymous with coherence, or who conflate coherence and integrity. See, for example, Susan L Hurley, ‘Coherence, Hypothetical Cases and Precedent’ in Scott Hershovitz (ed) *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 69-102 (hereafter *Hypothetical*), who (amongst other arguments) argues ‘Ronald Dworkin’s account of legal reasoning in *Law’s Empire* is an example of a coherence account’ (Hurley, *Hypothetical* (n225) 69). See also Susan L Hurley, *Natural Reasons: Personality and Polity* (OUP 1989) 262-263 (hereafter *Natural Reasons*.); Robert Alexy and Aleksander Pecznik ‘The Concept of Coherence and its Significance for Discursive Rationality’ (1990) 3 *Ratio Juris* 130. Last, for an interesting comparative discussion, see Aldo Schiavello ‘On “Coherence” and “Law”: An Analysis of Different Models’ (2001) 14 (2) *Ratio Juris* 233 (hereafter *On Coherence*). Although this is in the context of moral responsibility (and thus there is no explicit reference to the *legal* value of integrity) Dworkin speaks about integrity as requiring two conditions: those of coherence and what he terms ‘authenticity’ (Dworkin, *JFH* (n20) 108). This latter condition means for Dworkin ‘we must find convictions that grip us strongly enough to play the role of filters when we are pressed by competing motives that flow from our personal histories’ (*ibid*). We must hold these convictions sincerely, and not for the sake of elegance, for this may then lead to arbitrary distinctions and differences rather than principled ones (*ibid*). See further Dworkin, *JFH* (n20) 101; 108; 120. These passages show the argument that integrity is best understood through coherence is different from saying that integrity and coherence are synonymous (Schiavello, *On Coherence* (n34) 240). As there are two conditions that are needed to be morally responsible, or are sufficient for moral truth (Dworkin, *JFH* (n20) 120), this is different from holding a pure coherence theory of truth. Dworkin states that ‘in political morality, integration is a *necessary* condition of truth’ (*ibid* 5-6). In contrast, a coherence theory of truth is defined as ‘it is that the coherence, *and nothing else* is what [a proposition’s] truth consists in’ (Ralph CS Walker, *The Coherence Theory of Truth* (Routledge 1989) 2 (emphasis added)). In addition, this also means that, as the interpretation here still leaves room for the role of authenticity in integrity, that it is in fact a better interpretation than simply stating that integrity is in fact coherence.

<sup>35</sup> Veronica Rodriguez-Blanco, ‘A Revision of the Constitutive and Epistemic Coherence Theories in Law’ (2001) 14 (2) *Ratio Juris* 212, 218 (hereafter *Revision*). Though Dworkin does adhere to such a distinction, if however we are to see the concept of truth as an interpretive concept then such a sharp line between theories of truth and ‘proper investigative methodology, which are domain specific, cannot be drawn. Our approach recognises, on the contrary, only differences in degree in abstraction between the two kinds of theory’ (Dworkin, *JFH* (n20) 179). See also *JFH* (n20) 12-13; 37-38, 172-180.

contemporary legal practice.<sup>36</sup> The idea that integrity is best understood via coherence means this discussion identifies coherence as a characteristic possessed by true propositions as evidence of their justification.<sup>37</sup> Though Dworkin often talks about ‘the truth conditions of propositions of law’,<sup>38</sup> given the technical connotations of the discussion above, these statements shall be taken to mean that what in fact Dworkin means is a proposition of law is *justified* if these particular conditions are fulfilled. A proposition of law can still be morally justified, even if there is a degree of incoherence. The proposition will not be false, but might be better described as a ‘sub-optimal’ solution. Nonetheless, this solution is still a moral one.<sup>39</sup>

## **2.2. Integrity understood through coherence: does it fit?**

The previous section provided an explanation of which conception of coherentism shall be referred to and discussed in this chapter. This section shall analyse Dworkin’s ideas to show support for the view integrity is best understood via coherence. This will partially provide the more positive account of why Dworkin’s theory of law as integrity is the appropriate legal framework to answer the central research question set.

It is important to provide a textual analysis of Dworkin’s writings because they provide the best understanding of Dworkin’s views. An analysis of these writings also shows they provide a large degree of support for the thesis that integrity and constructive interpretation are concerned with coherence, and coherence considerations fit our legal practices in general. This analysis can then be used to provide a detailed explanation of *how* (and on what basis) judges can be more proactive and confidently arrive at a responsible and sophisticated

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<sup>36</sup> Ronald Dworkin, *Justice In Robes* (Belknap Press of Harvard University Press 2006) 13-14 (hereafter *JIR*).

<sup>37</sup> Rodriguez-Blanco, *Revision* (n35) 218.

<sup>38</sup> Dworkin, *JIR* (n36) 13.

<sup>39</sup> Guest, *How to Criticise* (n1) 9 (online). See Dancy, *Introduction* (n13) 110-142 for his discussion of coherence theories of justification and truth, and in particular 116-117 for his discussion of the link between justification and truth on a coherence account. See also BJ, *SEK* (n19) chapter 8.

decision in legal cases with an inherently ethical content. This analysis will also provide an important background and context when looking at the criticisms of Dworkin's arguments in the latter parts of the chapter.

Dworkin often talks about coherence in relation to integrity, and how coherence in law would be desirable. But this is often part of a larger discussion of the demands of integrity and law. Although the term coherence appears in these demands of integrity, the demand is not often developed substantially, in terms of the elements necessary for a coherentist justification as noted above.<sup>40</sup> Thus, until it has been shown Dworkin actually wishes to endorse the conception of coherence in the technical sense outlined above, we cannot be certain that Dworkin's demands of integrity which relate to coherence actually express an endorsement of coherence itself. We can agree with Raz coherence is at times used to indicate no more than the intelligibility of a principle or the cogency of an idea.<sup>41</sup>

The section shall be broadly structured by arguments as they appear in *Law's Empire*, whilst exploring the interconnections between *Law's Empire* and Dworkin's other writings. In *Law's Empire*, each chapter builds upon one another to develop a clear and sustained answer to the aims it sets for itself.<sup>42</sup> Due to constraints of space, other criticisms and arguments

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<sup>40</sup> Joseph Raz deals explicitly with a very similar point in his discussion of Dworkin's theory of law and its commitment to coherence. He notes '[t]he general feel of [Law's Empire] suggests that coherence is to be striven for. Perhaps it is impossible to say in advance what degree of coherence is to be achieved. But the drift of the argument suggests that coherence is a distinctive advantage, and that therefore one should strive to end up with a view of the law that regards it as coherent as possible, provided not too much violence is done to other values' (Joseph Raz, 'Speaking with One Voice: On Dworkinian Integrity and Coherence' in Justine Burley (ed), *Dworkin and his Critics: with replies by Dworkin* (Blackwell 2004) 288 (hereafter *One Voice*)). It is also clear that Jeremy Waldron understands that coherence is pervasive in all of Dworkin's writings, despite not discussing the concept itself rigorously or explicitly. He notes that '[t]he central chapters of *Law's Empire* do not simply present a theory ... in a "take-it-or-leave-it" fashion. They highlight an important feature of political life in a pluralistic society ... The adoption of that heuristic [integrity] is then identified, boldly with the very foundations of law, legality and legal rights' (Waldron, *Circumstances* (n32) 4-5).

<sup>41</sup> Raz, *One Voice* (n40) 286. This is the coherence that Gerald Postema strives for in his discussion of integrity. See Postema, *Workclothes* (n31) 295. Whilst Susan Hurley makes the suggestion that the arguments for integrity are also meant to be arguments of coherence (Raz *One Voice* (n40) 288; Hurley, *Natural Reasons* (n34) 262-263) this is not being suggested here.

<sup>42</sup> 'This book refines, and expands and illustrates [his] conception of law. It excavates its foundations in a more general politics of integrity, community and fraternity. It tracks its consequences for abstract legal theory and then for a series of concrete cases' (Dworkin, *Law's Empire* (n3) vii- viii).

about and against Dworkin relating to coherence will only be touched upon where relevant to the discussion.

### **2.2.1. Constructive interpretation**

Dworkin's idea of constructive interpretation is a key element of his theory of law<sup>43</sup>. Dworkin's commitment to constructive interpretation as a means of interpreting the social practice of law is what leads him to the value of integrity. A more thorough account of the coherence considerations underlying this idea in Dworkin's theory shall be developed later on, in the context of Guest's arguments that we should see law through the value of justice.

Initially, constructive interpretation's commitment to coherence in the technical sense above can be seen when Dworkin responds to Raz's claim that his account supports an endorsement of strong monistic coherence. When Raz talks of monism in interpretation, he means social practices are in service of only one single point, and must be coherent with that single point.<sup>44</sup>

Dworkin, however, views the issue differently. He notes ““purpose,” used in the singular, need not mean a single overriding ambition; someone acts with purpose even if his ambitions are complex and competing so that he must sometimes neglect one to serve another’. Furthermore, Dworkin believes ‘[a]ny suspicion that I had “monism” in mind should have been put to rest by the dozens of examples of constructive interpretation I gave that involve complexity and competition’, such as Dworkin's discussion of local priority and inclusive integrity.<sup>45</sup>

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<sup>43</sup> ‘General theories of law ... for all their abstraction [ ] are constructive interpretations’ (Dworkin, *Law's Empire* (n3) 90).

<sup>44</sup> Raz, *One Voice* (n40) 285-286

<sup>45</sup> Dworkin, *Dworkin Replies* (n11) 381. However, in *Justice in Robes*, Dworkin notes that ‘any legal argument is vulnerable to what we might call justificatory ascent. When we raise our eyes a bit from the particular cases that seem most on point immediately and look at neighbouring areas of law, or maybe even raise our eyes a bit and look in general ... we may find a serious threat to our claim that the principle we were about to endorse allows us to see our legal principles in their best light. For we may discover that that principle is inconsistent with, or sorts badly with some other principle that we must rely on to justify some other and larger part of the law ... [This is a problem] not just a matter of theoretical elegance but also of a matter of how a community

Constructive interpretation also makes further demands of coherence. When providing his example of courtesy, Dworkin highlights the two conditions for the interpretive attitude are that the practice of courtesy has some point, and the requirements of courtesy are sensitive to its point, ‘so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point’. People seek to impose meaning on the institution and then restructure the practice in light of this meaning, with value and content becoming entangled.<sup>46</sup>

Linking back into the essentials of coherentism and the conception of coherence, Dworkin’s idea that we must see the practice through a particular value of which the content of the practice is sensitive to this value has an important implication. The interpretive attitude makes the demand that those who hold this attitude must seek to rid the practice of unexplained anomalies in the system of rules, given the emphasis on re-structuring the practice in light of the value. It can be inferred the reasons behind re-structuring the set of rules in light of the value the practice is seen through are the same reasons BonJour highlights in relation to the distinctive significance of anomalies when discussing the concept of coherence. The anomaly in the set of rules undermines the claim that the value the practice is taken to serve is *genuinely* the value we should see the practice through. It is in this sense

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committed to equal citizenship should govern itself’ (Dworkin, *JIR* (n36) 52-53). In terms of this idea’s fit with Dworkin’s arguments surrounding local priority, Dworkin notes that ‘[o]f course, I do not mean ... that the threat will always or often materialise. Most of the time it will not, at least in a serious and time consuming way, and we can cheerfully proceed on the footing of what we might call very local priority ... But justificatory ascent is always there, as it were on the cards: we cannot rule it out a priori’ (*ibid* 53-54). Given this, and the idea that coherence with fundamental principle is the driving force behind integrity, it could again be asked whether these passages show that Dworkin is in fact committed to, or at least inclined to, a different form of monism; understood here to mean that there is an elimination of unconnected sub systems (BJ, *SEK* (n19) 98) so that the legal system is “globally coherent” as opposed to “locally coherent” (Raz, *Relevance* (n19) 292). It does not mean that ‘all principles follow from one of their number’ (*ibid* 290). This is despite his explicit statement that ‘I am not a monist [in a Razian sense]’ (Dworkin, *Dworkin Replies* (n11) 381). It seems as though despite what Dworkin has said there are passages that reveal a desire or inclination for his legal theory to head in the stipulated monistic direction. For example, see Dworkin, *Law’s Empire* (n3) 217; 251-253; 264-265; 404, and implicitly in *TRS* (n31) 129-130. Perhaps the better way to explain this is that there is a pull towards the stipulated form of monistic coherence (though it is not essential) in Dworkin’s theory, given that it provides for a greater degree of coherence.

<sup>46</sup> Dworkin, *Law’s Empire* (n3) 47-48.

Dworkin's interpretive attitude in his account of constructive interpretation makes a key demand and has a key element of coherence bound up in it.<sup>47</sup>

However, this is not to say the value is fixed. Dworkin contemplates in some circumstances integrity may not fit as the value the practice of law should be seen through. Dworkin imagines this in relation to a utopian state and when only a sceptical interpretation of the law is possible. In the former scenario, Dworkin believes '[i]ntegrity would not be needed as a distinct political virtue...Coherence would be guaranteed because officials would always do what is perfectly just and fair'.<sup>48</sup> This is one place where Dworkin comes closest to equating coherence *with* integrity. In the latter scenario, a justification of different parts of the law would by necessity show a fundamental contradiction of principle, and there would be *no value at all* the law could be seen through, as there would be no possible way for any judge to find a coherent interpretation of law.<sup>49</sup>

Dworkin's main argument against this latter argument is 'it would be a serious misunderstanding of the logic of principle to consider [two standards] contradictory' and whilst in some cases 'they will conflict...coherence does then require some nonarbitrary scheme of priority or weighting or accommodation between the two, a scheme that reflects

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<sup>47</sup> In addition, this demand of coherence is apparent in the value of integrity itself. In *Law's Empire*, Dworkin asks 'is integrity only consistency...under a prouder name?' Dworkin believes this is not the case as '[i]ntegrity demands that the public standards of community be both made and seen, so far as this is possible, to express a coherent scheme of justice and fairness, in the right relation. An institution that accepts that idea will sometimes, for that reason, depart from a narrow line of past decisions in search of *fidelity to principles conceived as fundamental to the scheme as a whole*' (*ibid* 219) (emphasis added).

<sup>48</sup> *ibid* 176.

<sup>49</sup> *ibid* 176- 177; 273. For Dworkin's discussion of the critical legal studies movement in general, see *Law's Empire* (n) 271- 275. Indeed, see how Jeremy Waldron interprets and develops Dworkin's ideas above explicitly into what he calls "the circumstances of integrity" in Waldron, *Circumstances* (n32) at 3-8. Gerald Postema's discussion of the "circumstances of integrity" in *Workclothes* (n31) 299-301, is more expansive than Waldron's, yet capture the main spirit of Waldron's argument. Last, see also how Guest acknowledges this argument when explaining the role of integrity in Stephen Guest 'The Role of Moral Equality in Legal Argument' in François Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (Juta & Co., 2005) <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the\\_role\\_of\\_moral\\_equality\\_in\\_legal\\_argument.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the_role_of_moral_equality_in_legal_argument.pdf)> 20-21 (online) accessed 2<sup>nd</sup> July 2014 (hereafter *Moral Equality*)).

their respective sources in a deeper level of political morality'.<sup>50</sup> Here, there is an emphasis on the fundamental principles in the legal system operating *themselves* as the primary unit of justification. We can infer from this that some degree of coherence is necessary in order for the integrity *as a value* to even arise.

Further, in highlighting integrity is sensitive and flexible to the best interpretation of the practice of law, this shows constructive interpretation *itself* makes another important demand of coherence. In some circumstances ‘achieving a high degree of coherence may well involve significant *conceptual change*’.<sup>51</sup> As integrity is ‘[t]he meld between the legal materials and moral theory’,<sup>52</sup> if it is the case the legal materials do *not* meld with moral theory in order to achieve the best interpretation of the law, this may require a re-think as to which value we should see the law through, so that we *can* meld both legal materials and moral theory together.

This is not to say facts are significant in themselves, only that there is a possibility no moral case can be made for integrity,<sup>53</sup> and this shows constructive interpretation encapsulates a further demand for coherence. The best interpretation/moral argument of the legal practice may require significant change conceptually, in order to embed certain well-established facts into the moral argument that makes for the best interpretation of legal practice. The value of integrity might therefore have to be revised or abandoned, as this value turns out to be the anomaly in the best interpretation of the current legal system.<sup>54</sup>

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<sup>50</sup> Dworkin, *Law's Empire* (n3) 268- 269. See also Waldron, *Circumstances* (n32) 8.

<sup>51</sup> BJ, *SEK* (n19) 100 (emphasis added).

<sup>52</sup> Stephen Guest, *Ronald Dworkin (Jurists: Profiles in Legal Theory)* (2<sup>nd</sup> edn, Edinburgh University Press 1997) 33 (hereafter RD).

<sup>53</sup> Guest, *How to Criticise* (n1) 3-6 (online).

<sup>54</sup> BJ, *SEK* (n19) 99-101; Guest, *How to Criticise* (n1) 3 (online). The same considerations underlie Dworkin’s discussion of courtesy when using it to highlight the distinction between concepts and conceptions. Though someone may state that the “very meaning” of courtesy is that of respect, Dworkin also goes on to note that this claim is not timeless, holding only because of a particular type of agreement that might ultimately vanish. These concerns further underpin Dworkin’s discussion of paradigms of courtesy (Dworkin, *Law's Empire* (n3) 70-73). Much the same point can also be made about Dworkin’s admission that ‘[p]erhaps some or all interpretive

## **2.2.2. Checkerboard solutions**

Dworkin's argument concerning checkerboard solutions is one primarily intended to show the value of integrity fits our political practices.<sup>55</sup> Thus, this argument is central to Dworkin's theory. However, '[i]t is noticeable that Dworkin describes what is wrong with checkerboard solutions in a number of different ways, not all of which are clearly synonymous'.<sup>56</sup> If these descriptions of what is wrong with a checkerboard solution are *not* synonymous, and checkerboard solutions can be best explained by appealing to concepts *other than* coherence, then this argues against one main point trying to be made in this chapter, that integrity is best understood through coherence. However, it shall be argued the real issue with checkerboard solutions is one of coherence.

Initially, Dworkin uses the term 'to describe statutes that display incoherence in principle that can be justified, if at all, only on grounds of a fair allocation of political power between different moral parties'.<sup>57</sup> Dworkin believes most of us would be dismayed by laws that, for example, prohibit abortion for women born in even years but not in odd ones, and more generally treat similar situations differently on the basis of arbitrary grounds when matters of

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concepts began their conceptual lives as criterial' (Dworkin, *JIR* (n36) 264, footnote 7). To see a further nuanced discussion about the complexity and constraints of interpretation, 'the critically argumentative and reflexive character of intellectual practices' (*ibid* 44) amenable to a coherentist thesis, see Dworkin, *JIR* (n36) 43-48, in the context of discussing Stanley Fish's arguments in favour of pragmatism and against Dworkin. A similar discussion will be more thoroughly looked at when discussing Guest's objections to Dworkin's ideas surrounding constructive interpretation.

<sup>55</sup> Dworkin, *Law's Empire* (n3) 178. Dale Smith has recently published a chapter, (Dale Smith, 'The Many Faces of Political Integrity' in Scott Hershovitz (ed) *Exploring Law's Empire: the jurisprudence of Ronald Dworkin* (OUP 2006) (hereafter *Faces*) which looks at the issue of checkerboard solutions in detail. Smith goes on to argue 'that Dworkin has failed to vindicate his claim that integrity should characteristically trump justice in cases where they conflict' (*ibid* 119). Whilst this chapter deals with a similar argument concerning justice and integrity below, Smith's analysis of checkerboard solutions shall be drawn upon to provide context when needed.

<sup>56</sup> Smith, *Faces* (n55) 125. Smith gives us 'a (by no means complete) sample: checkerboard solutions display "incoherence in principle"; checkerboard solutions "can be justified, if at all, only on grounds of a fair allocation of political power between different moral parties"; checkerboard solutions "treat similar [actions] differently on arbitrary grounds", in situations where matters of principle are at stake; checkerboard solutions concern a single principle "which is affirmed for one group and denied for another"; checkerboard solutions "treat people differently when no principle can justify the distinction"; and checkerboard solutions do not give effect to anything that one can recognise as a principle of justice (even if one rejects that principle)' (*ibid*) (citations in parentheses omitted).

<sup>57</sup> Dworkin, *Law's Empire* (n3) 435 footnote 6.

principle are at stake. When matters of principle are at stake, the model we endorse is one where ‘the collective decision must nevertheless *aim to settle on some coherent principle* whose influence then extends to the natural limits of its authority’.<sup>58</sup> Dworkin then asks whether checkerboard solutions are rejected on grounds of justice. Whilst Dworkin believes we are in the right neighbourhood, because ‘if checkerboard solutions do have a defect, it must lie in their distinctive feature, that they treat people *differently when no principle can justify the distinction*’,<sup>59</sup> this does not reveal the whole picture. As the checkerboard solution will prevent some instances of justice (albeit perhaps not on any principled basis) it cannot be said that unless all instances of injustice can be eliminated, none must be. Therefore it seems there is no reason of justice to, in advance, reject the checkerboard strategy. Yet Dworkin notes that intuitively we still condemn it. This is not to say everyone would always condemn every checkerboard solution. If a person believed strongly enough abortion is always murder, they may rank the checkerboard solution above outright license, despite the checkerboard solution being incoherent in its compromise. However, if they rank the checkerboard solution last in other circumstances, Dworkin believes they still share the same intuition, but that this yields when the issue is a grave one. In addition, this intuition is also likely to be at work in more complicated rankings that might be made.<sup>60</sup> In light of this, Dworkin takes there to be a third political value at work: integrity. Integrity is the most natural explanation of why we oppose checkerboard solutions.<sup>61</sup>

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<sup>58</sup> ibid 179 (footnote omitted) (emphasis added).

<sup>59</sup> ibid 180 (emphasis added).

<sup>60</sup> Dworkin asks: ‘[w]ould you not think a statute prohibiting abortion except in the case of rape distinctly better than a statute prohibiting abortion except to women born in one specified decade each century? At least if you had no reason to think either would in fact allow more abortions? You see the first of these statements *as a solution that gives effect to two recognisable principles of justice, ordered in a certain way*, even though you reject one of the principles. You cannot treat the second that way; *it simply affirms for some a principle it denies to others*’ (ibid 183) (footnote omitted) (emphasis added).

<sup>61</sup> ibid 178-184. Smith uses the passage quoted at footnote 60 above as textual evidence that ‘the reason that we reject internal compromises is because they possess *several* flaws ... a checkerboard solution both treats people differently in a way that is unjust and cannot be justified by reference to anything recognisable as a principle of justice’ (Smith, *Faces* (n55) 141) (emphasis in original). Though Smith regards this formulation as having a number of advantages, this way of putting matters still seems odd. If the solution cannot be justified by

All the direct quotes above concerning checkerboard solutions, whilst superficially may look inconsistent, show the main objection to such solutions is that they display what shall be called “incoherence with equality”. The common theme is that such solutions are *anomalous*, not just because in some ways they might be seen as illogical. They are anomalous because checkerboard solutions ‘undermine the claim of the allegedly basic explanatory principles to be genuinely basic’.<sup>62</sup> Those basic principles in Dworkin’s theory of law are principles of equality. As he explicitly notes:

law as integrity...supposes that law’s constraints benefit society not just by providing predictability or procedural fairness, or in some other instrumental way, but by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does.<sup>63</sup>

Checkerboard solutions are anomalous because the political community would lose its legitimacy if the community characteristically adopted principles which do not satisfy the constraints on being a moral principle<sup>64</sup> because the degree of incoherence is so great with the interpretive concept of justice, and because it would fail to show equal concern for all its members (of which integrity is essential to that equal concern).<sup>65</sup> A principle displaying incoherence with equality would violate this principle of equal concern in the most flagrant way. This in turn shows why the fundamental principles of equality are so important, as this

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principles that do not even satisfy the conceptual constraints on being a moral principle (*ibid* 137), then there is a redundancy in the first half of Smith’s formulation. In failing to satisfy the moral conceptual constraints, the principle or principles supposedly “justifying” the checkerboard solution can do no moral work at all. Thus, it will *necessarily* be the case that a checkerboard solution will treat people differently in a way that is unjust, and thus the reference to the differential treatment *being unjust* is not needed.

<sup>62</sup> BJ, *SEK* (n19) 99.

<sup>63</sup> Dworkin, *Law’s Empire* (n3) 95-96.

<sup>64</sup> *ibid* 218; Smith, *Faces* (n55) 137, footnote 36. As Smith notes in the context of checkerboard solutions a “moral principle must mean a principle of justice, since Dworkin acknowledges that checkerboard solutions can be supported by recognisable principles of fairness” (Smith, *Faces* (n55) 136).

<sup>65</sup> Ronald Dworkin, ‘Response’ in Scott Hershovitz (ed) *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 297 (hereafter *Response ELE*).

highlights their legitimising and regulating function. The degree of incoherence is so great as to give rise to the anomalous problem of checkerboard solutions.

To elaborate on the idea that the community must adopt principles which are ‘recognisably moral in nature’,<sup>66</sup> what is required is we consider the concept of justice, and whether the principles satisfy the conceptual requirements for being a moral principle. Provided this is the case, it does not matter whether the principle(s) are valid under the correct conception of justice, as they will at least be able to do some moral justificatory work. Nonetheless, it is still a controversial issue as to what actual constraints are imposed by the concept of morality.<sup>67</sup> However, ‘principles of justice will...gain moral recognition—if they do—because they have a force independent of recognition. Someone has to do the recognising first’.<sup>68</sup> But this discussion points back to issues of coherence.

This can be seen if we ask *why* a principle gains moral recognition or if we ask a particular person *why* they recognise principle X as a principle of justice. In order to begin to formulate a response to this question and provide reasons for that answer that person must have in mind (however vague) a statement or proposition of the central concept of (or point of) justice. This is itself an interpretive question. The constraints on the concept of justice are sensitive to its point. Thus, moral argument is needed in order to show *how* the constraints on the concept of justice are sensitive to its point.<sup>69</sup> This, in turn, will mean that when considering whether a principle is moral or not, further moral argument will be needed to ascertain whether the

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<sup>66</sup> Smith, *Faces* (n55) 136. For example, ‘a person could regard the rape-abortion law [see footnote 60 above] as upholding a principle that is recognisably moral in nature. In other words, she could view her opponents as putting forward a genuinely moral position (albeit an incorrect one). Moreover, she could distinguish on this basis between the rape-abortion law and the checkerboard-abortion law, since the latter cannot be seen to uphold a principle that is recognisably moral in nature’ (*ibid*).

<sup>67</sup> *ibid* 137, footnote 35; *ibid*, footnote 36.

<sup>68</sup> Guest, *How to Criticise* (n1) 6 (online). See Dworkin’s recognition of a similar point in *Response ELE* (n65) 296.

<sup>69</sup> Dworkin, *Law’s Empire* (n3) 92-3. ‘We share a preinterpretive sense of the rough boundaries of the practice on which our imagination must be trained’ (*ibid* 75).

principle is moral in nature, in light of the meaning and point of the concept of justice.<sup>70</sup> If these points are correct, then it also shows the methodology of constructive interpretation is used throughout. Therefore, we see that the heart of the issue is a particular issue of incoherence in principle.

What is implicit here is there is almost a continuum of “unjustifiability”. The checkerboard solution simply has no principle justifying it, making it clear the “unjustifiability” of the checkerboard solution, relative to the rape-abortion law,<sup>71</sup> is distinctively anomalous. When correctly viewing the issue through the idea of coherence, this allows us to see the checkerboard solution revolves around this main conception here. The checkerboard solution displays incoherence with equality. It displays no coherence with ‘principles conceived as more fundamental to the scheme as a whole’.<sup>72</sup> Further, because the principle *itself* purporting to justify the checkerboard solution has no degree of coherence with interpretive concept of justice then the principle cannot be regarded as moral. Thus, when a political compromise tries to use that principle as a justificatory basis for the differential treatment of parties in relation to matters of principle, the solution is an anomalous one according to Dworkin’s theory of law, because it displays incoherence with equality. It is in this sense both the issues (in relation to the interpretive concept of justice, and with Dworkin’s fundamental principles of equality) are bound up.

This analysis complements Dworkin’s views on the matter. He states that:

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<sup>70</sup> ibid 47. Given the foregoing discussion, we can use the textual support Smith highlights from Dworkin’s work regarding both ‘coherence in principle’ (Smith, *Faces* (n55) 133) and ‘recognisable principles of justice’ (Smith, *Faces* (n55) 135) to show that the view above has a great deal of support. See Smith, *Faces* (n55) 133-139. Dworkin also notes that ‘[j]ustice and other higher order moral concepts are interpretive concepts, but they are much more complex and interesting than courtesy, and also less useful as an analogy to law’ (Dworkin, *Law’s Empire* (n3) 424, footnote 20).

<sup>71</sup> Smith, *Faces* (n55) 136. See footnote 60 above.

<sup>72</sup> Dworkin, *Law’s Empire* (n3) 219. Smith also explicitly recognises and dismisses this particular argument. See Smith, *Faces* (n55) 150.

I think...only a single principle [of integrity] is needed. I discuss checkerboard statutes (which are very rare) only to illustrate what I thought to be an obvious way of infringing a general principle of coherence...I would prefer a single ideal: integrity requires that the community's law be justifiable through a coherent scheme of principle that provides an eligible interpretation of that law.<sup>73</sup>

To conclude, the problems associated with checkerboard solutions are best understood through arguments of coherence with the 'principles conceived as more fundamental to the scheme as a whole'.<sup>74</sup> These arguments go far in supporting the assertion that integrity is best understood through coherence. In turn, this also shows that coherence considerations fit our legal practices. Therefore, we can highlight these demands of coherence when looking to explain *how* judges can come to a legally responsible decision in cases with an inherently ethical content.

### **2.2.3. Associative obligations**

It is important to look at how Dworkin's ideas about 'associative obligations',<sup>75</sup> make demands of coherence in the technical sense above. *Law's Empire* (for heuristic purposes) separates the discussion of 'whether our political practices accept integrity as a distinct virtue'<sup>76</sup> and whether we do well to interpret our politics in light of integrity.<sup>77</sup> Only once both sides of the argument have been considered can it be said there has been a thorough interpretive investigation into how to best understand the value of integrity. This means a fuller picture can be built up as to the underlying structure of the legal framework to be integrated with the ethical framework to answer the central research question set.

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<sup>73</sup> Dworkin, *Response ELE* (n65) 296.

<sup>74</sup> Dworkin, *Law's Empire* (n3) 219

<sup>75</sup> ibid 198.

<sup>76</sup> ibid 178.

<sup>77</sup> ibid 186.

At an overarching level, Dworkin highlights the link between integrity and community in the following way:

Here, then, is our case for integrity...A community of principle accepts integrity. It condemns checkerboard statutes...[as] violating the associative character of its deep organisation. Internally compromised statutes cannot be seen as flowing from any coherent scheme of principle...They contradict rather than confirm the commitment necessary to make a large and diverse political society a genuine rather than bare community: the promise that law will be chosen, changed, developed and interpreted in an overall principled way.<sup>78</sup>

Furthermore, the model of principle

insists that people are members of a genuine political community only when they accept that their fates are linked in the following strong way: they accept that they are governed by common principles, not by rules hammered out in political compromise. Politics...is a theatre of debate about which principles the community should adopt as a system...Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions *presuppose* and endorse.<sup>79</sup>

The first important point about the foregoing passage is the emphasis on *a system* of principles the community should adopt. One of the main ideas of the conception of coherentism discussed is it is such a *system* of beliefs, or in this case principles, which is the primary unit of justification. It is clear in the passage above that particular principles are justified in a derivative way by being members of a system. We can see with the idea that the

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<sup>78</sup> ibid 214. See also ibid 404.

<sup>79</sup> ibid 211 (emphasis added).

principles are not only common to persons but are related to each of the other principles themselves there is a symmetrical, holistic and nonlinear relation of justification here, as is the case with a coherentist reasoning model.

Additionally, the main aim of the interpretation of the model of principle *itself*, to ‘justify the assumption of true community we seem to make’,<sup>80</sup> shows that in interpreting ‘a legal culture in which law is extrapolated in that way to secure integrity and equal concern’,<sup>81</sup> coherence considerations are prominent. Here, there is ‘fidelity to principles conceived as more fundamental to the scheme as a whole’.<sup>82</sup> This means the degree of coherence of the system of principles the community adopts will be greater. By explicit reference and attention to the fundamental principles in the system, the presence of unexplained anomalies in the content of the system is likely to be less. The ready analogy is in the process of reflective equilibrium, whereby ‘[t]he goal...is to match, prune and adjust considered judgements and their specifications to render them coherent’.<sup>83</sup> This discussion can be linked back to the value of integrity by highlighting that Dworkin notes ‘a political society that accepts integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority’.<sup>84</sup> Integrity, therefore ‘has an intelligible role and moral force where justice is feasible and in dispute’<sup>85</sup> *only because* those citizens accept they are governed by common principles and that politics is a theatre of debate about which principles the community should adopt as a system. For without this community and level of coherence, the particular circumstances in which *integrity has moral force* would not arise.

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<sup>80</sup> ibid 209.

<sup>81</sup> Dworkin, *Response ELE* (n65) 297, footnote 13.

<sup>82</sup> Dworkin, *Law's Empire* (n4) 219.

<sup>83</sup> Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (7th edn, OUP 2013) 405 (hereafter B&C, *PBE*).

<sup>84</sup> Dworkin, *Law's Empire* (n3) 188.

<sup>85</sup> Postema, *Workclothes* (n31) 300.

Last Dworkin notes, in discussing other potential arguments for integrity and beneficial consequences that may follow if the value is recognised, that:

If people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards flow from the principles these decisions assume, then the set of recognised public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances.<sup>86</sup>

The prominence of coherence becomes obvious when the quote is situated in the context of the discussion above. Here, it can be reasonably asked what would guide this discovery of what certain principles require in new circumstances. Given the importance of a system being the primary unit of justification, attention to the most fundamental principles of a scheme, and Dworkin's ideas concerning 'local priority',<sup>87</sup> considerations of coherence best explain this beneficial consequence of integrity.

The foregoing section has shown how arguments of coherence are pervasive in Dworkin's account of associative obligations. Because integrity as a value presupposes a community of principle, even though sometimes a legislature may choose justice over integrity and thus cause a degree of incoherence, this cannot be done characteristically. The legislature's argument to legitimacy would be forfeited, and thus we would not be able to treat our community as a community of principle. The principles governing a community would not resemble a system as the degree of incoherence would be so great with the principles that are fundamental to a scheme as a whole. Nonetheless the adjudicative principle is still sovereign

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<sup>86</sup> Dworkin, *Law's Empire* (n3) 188.

<sup>87</sup> ibid 250.

over the grounds of the law, because no other view of what flows from past political decisions is admitted by integrity.<sup>88</sup>

#### **2.2.4. Overall conclusion**

In conclusion, a detailed account regarding the structural relations of justification in Dworkin's theory has been created. The thesis that integrity is best understood through the value of coherence fits with Dworkin's theory. Therefore, as Dworkin's theory shall form part of the co-dependent framework explaining on what basis and how judges can arrive confidently at an ethically sophisticated decision in legal cases with an inherent ethical content, the *type* of legal demands the framework will make on judges if they wish to deal responsibly with a case are now clearer. Therefore, the task of *showing* how judges can be more proactive and responsible in such cases is also clearer. But, in order to fully complete the interpretive investigation, it now needs to be argued we do well to see integrity through the idea of coherence. This shall be done by analysing the interlink between integrity and coherence, in the context of objections to the claim that law is best understood through integrity.

### **3. Justice does not work as well as integrity**

This chapter has provided an explanation of what we mean by coherence as a property of justification of a system of beliefs.<sup>89</sup> Further, an analysis of Dworkin's ideas to show support for the view integrity is best understood via coherence has been given. Throughout this latter

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<sup>88</sup> ibid 218. It is also worthwhile noting here that Dworkin states '[i]ntegrity is about principle and does not require any simple form of consistency in policy' (ibid 221). Though this might be taken as an argument against integrity best being seen through the particular conception of coherence discussed (given that consistency is an essential condition for coherence on the conception discussed), this is not so. The reason that no simple consistency is required in matters of policy is because '[t]he legislative principle of integrity demands that the legislature strive to protect for everyone what it takes to be their moral and political rights, so that public standards express a coherent scheme of justice and fairness' (Dworkin, *Law's Empire* (n) 221). We can see that some inconsistency may be admissible in order to therefore be consistent (or coherent) with our deeper commitments to the fundamental principles governing the legal system.

<sup>89</sup> BJ, SEK (n19) 88.

analysis, it has been consistently highlighted why such an investigation is essential to the larger aims of this thesis. This section shall show integrity is the value law should be seen through. This shall complete the more positive account of why Dworkin's theory of law is the appropriate legal framework to answer the central research question set, and provide us with a complete understanding as to the underlying justificatory structure of Dworkin's theory. Finally, this will answer the concerns raised at the end of chapter two, about not presupposing Dworkin's value of integrity is the appropriate value law should be seen through. All this shall be done by looking at Stephen Guest's arguments against integrity. Guest's discussion is the most systematic and comprehensive discussion of the moral weight of integrity. In addition, if justice is the value law should be seen through, it can be reasonably asked why this is only one of *four* principles in B&C's theory. By considering Guest's arguments, we will be able to assess the moral weight of integrity in the most illuminating way.

Guest argues on two grounds against Dworkin's theory:

first, that justice is a better model for law than integrity, and second, that even if integrity is the better model, that will only be on the contingent ground that integrity happens to best fulfil justice's requirements in the real world...integrity is only a theory about what is second best to justice.<sup>90</sup>

Guest also believes there are problems with constructive interpretation. In looking at these problems, this will allow arguments relating to the role coherence has to play in this idea to be developed. How both constructive interpretation and integrity fit together can then also be explained, strengthening the argument that integrity is best understood through the idea of coherence.

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<sup>90</sup> Guest, *IEJ* (n16) 1 (online).

The argument shall then use the snail darter case to show justice does not work as well as integrity. Guest's theory of law as justice is *not* coherentist in character. Guest believes instead of engaging in coherentist reasoning, in hard cases the lawyer should argue the direct case of justice instead.<sup>91</sup> However, both Guest's and Dworkin's theory of law are informed by the fundamental principle of equality of respect.<sup>92</sup> The argument will show if Guest wishes to adhere to the fundamental principle of equality of respect, then Guest must opt for an interpretive account of law which sees the practice through integrity, not justice. What is important in securing equality of respect is the *manner* of legal argument, in particular the coherentist manner as demanded by integrity. This gives further sense to Dworkin's idea that '[i]ntegrity...is not second but first best' and that judges need to recognise the demands integrity places on them, not simply ignore these demands and pursue justice according to their own lights on every occasion by weighing the different dimensions of equal respect for each case.<sup>93</sup>

### **3.1. “Equality of respect”**

First, however, Guest's explicit claim is 'the primary task of judges is to ensure there is just redress, subject to the general *balancing judgements* required in *the fundamental principle of treating people as equals*'.<sup>94</sup> This principle is also called the principle of equality of respect.

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<sup>91</sup> ibid 10.

<sup>92</sup> ibid 8.

<sup>93</sup> Ronald Dworkin, 'Réponse Aux Articles de Ronald Dworkin' (2005) 3 (233) Revue Internationale De Philosophie 435, 437 (hereafter, *Response Guest*).

<sup>94</sup> Guest, *IEJ* (n1) 1 (online) (emphasis added). Guest has also written about this principle in Stephen Guest, "Freedom and Status" Revisited: Where Equality Fits In' [1999] Otago Law Review 433 <[http://www.ucl.ac.uk/~uctlsfd/papers/freedom\\_and\\_status\\_revisited.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/freedom_and_status_revisited.pdf)> accessed 27<sup>th</sup> June 2014 (hereafter, *F&S*); Stephen Guest, 'Why the Law is Just' [2000] Current Legal Problems 31 <[http://www.ucl.ac.uk/~uctlsfd/papers/why\\_the\\_law\\_is\\_just.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/why_the_law_is_just.pdf)> accessed 27<sup>th</sup> June 2014 (hereafter, *WLJ*); Guest, *IEJ* (n16); Guest, *Moral Equality* (n); Stephen Guest, 'The Role of Courts in the Making of Policy' (2006) 25 (6) University of Queensland Law Journal 307 <[http://www.ucl.ac.uk/~uctlsfd/papers/the\\_role\\_of\\_courts\\_in\\_the\\_making\\_of\\_policy.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/the_role_of_courts_in_the_making_of_policy.pdf)> accessed 27<sup>th</sup> June 2014; Stephen Guest, 'Ronald Dworkin and the Question of Political Stability and Legitimacy' in Stephen Gough & Andrew Stables (eds) *Sustainability and Security within Liberal Societies: Learning to Live with the Future* (Routledge 2008)

As this is the fundamental principle in Guest's theory of law, it will be beneficial to briefly analyse this principle and the idea that we must balance the judgements the principle requires, so as provide context for the forthcoming arguments.

According to Guest 'if we are to hold fast to an ideal of equality...we need to know more about, not the outcome for a person's life, but how that person has been treated. This approach to equality understands it as a relationship between ourselves and others'.<sup>95</sup> Guest notes '[i]t follows, I think that, if we take seriously the idea that we should treat others as our equals, we must also support a political structure that imposes a duty on the state to treat all of its citizens as equals...official powers will only extend as far as making decisions consistent with treating people with respect'.<sup>96</sup> Also relevant here is that '[e]quality grounds institutions that are more appropriate to monitoring equality of respect than the legislature, such as the judiciary'.<sup>97</sup>

Guest further states if the judiciary is to be deferential it must be deferential to the ideal that because the legislature has acted this itself instantiates equality, since the weight of democratic majority requires deference to what the legislature has done. This ideal is itself an elaboration of the principle of equality. In relation to the interpretation of statutes (important for our purposes later), the direction Guest gives to resolve a difficulty in interpretation is the correct interpretation is one which is able to best express the requirements of justice. Last, according to Guest, the reasonable expectation principle, or the principle of certainty is also

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<[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/ronald\\_dworkin\\_and\\_the\\_question\\_of\\_political\\_stability\\_and\\_legitimacy.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/ronald_dworkin_and_the_question_of_political_stability_and_legitimacy.pdf)> accessed 27<sup>th</sup> June 2014; Guest, *How to Criticise* (n1).

<sup>95</sup> Guest, *WLJ* (n94) 7 (online). See also Guest's arguments against what he calls 'equality of outcomes' (Guest, *Moral Equality* (n49) 7 (online)) in *Moral Equality* (n) at 7-8 (online). Guest also highlights 'an important distinction between two ideas of equality as a moral principle, which are used by Dworkin' (Guest, *IEJ* (n16) 6 (online)) which is incredibly similar to the distinction Guest draws here. The distinction is between "treating people equally" in the sense of giving them equal amounts (of resources) and the idea of "treating people as equals". It is the latter idea that does the fundamental work in moral judgements ... [Dworkin] says' (Guest, *IEJ* (n16) 6 (online)).

<sup>96</sup> Guest, *WLJ* (n94) 9 (online).

<sup>97</sup> Guest, *Moral Equality* (n49) 14 (online).

an expression of treating people as equals; '[i]f people are led to believe that they will be treated in a particular kind of way, then treating them fairly might require that they be treated that way.<sup>98</sup>

Therefore:

[W]hen a judge is asked to enforce a statute or precedent or permit an official action which he believes does not, in itself, treat all citizens with equal respect...[e]ach judge would weigh the competing demands of the different dimensions of equal respect and decide hard cases by declaring the law to be what, in that judges opinion, best achieved overall justice. This would not mean...judges rewrite the law to suit their own convictions: it rather means that they use their own convictions to state what, in their opinion, the law actually is...In neither case would the judge be constrained by any need to show that his weighting of these...dimensions of equal respect was reflected in the decisions of other judges in other cases.<sup>99</sup>

### **3.2. Constructive interpretation**

This section shall now further argue constructive interpretation is structured by coherentist considerations. It is important to argue for this because though Dworkin believes the law is interpretive, it does not necessarily follow it is *constructively* interpretive; 'even a preliminary account [of interpretation] *will be controversial*, for if a community uses interpretive concepts at all, the concept of interpretation will be one of them'.<sup>100</sup> Therefore, '[t]he strength or weakness of Dworkin's principal thesis about the nature of law then rests

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<sup>98</sup> Guest, *WLJ* (n94) 12 (online). Dworkin interprets Guest summarily in the following way: '[e]quality of respect requires, first, equal respect for citizens as the authors of laws that govern them, next, equal respect in protecting legitimate expectations that have been encouraged by past statutory and judicial pronouncements, and, finally equal respect in the substantive treatment of individuals by the state. These different dimensions of equality [potentially] pull in opposite directions' (Dworkin, *Response Guest* (n93) 435). See also Guest's discussion in Guest, *Moral Equality* (n49) 16-17 (online).

<sup>99</sup> Dworkin, *Response Guest* (n93) 435-436.

<sup>100</sup> Dworkin, *Law's Empire* (n3) 49 (emphasis added).

on...the move from interpretation to constructive interpretation'.<sup>101</sup> Dworkin thinks this move is sound. He notes that 'creative interpretation is not conversational but constructive. Interpretation of works of art and social practices...is indeed essentially concerned with purpose'.<sup>102</sup> Dworkin then *implements* this interpretative methodology to justify state coercion, leading him to his theory of law as integrity.<sup>103</sup> If we are able to show Guest's problems with constructive interpretation can be solved by resort to coherentist considerations, we can maintain a constructively interpretive approach to law is still appropriate.

Guest begins noting there are two ways the world can be viewed. The first is by clearly separating out a describable act and an ideal principle, so that the facts can be examined before a moral judgement of that fact is made. In contrast there is Dworkin's interpretivism, whereby both the fact and its justification merge. However, Guest also states that as interpreters must have something there to interpret, it is not clear (when making sense of the law) whether interpreters are not first identifying a legal practice, then saying whether the practice is good or not *independently* of that practice. Guest therefore thinks the distinction between the fact and what justifies is still present, albeit in the background. Nonetheless, something must be gained by adopting Dworkin's approach, as one of Dworkin's main ideas is the law can only be seen through making an interpretive judgement. Whilst Guest highlights two advantages of the interpretive approach,<sup>104</sup> more importantly here there is a disadvantage as well. If the fundamental principle of equality of respect does not guide the judge's interpretation of the law in circumstances where the law departs from morality, the

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<sup>101</sup> Andrew Halpin, 'The Methodology of Jurisprudence: Thirty Years Off the Point' (2006) 19 *Can J L & Jurisprudence* 67, 97, footnote (V)(i) (hereafter *Thirty Years*).

<sup>102</sup> Dworkin, *Law's Empire* (n3) 52 (emphasis omitted).

<sup>103</sup> Halpin, *Thirty Years* (n101) 97, footnote (V) (h).

<sup>104</sup> The first is that as judges are unelected, they should not seek to make new law when it is perceived to be unjust. Second, judges will perform their role better by concentrating on the special merits of making the current body of law morally coherent, as opposed to thinking that law can be set aside for "justice" (Guest, *IEJ* (n16) 9 (online)).

judge will not be able to make sense of the law at all and consequently will not be able to come up with any interpretation of it.<sup>105</sup>

Therefore,

The question arises whether there is a distinction between arguing the direct case of justice and arguing the case in integrity. If the argument for “fit” carries no weight when the argument of “substance” is sufficiently strong, that suggests that “fit” and “substance” are just part of one continuum of moral argument because it is difficult to see how there could be any point at which “fit” could check “substance”.<sup>106</sup>

Guest also states that interpretation in *all* its forms looks like it needs something *outside* the interpretive process, relatively fixed in relation to the interpreter. However, in law, it is unclear what the “thing to be interpreted” is. For example, in the case of a person interpreting the words on the page of a statute, these words would have no legal significance unless they were endowed with the status of a “statute”. Interpretation goes further down, as the correct way to appreciate the words as legislative is only if the legislature is democratic. The interpreters understanding of what the statute requires in a particular case originates from a general moral position they hold, derived from justice about the moral force of democracy. But the interpretive process, merely by the device of holding interpretations in check, cannot account for the distance between interpreter and the thing interpreted. Otherwise interpretation keeps on going down, forms a regress, and we become lost. Things cannot go down, and there must be something that anchors interpretations in the outside world. Guest

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<sup>105</sup> ibid 9-10 (online). Guest also notes that “[t]he attractiveness of [constructive interpretation] lies in its ability to unite a description of some existing practice with an account of what that practice ought to be ... But this does not just mean that we are enabled to look at the thing from some special sort of angle, or new perspective, or point of view. Interpretation, rather, allows you to suppose, not only that there is something there with which you engage but also that you can “make it your own”. Your convictions about things—about what the law ought to achieve, or what art is about, and so on—are brought to bear in a way that, when properly understood, the gap between the interpreter and the “thing interpreted narrows” (Guest, *Moral Equality* (n49)18 (online)).

<sup>106</sup> Guest, *IEJ* (n16) 10 (online).

also contends that since in principle we can draw a line for interpretive concepts, and we cannot draw a line for justice, justice is not an interpretive idea. Since justice is not an interpretive idea, if law is a form of justice, law itself is not a practice which we interpret constructively. Instead, the better model is *conversational* interpretation.<sup>107</sup>

Guest's arguments are subtle and interlinked, as he looks to play on integrity's conservatism (integrity's 'function, its special virtue is to *constrain*'<sup>108</sup>), and the problems he perceives regarding constructive interpretation. The latter shall be dealt with first. It is only by arriving at a proper understanding of the role of constructive interpretation that we will be able to understand why we need to argue, not the direct case of justice, but the case of integrity instead.

It seems Guest is beginning 'with something that he takes to be a correct statement of the law as it stands...and then transforms that statement creatively so as to move the law closer to what it ought to be'.<sup>109</sup> Although Guest notes this interpretive process derives from a previous moral position the interpreter holds, his *initial* assumption is the process, indeed interpretation in *all* its forms, needs something outside of the interpretive process that is relatively fixed.<sup>110</sup>

But the interpretation of law does not need something outside the interpretive process. The issue is whether an account of interpretation can fix the thing to be interpreted whilst not requiring that thing (whatever it may be) to stand outside the process of interpretation. This can be done borrowing again from coherentist reasoning in epistemology. The analogy shall use the term "conviction" as opposed to "belief". The term "conviction" is employed by Dworkin, and understood by Guest as informing which interpretation of law a judge should

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<sup>107</sup> Guest, *IEJ* (n16) 11-12 (online).

<sup>108</sup> Guest, *RD* (n52) 37 (emphasis in original).

<sup>109</sup> Dworkin, *Response ELE* (n93) 309.

<sup>110</sup> Guest, *Moral Equality* (n49) 18 (online).

apply to the case at hand.<sup>111</sup> Before this it is necessary to introduce a distinction Dancy highlights, between antecedent and subsequent security. ‘Antecedent security is security which a [conviction] brings with it, which it has prior to any consideration of how well it fits with others or of the coherence of the set...[s]ubsequent security is security which a [conviction] acquires as a result of its contribution to the coherence of the set’.<sup>112</sup>

It is clear interpretation employs our own moral and political convictions in relation to ‘the rules and standards taken to provide the tentative content of the practice’.<sup>113</sup> These propositions and practices can be part of the interpretive process. Furthermore, we might have an attitude toward these propositions, whereby we demand more than others might before we reject those rules and standards,<sup>114</sup> as we believe these standards are what is “really” required to better serve the justification of our practice.<sup>115</sup> However, over time, one can come to have further convictions about those initial convictions, not in some first-order/second-order way, but merely have convictions that are separate to those initial convictions. In turn, this *may* lead to the rejection of the initially held convictions about “the rules and standards”. However, if the attitude above is taken, the removal of an initial conviction will require more to justify it because both these propositions and convictions are part of the interpretive set of practices too, of which we have a particular attitude. So in this sense, the object of interpretation remains relatively fixed for the interpreter and will have a greater degree of security, but it will be an analogous form of *subsequent*, not antecedent security, and thus its security is to be seen entirely in terms of security *within* the interpretive process, not standing *outside* the process.<sup>116</sup> Further, ‘there is no asymmetry created by

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<sup>111</sup> Support for this can be seen in Guest, *How to Criticise* (n1) at 6 (online), and is prevalent throughout Dworkin’s writings.

<sup>112</sup> Dancy, *Introduction* (n13) 122.

<sup>113</sup> Dworkin, *Law’s Empire* (n3) 66.

<sup>114</sup> Dancy, *Introduction* (n13) 125.

<sup>115</sup> Dworkin, *Law’s Empire* (n3) 66.

<sup>116</sup> Dancy, *Introduction* (n13) 125. This, I believe, is what Dworkin is implicitly getting across when he talks about ‘stages of interpretation’ (Dworkin, *Law’s Empire* (n3) 65). Dworkin initially notes ‘there must be a

accepting that all beliefs have some degree of antecedent security, provided that the antecedent security they enjoy is everywhere of the same sort'.<sup>117</sup>

This structure also provides a retort to Guest's other contention with constructive interpretation; interpretation cannot continue on an infinite regress and the idea of holding interpretations in check cannot accommodate the distance between the thing interpreted and the interpreter. This latter argument has clear similarities to the 'epistemic regress problem'<sup>118</sup> in epistemology. Likewise, given the structure of interpretation above, it should be responded to in kind by adducing coherentist considerations. Why must 'interpretations go down and down (or up and up)'?<sup>119</sup> This presupposes there is a linear order of dependence regarding interpretation. But, given the structure of interpretation above, it is apt to respond this presupposition is wrong. Interpretation requires the adoption of a holistic view, whereby it is a *system* of convictions and interpretations which is the primary unit of justification. There is no relationship of priority and posterity between particular interpretations, but instead a reciprocal dependence within the system.<sup>120</sup> This can still account for 'distance between the interpreter and the thing interpreted'<sup>121</sup> if we take care to notice the distinctions in levels of subsequent security adverted to earlier.

Therefore, we can agree that interpretation is derived from a general moral position the interpreter holds, but in a better way, both on accounts of fit and substance, with Dworkin's ideas. Interpretation for Dworkin takes on a symmetrical, coherentist character. If all this is

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"preinterpretive" stage in which the rules and standards are taken to provide the tentative content of the practice are identified' (*ibid* 65-66). But, more importantly here, Dworkin notes that '*some kind* of interpretation is necessary, even at this stage. Social rules do not carry identifying labels' (*ibid* 66). This is further backed up when Dworkin speaks of how 'there must be a postinterpretive or reforming stage' (*ibid* 66), and that 'judgements [at that stage] may require concluding that some of the tentative assumptions about the law at the earlier stage were "mistakes"' (Dworkin, *Response ELE* (n65) 309).

<sup>117</sup> Dancy, *Introduction* (n13) 124-125.

<sup>118</sup> BJ, *SEK* (n19) 17.

<sup>119</sup> Guest, *IEJ* (n16) 12 (online).

<sup>120</sup> BJ, *SEK* (n19) 24.

<sup>121</sup> Guest, *IEJ* (n16) 12 (online).

true, the role coherence plays within constructive interpretation should be explicit, pervasive, and supports the foregoing discussion of the underlying justificatory structure of Dworkin's theory.

Further, as it has been shown throughout this chapter integrity is understood best through coherence, and constructive interpretation is best regarded as displaying elements of coherentist reasoning, Dworkin's idea that integrity is 'both the product of and the inspiration for comprehensive interpretation of legal practice'<sup>122</sup> is given new meaning and sense. As coherentist considerations underlie Dworkin's idea of constructive interpretation, and the value of integrity, it is natural the two ideas fit together and complement each other. Given the best way to interpret social practices is a constructive one, an interpretive process in which (ideally) the rules and standards of the practice cohere with its particular point, it follows that the best implementation of that methodology is through a value best understood through the idea of coherence. There is a consistent demand of coherence made throughout the entire legal framework. A clear explanation is therefore possible as to how and on what basis judges can confidently arrive at a legally responsible decision in hard cases with an inherent ethical content.

It now remains to be shown integrity is the value law should be seen through. The snail darter case shows considerations of coherence both fit better and are more attractive than Guest's idea of arguing the case of justice directly in a non-coherentist manner.<sup>123</sup>

### **3.3. Integrity, justice and the snail darter**

Even if law as justice is able to explain and resolve the issue in the snail darter case by 'a direct appeal to the most fundamental principle of justice'<sup>124</sup> (which it can do only in an

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<sup>122</sup> Dworkin, *Law's Empire* (n3) 226.

<sup>123</sup> Guest, *IEJ* (n16) 10 (online).

<sup>124</sup> *ibid* 16 (online).

unnatural way), an appeal to integrity is able to explain the snail darter case in a way that accords better with arguments of substance surrounding the fundamental principle of equality of respect. Integrity itself is a key component of equality of respect. Integrity assumes we can make sense of and enforce collectively the demand that we deny no one the respect we give to others according to our own convictions about what this fundamental principle means. Further, instructing judges to act according to integrity means they will pursue this demand/goal as effectively as can be done, because integrity and equal respect require *integration* and *coherence*. Yes, there will be disagreements on what integrity means, *but at least there is an understanding they must pursue coherence with those principles most fundamental to the system as a whole*, as opposed to none at all. If judges were allowed to go after justice directly according to their own lights, people would be cheated of the demand of coherence/integrity that is part of equality of respect in the long run.<sup>125</sup>

One main problem, however, is presenting this argument in a suitable manner. Guest notes '[i]t is not at all clear that arguments about what justice requires would be any more controversial than arguments about what integrity requires'.<sup>126</sup> Further, Guest believes many of Dworkin's arguments that law as integrity provides a realistic base for legal argument could also be satisfied (albeit in a different way) by law as justice.<sup>127</sup> Last, as the arguments here are interpretive arguments, this means Guest's theory may not be 'fully responsive to descriptive criticisms which take the form: this is not actually how judges behave'.<sup>128</sup>

Initially, it seems as though the last point has to be conceded. Space precludes a detailed case analysis in relation to whether the law should be seen through justice or integrity (best

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<sup>125</sup> Dworkin, *Response Guest* (n93) 436-437. That is '[i]ntegrity is a more dynamic and radical standard than it first seemed, because it encourages a judge to be wide ranging and imaginative in his search for *coherence with fundamental principle*' (Dworkin, *Law's Empire* (n3) 220) (emphasis added). See also *Law's Empire* (n3) 176, 221, 225, 243, 245.

<sup>126</sup> Guest, *IEJ* (n16) 15 (online).

<sup>127</sup> ibid 15 (online).

<sup>128</sup> Guest *RD* (n52) 56.

understood through coherence). However this argument here, coupled with the arguments concerning constructive interpretation and those that have shown integrity is best understood through coherence, should provide a great deal of support in favour of integrity, despite only concentrating on one case. In addition to this, the argument here correctly proceeds on an interpretive basis. Whilst questions of fit will arise, this is one dimension of interpretation, and like was seen with the coherentist structure of constructive interpretation, can constrain arguments of substance in a complex coherentist interaction.<sup>129</sup>

### **3.3.1. The snail darter**

There are many reasons why the snail darter case is being used. First, Dworkin believes this case provides an instance of theoretical disagreement in law.<sup>130</sup> Second, Dworkin uses it as his main example to show how integrity demands cases be resolved involving statutes.<sup>131</sup> As Guest is (despite the arguments above to the contrary) an advocate of Dworkin,<sup>132</sup> he cannot (for want of not substantially criticising Dworkin) argue the snail darter case is one that does not show theoretical disagreement in law, nor cannot be resolved by reference to integrity. Most importantly though, it seems hard to describe the issue and resolution of the case by ‘a direct appeal to the most fundamental principle of justice’.<sup>133</sup>

In 1973, in the United States there was a national climate of great concern relating to conservation. In that same year the Endangered Species Act (hereafter ESA) was passed by Congress. The ESA authorises the Secretary of the Interior to denote species that would be endangered by the destruction of some habitat critical to their survival. Once this designation has occurred, Section 7 of the ESA requires that:

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<sup>129</sup> Dworkin, *Law's Empire* (n3) 410.

<sup>130</sup> *ibid* 23.

<sup>131</sup> See Dworkin, *Law's Empire* (n3) chapter 9, in particular 347.

<sup>132</sup> See Guest, *RD* (n52) chapter 1 “Introduction”, chapter 2 “A Preliminary Sketch” and Guest, *How to Criticise* (n1)

<sup>133</sup> Guest, *IEJ* (n16) 16 (online).

All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by...taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary...to be critical.<sup>134</sup>

An opposition group of conservationists were against the Tellico Dam and Reservoir construction projects of the Tennessee Valley Authority (hereafter TVA) ‘not because of any threat to species, but because these projects *were altering the geography of the area*’,<sup>135</sup> with narrow ugly ditches being created from streams to produce a perceived unneeded increase in hydroelectric power. It was discovered the Tellico Dam, almost finished and costing over one hundred million dollars, ‘would be likely to destroy the only habitat of the snail darter, a three-inch fish of *no particular beauty or biological interest or general ecological importance*’.<sup>136</sup> The Secretary was then persuaded to designate as endangered the snail darter, and the conservationists then brought proceedings to enjoin the dam.<sup>137</sup>

TVA argued:

[T]he statue should not be construed to prevent the completion or operation of any project substantially completed when the secretary made his order. The phrase “actions authorised funded or carried out” should be taken to refer to beginning a project, not completing projects begun earlier.<sup>138</sup>

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<sup>134</sup> The Endangered Species Act of 1973, Pub L No 93-205 sec 7, 87 Stat. 884, 892 (codified as amended at 16 U.S.C. §1536 [1982]).

<sup>135</sup> Dworkin, *Law’s Empire* (n3) 20 (emphasis added).

<sup>136</sup> ibid 21 (emphasis added).

<sup>137</sup> ibid 20-21.

<sup>138</sup> ibid 21.

This claim was supported by various acts of Congress, which continued to appropriate funds for the Tellico Dam, and suggested it be completed. These appropriation measures were all taken after the Secretary declared completing the dam would destroy the snail darter. The Supreme Court ordered the dam be halted, with Justice Lewis Powell writing a dissent for himself and Justice Blackmun.<sup>139</sup>

### **3.3.2. Can law as justice explain the snail darter?**

As noted above, it seems hard to describe the issue and resolution in this case by recourse to law as justice, regardless of whether the snail darter is seen as having either instrumental value or intrinsic value.<sup>140</sup>

Guest would frame the issue by asking what rights the statute has created, though matters of policy are pertinent to this decision.<sup>141</sup> It is noted by the Court the respondents in the case were a Tennessee conservation group, persons who used the Little Tennessee Valley area affected by the dam and a regional association of biological scientists.<sup>142</sup> The petitioners in this case were TVA, and the majority opinion of the Court asked two questions: '(a) would TVA be in violation of the Act if it completed and operated the Tellico Dam as planned? (b)

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<sup>139</sup> ibid 20-22 (emphasis added).

<sup>140</sup> See the emphasised quotes above in the text accompanying footnotes 135 and 136, which indicate the snail darter had a purely instrumental value. Indeed, the court was not unaware of this either. Chief Justice Burger, writing for the majority of the justices, noted first that '[u]ntil recently the finding of a new species of animal life would hardly generate a cause célèbre. This is particularly so in the case of darters' ((n14) at 159). See also how Chief Justice Burger notes that '[i]t may seem curious to some that the survival of a relatively small number of three- inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million' ((n14) at 172). See last, the majority's reliance on the Report of the House Committee on Merchant Marine and Fisheries which takes a very instrumental approach to the purpose of the ESA ((n14) at 177-178). Even Powell J seems to be in agreement with the majority's (perceived) instrumental approach. He notes that '[a]lthough the snail darter is a distinct species, it is hardly an extraordinary one. Even ichthyologists [sic] familiar with the snail darter have difficulty distinguishing it from several related species' ((n14) at 197). See also (n14) 204 and footnote 13. Dworkin notes in contrast, in *Life's Dominion* that 'we tend to treat distinct animal species (though not individual animals) as sacred. We think it very important, and worth considerable economic expense, to protect endangered species from destruction at human hands or by a human enterprise ... [for example] dams that threaten the only habit of a certain species of fish' (Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (HarperCollins 1993) 75).

<sup>141</sup> Dworkin, *Law's Empire* (n3) 447 footnote 1; Guest, *Moral Equality* (n49) 21-22 (online).

<sup>142</sup> (n14) at 161, footnote 10.

if TVA's actions would offend the Act, is an injunction the appropriate remedy for the violation?'.<sup>143</sup>

Therefore, it may simply seem like these are the two parties between whom the judge weighs the different dimensions of equal respect and decides what would best achieve overall justice. However, the Court often indicates the real political, policy based issue is a matter of abstract justice. For example, the Court explicitly considers the problem whether 'in this case the burden on the public through the loss of millions of unrecoverable dollars would greatly outweigh the loss of the snail darter'.<sup>144</sup> The majority decision notes their interpretation

of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and many millions of dollars in public funds. But examination of the language, history and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.<sup>145</sup>

This is despite the majority of the Court noting that 'neither the Endangered Species Act nor Art. III of the Constitution provides federal courts with the authority to make such fine utilitarian calculations'.<sup>146</sup> Indeed, Dworkin also frames the issue as 'whether the Endangered Species Act gives the [S]ecretary of the [I]nterior power to halt a vast, almost finished federal power project to save a small and ecologically uninteresting fish'.<sup>147</sup>

Saving the snail darter does not seem to present that great an issue of justice when an instrumental value-approach is taken and the ecological importance of the snail darter is considered. It could not be argued the conservationists were being treated callously and not

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<sup>143</sup> ibid at 172.

<sup>144</sup> ibid at 187

<sup>145</sup> ibid at 174. See also how the Court notes that '[w]e have no expert knowledge on the subject of endangered species, much less do we have a *mandate from the people* to strike a balance of equities on the side of the Tellico Dam' (ibid at 194) (emphasis added)

<sup>146</sup> ibid at 187.

<sup>147</sup> Dworkin, *Law's Empire* (n3) 313.

‘in accordance with real equality’<sup>148</sup> if they were denied a right to save an ecologically uninteresting fish. But this does not accurately capture the legal issues. The conservationists were not arguing they had a right the dam be enjoined because of the instrumental value of the snail darter. The quotes above show the Court recognises this as well.

However, even if an intrinsic value-approach is taken (though again the conservationists concern was not primarily with the snail darter<sup>149</sup>), the complexity of the issues highlighted is not captured by (as Guest’s theory directs) asking (and trying to work out directly): ““if we assume that the statute “spoke” to all people as equals”<sup>150</sup>, is it possible to read the statute in a way that says the dam must be enjoined? Or does the project lie outside the scope of the Act?” What does it mean to say the statute should be read so as to take account of the duty of the legislature to treat people in accordance with equality of respect, and if it does not we should minimise the equity deficit of the decision?<sup>151</sup> Could the judge hold “the law forbids completion of the dam, because deciding it does not would too grossly deny (the conservationists? American citizens in general?) equal respect by substituting the judgement of the elected representatives, during a time of great national concern about conservation, for the judges’ own judgement of morality”?<sup>152</sup> This is despite various acts of Congress after the Secretary of the Interior’s decision suggesting the dam be completed, and the House Appropriations Committee specifically stating: “[i]t is the Committee’s view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion”?<sup>153</sup> Alternatively, could the judge hold “the law does not forbid completion of the dam, possibly because the fish is ecologically uninteresting, but more importantly as this too would not treat all citizens with equal respect, as ‘a democratically

<sup>148</sup> Guest, *Moral Equality* (n49) 21 (online).

<sup>149</sup> See also Dworkin’s recognition of this in *Law’s Empire* (n3) 337-338.

<sup>150</sup> Guest, *Moral Equality* (n49) 21 (online). That is, ‘[f]or statutes, judges should assume the legislature was acting consistently with real equality’ (*ibid*) (online).

<sup>151</sup> Dworkin, *Response Guest* (n93) 435-436.

<sup>152</sup> *ibid*.

<sup>153</sup> (n14) at 170 (emphasis omitted).

elected legislature is the appropriate body to make collective decisions,<sup>154</sup> about the appropriation of public funds, which should not be wasted”?<sup>155</sup> In order for Guest’s theory to take account of these complexities, the sorts of considerations that would be brought to bear on the case would push us towards Dworkin’s theory of integrity.

However, even when the larger question of justice is considered, whether a statute designed to stop and reverse the trend toward species extinction is to come at any cost even if vast sums of public money are to be wasted,<sup>156</sup> integrity is still a more attractive option in relation to arguments of substance surrounding the fundamental principle of equality of respect. In response to Guest’s statement that ‘[i]f the argument for “fit” carries no weight when the argument of “substance” is sufficiently strong, that suggests that “fit” and “substance” are just part of one continuum of moral argument because it is difficult to see how there could be an point at which “fit” could check “substance”’,<sup>157</sup> the relationship between these elements is more complicated than this, and that in a way, we *cannot* have arguments of substance without those arguments of fit. It is not just that a purported constructive interpretation is attractive if it is consistent with previous settled law. Equality (where a community is divided in political opinion) demands that, informed by our own convictions concerning equal respect, we deny no one the respect we give to others. These demands are best realised in law through coherence considerations, and enforcing that demand collectively via integrity. Coherence requires the minimisation of the presence of unexplained anomalies within the context of the larger legal system, that (ideally) there be a set of underlying principles that

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<sup>154</sup> Dworkin, *TRS* (n31) 108.

<sup>155</sup> Dworkin, *Law’s Empire* (n3) 339. Nor does it seem that Guest’s adherence to conversational interpretation will be of particular use to him here. The main benefit Guest sees for this method of interpretation is that ‘[c]onversational interpretations can establish what people believe wrongly and the mere fact of wrongness is not a ground for discounting those beliefs’ (Guest, *IEJ* (n16) 13 (online)). Second, and more importantly, Dworkin shows in Chapter 9 of *Law’s Empire* that this view of conversational interpretation, directed towards statutes (which Dworkin calls the ““speakers meaning” view” (Dworkin, *Law’s Empire* (n3) 315)) ‘can be cured only by transforming it, in stages, into Hercules’ method’ (which shall be outlined below) (Dworkin, *Law’s Empire* (n3) 316).

<sup>156</sup> (n14) at 184.

<sup>157</sup> Guest, *IEJ* (n16) 10 (online).

can justify many parts of the law, and that the relation of justification is symmetrical and holistic in character. Vital parts of constructive interpretation and legal reasoning are missed if we go directly to the problem with law as justice, thus cheating people of elements of the fundamental principle of equality of respect.<sup>158</sup>

### **3.3.3. Law as integrity and the snail darter**

This section shall go on to summarise how Hercules decides the snail darter,<sup>159</sup> and further explore how arguments of coherence better explain how integrity is able to take into account later decisions of Congress in this case. The role of coherence here *complements* Dworkin's discussion of the snail darter.

Hercules' method, at its most basic, is that statutes must be read in the way that follows from the best justification of a past legislative event. He is trying to show a piece of social history in its best light, meaning his interpretation must justify the legislative process as a whole and must be sensitive to his convictions about the ideals of political integrity and fairness as they apply to legislation in a democracy. As Hercules is justifying a statute, he is able to take into account justifications of policy. Integrity requires Hercules to develop for the ESA a justification that runs throughout the statute, and is consistent with other legislation in force. This would seem to require that the justification of the ESA is consistent with the National Environmental Policy Act 1969 (hereafter NEPA).<sup>160</sup> The majority of the Court held that:

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<sup>158</sup> Dworkin, *Response Guest* (n93) 436-437. For further discussion and analysis of how the dimension of fit reflects the demands of integrity, constrains and is constrained by arguments of substance, in the context of interpreting past political decisions regarding standards of disclosure in medical negligence claims, see chapter 6, point 2.2.1.1., "Standards of disclosure". More generally, to see the interplay between fit and substance in the context of aesthetic claims (involving chocolate ice-cream) and morality, see chapter four, point 5.2., "Brian Leiter's Challenge—The "Chocolate Convention"".

<sup>159</sup> See chapter 9 of *Law's Empire* (n3). Hercules is an imaginary judge Dworkin has invented, so as to show how a philosophical judge of 'superhuman skill, learning, patience and acumen' may interpret and apply Dworkin's theory of law (Dworkin, *TRS* (n31) 105).

<sup>160</sup> The National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 *et seq.*)

[T]he two statutes serve different purposes. NEPA essentially imposes a procedural requirement on agencies, requiring them to engage in an extensive *inquiry* as to the effect of federal actions on the environment; by way of contrast, the 1973 Act is substantive in effect, designed to *prevent* the loss of any endangered species, regardless of the cost.<sup>161</sup>

However, both statutes seem to have, as an underlying policy justification, the protection of the environment (in a broad sense). This justification is best seen as a demand for coherence. There is a demand the justification be mutually explanatory, with the direction of justification dependent upon the legislation in question.<sup>162</sup> Furthermore, this policy can be specified in the case of the ESA to the protection of endangered species. Hercules then describes a competing policy, that public funds should not be wasted. However, he has to look at the statute's text to see whether the policy of protection, with this qualification, justifies the rest of the statute. The majority certainly did think not. They noted that '[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend towards species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute'.<sup>163</sup>

Most importantly, in contrast with Guest, Dworkin notes that '[n]or does the fate of the snail darter, however important Hercules believes this to be, involve any question of principle, of rights particular citizens might be thought to have against others or the community. It is a question of what state of affairs is best for everyone'.<sup>164</sup> Thus, for reasons of fairness, Hercules' interpretation in this situation must be sensitive to public opinion, as revealed in

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<sup>161</sup> (n14) at 188 footnote 34 (emphasis in original).

<sup>162</sup> That is, though it would take a more complex argument to justify each proposition fully, two of each of the three following propositions could be used to justify, and thus they lend support to, the remaining proposition: we ought to protect the environment; we ought to inquire extensively into the effects of federal actions on the environment; and we ought to prevent the loss of any endangered species.

<sup>163</sup> (n14) at 184.

<sup>164</sup> Dworkin, *Law's Empire* (n3) 340-341.

legislative statements. Hercules will also be attentive to the convictions legislators express because they themselves are political decisions. For example, formal committee reports, which played such a large part in the case itself, are to be treated as acts of the state personified. They report the convictions of legislators, and contextualise the statute. Thus, as integrity demands the state act with coherence, Hercules must make sure the state does not say one thing, whilst enacting another.

But Dworkin is at his most brief at this point. Dworkin believes Hercules should take the later decisions of Congress, which further appropriated funds for the Tellico dam and stated they did not believe the ESA was applicable, into account. Dworkin seems to imply these statements can serve two purposes: to give us an indication of public opinion, *and* be seen as a political act of the state personified. Dworkin further notes this is important as the life of a statute is not fixed according to law as integrity. Thus overall, Hercules

thinks that reading the statute to save the dam would make it better from the point of view of sound policy. He has no reason of textual integrity arguing against that reading, nor any reason of fairness, because nothing suggests that the public would be outraged or offended by that decision. Nothing in the legislative history of the bill itself...argues the other way, and the later legislative decisions of the same character argue strongly for the reading he himself thinks best. He joins the justices who dissented in the case.<sup>165</sup>

The point here is appeals to the concept of coherence can better explain how integrity is able to take into account the later legislative decisions, despite the misgivings of the majority of the Court. They noted:

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<sup>165</sup> ibid 337-350.

Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress, particularly not in the circumstances presented by this case. First, the Appropriations Committees had no jurisdiction over the subject of endangered species, much less did they conduct the type of extensive hearings which preceded the passage of the earlier Endangered Species Acts, especially the 1973 Act. We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in the Appropriations Committees reports.<sup>166</sup>

The principles and policies behind the Appropriations Acts could be looked at to see what would make those statutes (interpreting the whole legislative process) the best they could be, and then compare this coherent sub system with sub system of principles and policies underlying the ESA, to get at something like the Court talks about above. However, if no place was found at all for the Appropriations Acts as part of our coherent set of policies, principles and legislative history that underlies the justification of the ESA (there is a qualification that public funds not be wasted), this would be both inconsistent with the Appropriations Acts, and more importantly, those Acts would be an unexplained anomaly in relation to the policy that public funds should not be wasted. This is regardless of the fact that the Appropriation Acts ‘have the limited and specific purpose of providing funds for authorised programs’,<sup>167</sup> and the Court stating that ‘the special appropriation for 1978 of \$2 million for transplantation of endangered species supports the view that the Committees saw such relocation as the means whereby collision between Tellico and the Endangered Species

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<sup>166</sup> (n3) at 191.

<sup>167</sup> ibid at 190. This is despite the court noting that ‘[w]e recognise that both substantive enactments and appropriations measures are “Acts of Congress”’ (ibid).

Act could be avoided'.<sup>168</sup> The Court used the evidence of the Appropriations Committees and Appropriations Acts passed by Congress to show why there should not be an implied repeal of the ESA.<sup>169</sup> In the Court showing why there should not be an implied repeal, there are elements of what needs to be taken into account when looking at the case through integrity. The Court tries to make the legislative story of the Appropriations Acts the best they can be, but then uses this interpretation to *reject* the overall conclusion there should be an implied repeal of the ESA. But once we see that we have to make the ESA the best it can be, it seems like we must take these Appropriation Acts into *account*, *not* reject them and keep them separate from the ESA, as far as they have a bearing on the statute itself.

### **3.3.4. Overall conclusion**

In conclusion, one main aim has been to argue integrity is the value law should be seen through, whilst also showing we do well to see integrity through the particular conception of coherence discussed above. This has been shown in the context of Guest's argument that justice is the value law should be seen through. This section first looked at Guest's arguments against constructive interpretation. His main concerns were interpretation in all its forms requires something outside the interpretive process, and the distance between the thing interpreted and the interpreter cannot be accounted for merely by the idea of holding interpretations in check, or else a regress threatens. It was shown how these concerns could be responded to using coherentist considerations. Furthermore, it was shown the conception of coherence discussed was the common underlying link between constructive interpretation and integrity. The argument then used the snail darter case to show if Guest wishes to adhere to his fundamental principle of equality of respect, integrity is the value law should be seen

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<sup>168</sup> ibid at 192.

<sup>169</sup> ibid at 189-193.

through, because it directs us towards the coherentist *manner* of legal argument, and demands of coherence in the principle of equality of respect.

#### **4. Chapter conclusion**

This chapter has argued along a number of different lines, but all with the aim of arguing two main points. First, integrity is the value law should be seen through, and second, integrity is best understood via a particular conception of coherence. Last, the chapter has sought to argue constructive interpretation has an essentially coherentist character. As integrity is best understood through coherence, and constructive interpretation is essentially coherentist, it is natural this value and this methodology overlap. All the while, it is clear these questions have been interpretive and internal to Dworkin's theory of law.

These conclusions are important because we can now be confident Dworkin's theory is the appropriate legal framework to use to answer the central research question. A clear interpretive understanding as to the underlying structure of Dworkin's theory has been developed, with coherence considerations pervasive throughout. Therefore we can explain and show (at least legally) *how* judges can be more proactive and confidently come to a responsible decision in cases like *Sidaway* and *Chester*.

Moreover, it has been adverted to at many points throughout the discussion in this chapter that judges are able to rely on the soundness of their own convictions in applying moral principles and medical ethics.<sup>170</sup> Thus, using Dworkin's theory of law can further dissolve the paradox identified in the previous chapter. Finally, as the legal framework that shall be used as part of the integrated framework to answer the central research question has been analysed, this now means the other side of this integrated framework, the ethical framework, needs to

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<sup>170</sup> Dworkin, *TRS* (n31) 124. For example, in discussing how coherence considerations both fit and justify the process of constructive interpretation, the discussion of associative obligations, and of justificatory ascent. See also footnote 120.

be looked at. As we have a greater understanding of Dworkin's theory, we can progress to answering the more specific research question:

"How should B&C's four-principles approach influence cases with an inherently ethical content, when used as an example of Dworkinian principles in law?"

in order to understand how B&C's and Dworkin's theories can be interlinked and integrated with one another. This will in turn go towards answering the central research question. Therefore, the next chapter shall begin to answer this specific research question, by starting to analyse and re-interpret B&C's bioethical theory, that framework to be integrated with Dworkin's theory of law.

## **Chapter 4**

### **1. Introduction**

The previous two chapters established Ronald Dworkin's theory of law as the appropriate legal framework to answer the central research question of this thesis. This conclusion was reached through an analysis of two more specific research questions: "What role do moral principles play in hard cases?" and "Is law best seen through integrity or justice?" This chapter will begin to analyse the ethical decision-making framework to be integrated with Dworkin's theory of law.

The starting point for the ethical theory to be used is Tom L Beauchamp and James F Childress's (hereafter B&C's) four-principles theory. This ethical theory has been chosen as it is one of the most widely-known. However, a clearer grasp of B&C's four-principles approach is needed because it is not problem-free. It needs to be reinterpreted to show the best structure B&C's theory can take, much like is the case with Dworkin's theory of law. Therefore, the more specific research question that shall be answered in this chapter is:

"What is the best interpretation of B&C's framework with regards to moral justification so as to come to an epistemically responsible decision regarding a moral course of action?"<sup>1</sup>

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<sup>1</sup> The specific research question has been formulated deliberately in this way to specify the *type* of justification that is required to answer the central research question, to come to the best understanding of B&C's framework, and integrate B&C's framework with Dworkin's theory of law. That type of justification is epistemic justification, or more specifically, moral-epistemic justification. This type of justification requires the appropriate choice of justificatory standards in order to be able to evaluate moral beliefs to determine whether they fit and are justified by the relevant available evidence, and to provide a means of bringing about true substantive moral beliefs, or the choice of 'truth-conducive' standards of justification (Laurence BonJour, *The Structure of Empirical Knowledge* (HUP 1985) 7-9 (hereafter BJ, SEK). It is also important to note here, though space precludes a detailed analysis, that '[m]oral knowledge, to the extent that anyone has it, is as much a matter of knowing *how*—how to act, react, feel and reflect appropriately—as it is a matter of knowing *that*—that injustice is wrong, courage is valuable, and care is due' (Geoffrey Sayre-McCord, 'Coherentist Epistemology and Moral Theory' in Walter Sinnott-Armstrong and Mark Timmons (eds) *Moral Knowledge? New Readings in Moral Epistemology* (OUP 1996) 137) (emphasis in original) (hereafter *Coherentist*).

This chapter shall show the best interpretation of B&C's writings is one based on a coherentist structure. Because of the common structural base between Dworkin's theory of law and B&C's ethical theory, this has a number of benefits; in particular being able to show that if a course of action is justified by B&C's theory, this should mean the legal proposition that embodies this coherent moral principle is (according to Dworkin's theory) true.<sup>2</sup>

This chapter will answer the specific research question by looking at one integral part of B&C's theory; their formulation of the 'common morality'.<sup>3</sup> This is to examine whether B&C's formulation of the common morality is able to function in the way they wish, and fulfils the roles they believe it performs. It is important to consider these issues because of how important the common morality is for B&C in justifying their four principles and more concrete moral judgments. The chapter will first outline the common morality as B&C formulate it. It will be shown a reasonable interpretation of B&C's common morality yields three essential claims. They are: (1) the common morality forms a basis for B&C's theory,

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<sup>2</sup> Jonathan Dancy, *Introduction to Contemporary Epistemology* (Blackwell 1985) 117 (hereafter *Introduction*).

<sup>3</sup> Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (7<sup>th</sup> edn, OUP 2013) 3 (hereafter B&C, *PBE*). This chapter will primarily use the 7<sup>th</sup> edition of *PBE*, as it is B&C's most recent edition of *PBE*, and is thus closest to their current thinking. This chapter will not look to reference the 6<sup>th</sup> edition of *PBE*. This is because B&C's the 7<sup>th</sup> edition formulation of the common morality is substantially similar to the 6<sup>th</sup> edition formulation of the common morality. Where there are differences however, these are better dealt with when discussing how to integrate B&C's and Dworkin's theories together. Therefore, these differences are discussed in chapter 5, point 4.3., "B&C's theory of the common morality is based on a constructive interpretation: B&C's four interpretive values secure the norms of the common morality". However, where appropriate, the chapter will reference the 5<sup>th</sup> edition of *PBE* (Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (5<sup>th</sup> edn, OUP 2001)) for comparative purposes. Whilst the common morality also appears in the 4<sup>th</sup> edition of *PBE* (Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (4<sup>th</sup> edn, OUP 1994)), B&C's current version of the common morality has moved away from the 4<sup>th</sup> edition formulation. The claim in the fourth edition, that '[a] common morality theory takes its basic premises directly from the morality shared in common by members of a society' (B&C, *PBE* 4<sup>th</sup> edn, ibid 100) shares many characteristics with B&C's more recent claim that 'particular moralities present concrete, nonuniversal and content-rich norms' (B&C, *PBE* 7<sup>th</sup> edn (n3) 5). In addition, Beauchamp himself has written an individual article on the common morality (Tom L Beauchamp, 'A Defence of the Common Morality' (2003) 13 (3) Kennedy Institute of Ethics Journal 259 (hereafter *Defence*)) and also a new chapter in Tom L Beauchamp, *Standing on Principles* (OUP 2010) (hereafter *SOP*) entitled 'From Morality to Common Morality' (ibid 189). The goal of this latter chapter is 'to identify and provide a limited defence of the three forms of justification of claims about the common morality' (ibid 189). However, it shall not be endeavoured to bring the *PBE* 7<sup>th</sup> edition formulation of the common morality into line with this article and this chapter. This is because, as Rauprich notes, the model presented by Beauchamp involves some quite radical changes (Oliver Rauprich, 'Common Morality: Comment on Beauchamp and Childress' (2008) 29 Theor Med Bioeth 43, 45) (hereafter *Comment*). Nonetheless, this does not mean it will not be examined how Beauchamp's work may inform B&C's formulation of the common morality. Perhaps it is because of the very nature of *PBE*, being co-authored, that there may be elements and statements of the common morality in *PBE* that are inconsistent and even contradictory.

(2) the common morality plays a justificatory, foundational role in itself, and (3) B&C join the common morality together with reflective equilibrium in a compound approach to justification.<sup>4</sup>

Space precludes a detailed analysis of whether the common morality fulfils all these roles. The chapter will thus focus upon the most important role of the common morality for the purposes of this chapter and thesis. Whilst B&C may succeed (although this is controversial<sup>5</sup>) in showing the common morality is universal in nature,<sup>6</sup> it shall be analysed whether B&C's common morality is able to make use of 'foundationalist moral theories'.<sup>7</sup> B&C note many of the claims made about the common morality 'are usually associated with so called foundationalist moral theories rather than coherentist theories, whereas we have often indicated the vital role of coherence through the process of reflective equilibrium' and 'a common-morality approach [does not sit well with] traditional understandings of a pure coherence theory'.<sup>8</sup> These remarks could form a response to claims raised by critics that the abstractness of the norms in B&C's common morality means it is unable to provide justificatory force for one line of moral argument over another.<sup>9</sup> B&C could argue that

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<sup>4</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 407.

<sup>5</sup> See, for example, Peter Herissone-Kelly, 'Determining the Common Morality's Norms in the Sixth Edition of *Principles of Biomedical Ethics*' (2011) 37 (10) *J Med Ethics* 585 (hereafter *Determining*). See also Soren Holm, 'Not Just Autonomy—The Principles of American Biomedical Ethics' (1995) 21 (6) *J Med Ethics* 332, and Peter Herissone-Kelly 'The Principlist Approach to Bioethics and its Stormy Journey Overseas' in Matti Häyry and Tuja Takala (eds) *Scratching the Surface of Bioethics* (Rodopi 2003) 67 (hereafter *Stormy Journey*). Last, see also Leigh Turner, 'Zones of Consensus and Zones of Conflict: Questioning the "Common Morality" Presumption in Bioethics' (2003) 13 (3) Kennedy Institute of Ethics Journal 193, and David DeGrazia, 'Common Morality, Coherence and the Principles of Biomedical Ethics' (2003) 13 (3) Kennedy Institute of Ethics Journal 219 (hereafter *Coherence*). See how B&C have responded to Turner in *PBE* 7<sup>th</sup> edn (n3), at 4; 410-418. Further, Beauchamp himself has looked to respond to Turner and DeGrazia in *Defence* (n3).

<sup>6</sup> Herissone-Kelly, *Stormy Journey* (n5) 65. Herissone-Kelly goes onto contend that this leads to the "global applicability thesis" (*ibid*) of B&C's four principle approach. 'This thesis holds that principlism is universally applicable to the sorts of issues that typically arise in the practice of medicine. This is a consequence of the supposed fact that the four principles—respect for autonomy, non-maleficence, beneficence and justice—are norms of the common morality' (Herissone-Kelly, *Determining* (n5) 584).

<sup>7</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 408.

<sup>8</sup> *ibid*.

<sup>9</sup> This is because, first, many of the moral norms B&C appeal to in *PBE* (most noticeably when criticising other ethical theories) are 'content-rich' (*ibid* 5), and second, as the common morality's norms are so 'content-thin' (*ibid*), this means 'each of [two] opposing positions can be traced back to a common principle discoverable in the common morality' so that the common morality 'provides little, if any justificatory advantage to either

*regardless* of the abstraction of the common morality's norms, they play an important justificatory, foundationalist role in B&C's approach to justification; '[r]eflective equilibrium needs the common morality to get off the ground, and so is in no position to offer a justification for it'.<sup>10</sup>

Criticism of B&C viewing the common morality as foundationalist has revolved around two points. First, precisely *because* the common morality is foundationalist, it is not 'well compatible with a standard coherentist justification'.<sup>11</sup> Second, the stronger claim is 'this sort of bifurcation [with reflective equilibrium] is neither necessary nor desirable',<sup>12</sup> and B&C 'should give up the foundational account'<sup>13</sup> of the common morality in favour of a pure coherentist approach through the mechanism of reflective equilibrium.<sup>14</sup>

The first point is true. But this argument does not mean the position B&C defend is theoretically invalid. It shall be argued B&C are arguing for a different position *altogether*. B&C seem to defend an analogous version of 'moderate foundationalism',<sup>15</sup> in comparison to both 'strong foundationalism'<sup>16</sup> and 'weak foundationalism'.<sup>17</sup> Therefore, in order to formulate an appropriate answer to the second question, this leads directly to whether the common morality is able to make use of foundationalist moral theories, in particular their version of moderate foundationalism.

In order to answer this question it is necessary to turn away from B&C's writings to consider foundationalism more generally as a structural position regarding justified beliefs.<sup>18</sup> Once this

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side'(John D Arras, 'The Hedgehog and the Borg: Common Morality in Bioethics' (2009) 30 *Theor Med Bioeth* 11, 20 (hereafter *Borg*)).

<sup>10</sup> Beauchamp, *SOP* (n3) 193.

<sup>11</sup> Rauprich, *Comment* (n3) 45.

<sup>12</sup> Arras, *Borg* (n9) 20.

<sup>13</sup> Rauprich, *Comment* (n3) 45-46.

<sup>14</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 408.

<sup>15</sup> BJ, *SEK* (n) 26.

<sup>16</sup> *ibid* 27.

<sup>17</sup> *ibid* 29.

<sup>18</sup> Robert Audi, *The Structure of Justification* (CUP 1993) 108 (hereafter *Structure*).

analysis has been undertaken, however, it will become obvious B&C should give up the foundationalist form of the common morality they advocate. It will be argued foundationalism is not viable as a structural account of justification.<sup>19</sup> Laurence BonJour contends ‘there is no way for an empirical belief to have any degree of warrant which does not depend on the justification of other beliefs’.<sup>20</sup> It will be shown this argument is as applicable to moral beliefs. Further, it will be shown how BonJour’s arguments are compatible with Dworkin’s writings on law and morality, and generally what other philosophers have called ‘moral realism as a moral doctrine’;<sup>21</sup> the objectivity of morality is a moral matter that rests on moral considerations and convictions.<sup>22</sup> Whilst this is not a decisive argument against foundationalism, it does mean B&C’s common morality theory requires a better explanation regarding the structure of moral justification. Given they note ‘we support a version of a third model, referred to as “reflective equilibrium”...sometimes characterised as...coherentism’,<sup>23</sup> it shall be investigated whether a fully-fledged commitment to (moral) coherentism *without* the foundationalist aspects B&C note would be best.

In order to frame this further investigation, it is necessary to look at one main objection that persuades B&C ‘to accept a version of reflective equilibrium as our primary methodology and to join it with our common-morality [i.e. foundationalist for purposes here] approach to considered judgements’,<sup>24</sup> even though B&C treat it only briefly. This is B&C’s presentation of the ““isolation problem””.<sup>25</sup> B&C note that “[a]lthough justification is a matter of reflective equilibrium in [their model], bare coherence never provides a sufficient basis for justification, because the body of substantive judgements and principles that cohere could themselves be

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<sup>19</sup> ibid.

<sup>20</sup> BJ, *SEK* (n1) 29.

<sup>21</sup> Matthew H Kramer, *Moral Realism as a Moral Doctrine*, (Wiley-Blackwell 2009) (hereafter *Realism*).

<sup>22</sup> ibid 1.

<sup>23</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 404.

<sup>24</sup> ibid 408.

<sup>25</sup> Laurence BonJour & Ernest Sosa, *Epistemic Justification: Internalism vs Externalism, Foundations vs Virtues* (Blackwell 2003) 53 (hereafter, BJ & Sosa *Justification*).

morally unsatisfactory'.<sup>26</sup> A line of reasoning shall be developed in response which includes the idea that 'whether being appropriately sensitive to the facts involves our views being sensitive to our experiences depends in large part on whether our beliefs concern matters that we believe to be discoverable through experience. When it comes to morals...the relevance of experience is at least questionable'.<sup>27</sup> The discussion will then show 'causal efficacy or empirical viability as a necessary condition for the reality or knowability of any phenomenon' should not be insisted upon,<sup>28</sup> but instead, 'there are compelling moral grounds for a proposition affirming the reality of many moral values'.<sup>29</sup> Thus, even if moral principles have no causal effects in our forming of moral convictions, there are still sound (moral) reasons for thinking moral values objectively true.<sup>30</sup> Thus, given the choice above, B&C should adopt a pure moral coherence theory of justification.<sup>31</sup>

## **2. B&C's common morality position outlined**

First, it is necessary to provide an outline of B&C's common morality theory. B&C look to introduce the common morality at the very beginning of *PBE*. They note:

All persons living a moral life know several rules that are usually binding: not to lie, not to steal others' property, to keep promises, to respect the rights of others, and not

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<sup>26</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 404.

<sup>27</sup> Sayre-McCord, *Coherentist* (n1) 175-176.

<sup>28</sup> Kramer, *Realism* (n21) 202.

<sup>29</sup> *ibid* 207.

<sup>30</sup> Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 70 (hereafter *JFH*).

<sup>31</sup> The foregoing introduction has not noted in much detail the role constructive interpretation plays with regards to these issues. This task is better reserved for the next chapter, once a closer comparison between B&C's writings and Dworkin's legal and ethical theory can be undertaken. Second, when the discussion here focuses on empirical beliefs specifically, and when there is a key distinction between empirical and moral beliefs, these shall be highlighted. Last, another important point highlighted by Ronald A Lindsay must be noted; '[t]here ... has been some discussion of how useful a common morality would be in resolving moral conflict, although the progress of this discussion has been hindered by differing understandings of the common morality' (Ronald A Lindsay, 'Slaves, Embryos, and Nonhuman Animals: Moral Status and the Limitations of Common Morality Theory' (2005) 15 (4) Kennedy Institute of Ethics Journal 323, 323 (hereafter *Status*)). Whilst this chapter will draw on many sources that do take the common morality to mean different things, the arguments will all be directed at the formulation of the common morality in the 7<sup>th</sup> edition of *PBE*. Where there is a different understanding of the common morality to the one contained in *PBE* that informs an argument or objection, it shall be made clear.

to kill or to cause harm to innocent persons...[however] debates do occur about [these principles'] precise meaning, scope, weight and strength, often in regard to hard moral cases.<sup>32</sup>

From this uncontroversial starting point, B&C note ‘the set of universal norms shared by all persons committed to morality [is] *the common morality*. It is not merely *a* morality, in contrast to other moralities. The common morality is applicable to all persons in all places, and we rightly judge all human conduct by its standards’.<sup>33</sup> B&C highlight a number of norms in the common morality, though they also note this is not a complete list. Those norms include examples such as do not kill, tell the truth, do not steal, and obey the law. In addition, B&C believe the common morality contains standards different from rules of obligation. They further give ten virtues that are recognised in the common morality, including nonmalevolence, integrity, truthfulness, and lovingness.<sup>34</sup>

B&C further clarify their position by noting an important caveat. They note that their common morality theory should not be thought of as ahistorical,<sup>35</sup> but instead:

the common morality is a product of human experience and history and is a universally shared product. The origin of the norms of the common morality is no different in principle from the origin of the norms of a particular morality for a profession. Both are learned and transmitted in communities. The primary difference

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<sup>32</sup> B&C, *PBE 7<sup>th</sup> edn* (n3) 3.

<sup>33</sup> ibid (emphasis in original) (footnote omitted). It can also be seen the formulation of the common morality has changed in one particular way from the 5<sup>th</sup> edition of *PBE* to the 7<sup>th</sup> edition. Whilst in the 5<sup>th</sup> edition B&C contend that the common morality ‘is the set of norms that all *morally serious* persons share’ (B&C, *PBE 5<sup>th</sup> edn* (n3) 3) (emphasis added), in the 7<sup>th</sup> edition, B&C contend that ‘all persons *committed to morality* accept the standards found in what we are calling the common morality’ (B&C, *PBE 7<sup>th</sup> edn* (n3) 4) (emphasis added). See Rauprich, *Comment* (n3) 58-60, and Herisone-Kelly, *Stormy Journey* (n5) 68-72 for discussion of the problems associated with the notion of ‘morally serious persons’ (B&C, *PBE 5<sup>th</sup> edn* (n3) 3). In addition, it must be noted that the formulation as found in the 7<sup>th</sup> edition of *PBE* is different to that as found in Beauchamp, *Defence* (n3), as in that article, Beauchamp discusses ‘persons committed to the *objectives* of morality’ (ibid 260) (emphasis added).

<sup>34</sup> B&C, *PBE 7<sup>th</sup> edn* (n3) 3.

<sup>35</sup> ibid 4 (footnote omitted).

is that the common morality has authority in all communities, whereas particular moralities are authoritative only for specific groups.<sup>36</sup>

B&C highlight the link between their four principles of respect for autonomy, beneficence, nonmaleficence and justice and the common morality by noting ‘[t]he common morality contains moral norms that are basic for biomedical ethics...The set of moral principles defended in this book [PBE] functions as an analytical framework intended to express general norms of the common morality that are a suitable starting point for biomedical ethics’; ‘[o]ur larger framework...encompasses several types of norms: principles, rules, rights, and virtues’.<sup>37</sup>

Peter Herissone-Kelly takes the foregoing passages to come to the following accurate description regarding the relationship between the common morality and B&C’s four principles, known as the ‘favoured subset model’.<sup>38</sup> The common morality is a set of norms shared by all persons committed to morality. “Norms” is a general term of which there can be different types (obligations, virtues etc). So, the common morality has several subsets of norms, including the common morality’s principles. The common morality’s principles might have more than four members, but these four particular principles have been chosen due to their relevance to bioethics.<sup>39</sup>

From this, it should be clear why the common morality is so important for B&C’s theory. These quotes show the common morality is the source of and the ultimate justification for

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<sup>36</sup> ibid 4.

<sup>37</sup> B&C, *PBE 7<sup>th</sup> edn* (n3) 14.

<sup>38</sup> Herissone-Kelly, *Stormy Journey* (n5) 68.

<sup>39</sup> ibid 67-68. Further support for this position is given when B&C note ‘[t]he four clusters of moral principles are central to biomedical ethics is a conclusion the authors of [PBE] have reached by examining considered moral judgements and the way moral beliefs cohere ... The selection of these four principles, rather than some other cluster of principles, does not receive an argued defence in Chapters 1 through 3. However, in Chapters 4 through 7, we do defend the vital role of each principle in biomedical ethics’ (B&C, *PBE 7<sup>th</sup> edn* (n3) 13-14) (emphasis omitted).

B&C's four principles and people's more concrete moral judgments.<sup>40</sup> Yet, B&C elaborate further on the vital roles it plays in their bioethical theory. Initially, in their chapter 'Method and Moral Justification',<sup>41</sup> B&C note their 'thesis is that reflective equilibrium needs the common morality to supply initial norms, and then appropriate development of the common morality requires...reflective equilibrium, a method of coherence'.<sup>42</sup> So, '[t]his supposed common moral ground is thought to be the substantive source and constraining framework for coherence formation i.e., the moral foundation upon which their theory is built'.<sup>43</sup> Linked into this is the claim that the common morality is the 'starting point and normative framework for moral theory construction in combination with a coherence theory of moral justification'.<sup>44</sup> Similar interpretations come from John Arras, who notes 'Beauchamp and Childress have adopted a...conception of the common morality as providing ultimate justification for the account they give of the so-called principles of bioethics...[Further,] Beauchamp and Childress [embrace] a conception of the common morality embedded in ordinary pre-theoretical experience, as the source of the very principles whose implications they had so deftly explored in previous editions [of *PBE*]'.<sup>45</sup> Last, B&C 'offer a hybrid approach to moral justification'<sup>46</sup> and B&C 'accord common morality a special place

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<sup>40</sup> Arras, *Borg* (n9) 12.

<sup>41</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 390.

<sup>42</sup> ibid 407. Beauchamp himself notes '[r]eflective equilibrium needs the common morality to get off the ground' (Beauchamp, *SOP* (n3) 193). Further, his thesis shall follow B&C's definition and meaning of considered judgements: our considered judgements are 'the moral convictions in which we have the highest confidence and believe to have the least bias. They are "judgements in which our moral capacities are most likely to be displayed without distortion"' (B&C, *PBE* 7<sup>th</sup> (n3) 405). As B&C further note, '[t]hese considered judgements occur at all levels of moral thinking, "from those about particular situations and institutions through broad standards and first principles to formal and abstract conditions on moral conceptions"' (ibid) (footnote omitted).

<sup>43</sup> Rauprich, *Comment* (n3) 44.

<sup>44</sup> ibid 45. Rauprich also adverts to what he calls the 'guardrail claim' (ibid 46) whereby 'common morality is for Beauchamp and Childress a moral foundation serving not only as a starting point but also as a constraining framework for ethical reasoning and theory construction' (ibid 46) (footnote omitted).

<sup>45</sup> Arras, *Borg* (n9) 12.

<sup>46</sup> ibid 14.

shielded from the jostling involved in the quest for coherence through wide reflective equilibrium'.<sup>47</sup>

Therefore, there are three essential claims made by B&C about the common morality. The first is seen in their statements where the common morality is spoken of being the “substantive source”, “moral foundation”, and “starting point” of B&C’s theory. These show the common morality forms a basis or source on which B&C base their theory, and provides norms for which more specific theory formation can begin. The second is seen with the quotes that the common morality is ‘the constraining framework for coherence formation’,<sup>48</sup> provides “ultimate justification”, the common morality is a *substantive* source,<sup>49</sup> and on a justificatory interpretation, a “moral *foundation*”. These quotes show the common morality plays a justificatory, foundational role in itself. Last, the quotes that the common morality is ‘a normative framework for moral theory construction *in combination* with a coherence theory of moral justification’,<sup>50</sup> and B&C offering ‘a hybrid approach to moral justification’<sup>51</sup> show B&C joining the common morality together with reflective equilibrium in a compound approach to justification.<sup>52</sup>

Finally, given the above, it can now be further made clear why an analysis of B&C’s common morality and the roles it performs is important. B&C take the common morality as the source of the four principles in their framework. In addition, along with reflective equilibrium, B&C make use of the common morality as one of the main justificatory standards to evaluate moral beliefs. Because B&C use the common morality as one of their main structural standards, it needs to be analysed whether this standard is appropriate, in terms of its form. This is not just to see whether the form is compatible with Dworkin’s

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<sup>47</sup> ibid.

<sup>48</sup> Rauprich, *Comment* (n3) 44.

<sup>49</sup> ibid.

<sup>50</sup> ibid 45.

<sup>51</sup> Arras, *Borg* (n9) 14.

<sup>52</sup> B&C, *PBE* 7<sup>th</sup> edn (n) 408.

theory of law, but also whether the form the standard takes means B&C's common morality cannot be used to show whether moral beliefs are justified. If B&C's common morality cannot perform the roles it is intended to perform, this casts doubt on the standard itself. But, chapter five will show the common morality as a source of the four principles interpretively has merit.

This analysis of the failure of the common morality to perform the roles B&C ascribe to it needs to be undertaken. If this standard can be reinterpreted to take a better form, the common morality may then actually be able to do some justificatory work (though by the very nature of the common morality it may not be able to do much). This reinterpretation will also give a better explanation of why the common morality, through the four principles, should have normative force. All of the analysis here therefore goes towards explaining and clarifying both *how* (in dealing with matters of form) and *why* judges should be more proactive in dealing with the inherent ethical and legal issues in cases like *Sidaway* and *Chester*. If judges are to rely on the soundness of their own convictions in applying moral principles (and wish to employ these convictions to reinforce their discussions by referral to medical ethics discourse) in cases with an inherently ethical content, they need to know what the appropriate standards are for justifying a moral belief. They also need to know what demands those standards make. This chapter and the next will establish this.

### **3. B&C, foundationalism and coherentism**

B&C's common morality theory has been outlined, with their three essential claims highlighted. The first criticism of B&C's view that the common morality is foundationalist needs to be examined. That criticism is the common morality is not 'well compatible with a

standard coherentist justification'.<sup>53</sup> This is because B&C are actually advocating a version of moderate foundationalism.

### **3.1. B&C's tension: coherentism**

First, B&C talk of considered judgements as ‘those worthy of belief independent of whether they can be supported by reasons’.<sup>54</sup> Further, B&C note ‘bare coherence never provides a sufficient basis for justification, because the body of substantive judgements and principles that cohere could themselves be morally unsatisfactory’.<sup>55</sup> It is because of this ‘reflective equilibrium needs the common morality to supply initial norms’<sup>56</sup>. Related to this is the claim ‘[w]e cannot justify every moral judgement in terms of another moral judgement without generating an infinite regress...The way to escape this regress is to accept some judgements as justified without dependence on other judgments’.<sup>57</sup> Finally, B&C note ‘[t]hese claims are usually associated with so called foundationalist moral theories’.<sup>58</sup>

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<sup>53</sup> Rauprich, *Comment* (n3) 45.

<sup>54</sup> B&C, *PBE 7<sup>th</sup> edn* (n3) 409. Even at this preliminary point, B&C’s discussion of considered judgements at times is contradictory to this insistence the common morality can supply norms that are ‘justified without dependence on other judgements’ (*ibid* 408). If certain norms are justified in and of themselves, it would not seem to matter whether they are well established or not. Yet B&C often indicate that this does matter. They note that ‘[a] moral belief that is used initially and without argumentative support can only serve as an anchor of moral reflection if it survives subsequent testing’ (*ibid*). Perhaps this should be taken to mean that we should not use those moral beliefs we form merely on a whim, or arbitrarily. But applied to the (apparently) foundational beliefs of the common morality, this statement seems contradictory. Further, at what principled point is a moral belief deemed to have “survived subsequent testing”? At what point can we “drop anchor”, as it were? These seem to be further problems B&C leave unresolved. The confusion can lastly be seen in B&C’s proclamation that ‘[a]lmost all justified criticisms of social practices proceed by appeal to considered moral judgments that are extended in fresh ways into new territory’ (*ibid* 408).

<sup>55</sup> *ibid* 407.

<sup>56</sup> *ibid* 408.

<sup>57</sup> *ibid* 407-408.

<sup>58</sup> *ibid*. These comments provide for a more convincing explanation as to why the common morality has been chosen as a justificatory standard to evaluate moral beliefs. See also how B&C contend that there are ‘three types of justification about a universal common morality’ (*ibid* 415). Those are ‘(1) empirical justification, (2) normative theoretical justification, and (3) conceptual justification’ (*ibid*). However, as Herisone-Kelly notes ‘in the absence of a fully-fledged analysis of the concept of morality, it appears unlikely that we would ever reach a suitably uncontentious identification of the common morality’s norms’ (Herisone-Kelly, *Determining* (n5) 585). What is more troubling and *not* a convincing explanation as to why the common morality has been chosen as a justificatory standard to evaluate moral beliefs, is the way that B&C (despite noting that their ‘common-morality theory does not view *customary* moralities as part of the common morality’ (B&C, *PBE 7<sup>th</sup> edn* (n3) 411 (emphasis in original)), often seem to justify the normative force that the common morality has by appeal merely to what Oliver Rauprich calls ‘moral commonality’ (Rauprich, *Comment*, (n3) 52). Whilst this has not gone unnoticed by B&C’s critics, B&C still seem to base many of their normative claims about the

B&C's approach 'differs in important ways from more standard accounts of reflective equilibrium'.<sup>59</sup> Oliver Rauprich notes he does 'not deny that the common morality model can be supplemented with an appeal to coherence. But one has to realise that this appeal is very different from, and even compromises the very idea of, standard coherence theories'.<sup>60</sup> He goes on to note '[w]e cannot hold the idea that moral beliefs can only be justified with regard to their coherence and mutual support and at the same time grant foundational privileges to a certain set of norms that is supposed to be constitutive of morality',<sup>61</sup> and that 'treating coherence as a side restraint is different from justifying moral norms by virtue of their levels of coherence and mutual support rather than with regard to a moral foundation'.<sup>62</sup>

Arras adopts a similar line of argument. He notes '[s]ince standard approaches to reflective equilibrium in contemporary moral theory are resolutely non-foundationalist and unbifurcated in this way...it is reasonable to ask just how plausible a hybrid approach is and what it actually accomplishes for reasoners in practical ethics'.<sup>63</sup> Alternatively, '[a]nother way of putting this question is to ask why [B&C] find it necessary or helpful to distinguish sharply the norms of the common morality from what Rawls called our "considered moral judgments"'.<sup>64</sup> Last, Arras asserts 'we should recall that the process of reflective equilibrium

common morality on the basis that the norms in the common morality are 'considered judgements *that are the most well-established moral beliefs*' (B&C, *PBE* 7<sup>th</sup> edn (n3) 407) (emphasis added). But the commonality of a moral norm indicates noting about its reliability or justificatory force (Rauprich, *Comment* (n3) 52). See, for example, B&C, *PBE* 5<sup>th</sup> edn (n3) 2-3; 400; 404; 407 B&C, *PBE* 7<sup>th</sup> edn, (n3) 4; 407-409; 412; 423. See the corresponding critiques directed at the 5<sup>th</sup> edition of *PBE*, but still pertinent to the 7<sup>th</sup> edition, in Rauprich *Comment* (n3) at 63-64 and DeGrazia *Coherence* (n5) at 222-225. See also Beauchamp's response to DeGrazia in *Defence* (n3) 266-267, yet this still seems to miss the point of DeGrazia's critique. The 4<sup>th</sup> edition common morality has not been included here, due to the substantial revision of this formulation of the common morality B&C, and because of its liability to other, more substantial criticisms.

<sup>59</sup> Arras, *Borg* (n9) 14.

<sup>60</sup> Rauprich, *Comment* (n3) 65.

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> Arras, *Borg* (n9) 18 (footnote omitted).

<sup>64</sup> *ibid* 19. This last contention could be challenged, given B&C talk about the 'common-morality approach to considered judgements' (B&C, *PBE* 7<sup>th</sup> edn (n3) 408), and Beauchamp himself notes '[m]y view is that the norms of the common morality *are* considered judgements and are most unlikely to be subject to alteration by reflective equilibrium' (Beauchamp, *SOP* (n3) 193). However, Arras has a particular idea of what 'considered judgments' (Arras, *Borg* (n9) 19) are, given the way he talks about them when describing the method of

is maximally inclusive. If...you think that it currently overlooks some crucial pieces of the moral picture...then this method simply asks you to toss it into the mix alongside all our other beliefs'.<sup>65</sup>

It therefore seems B&C's approach is incompatible with *a standard* coherentist justification. This is used by other theorists as a platform to launch further attacks on B&C's common morality theory.<sup>66</sup> However, this argument *by itself* does not mean the position B&C defend is theoretically invalid. Indeed, B&C's position might more plausibly be construed as a version of moderate foundationalism.

### **3.2. B&C's tension: traditional and weak foundationalism**

First, a taxonomy of foundationalist positions needs to be provided.<sup>67</sup> BonJour's writings are again useful. He notes '[o]ne way of distinguishing specific versions of foundationalism...is in terms of the precise *degree* of non-inferential epistemic justification which these "basic beliefs" are held to possess'.<sup>68</sup> BonJour takes moderate foundationalism to involve the claim that 'the noninferential warrant possessed by basic beliefs is sufficient by itself to satisfy the adequate-justification condition for knowledge'.<sup>69</sup>

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reflective equilibrium. There he notes that '[e]ven our considered moral judgments are deemed to be only provisionally fixed points' (*ibid*) (emphasis in original).

<sup>65</sup> Arras, *Borg* (n9) 19-20. See also Rauprich, *Comment* (n3) 66.

<sup>66</sup> See, for example, Arras, *Borg* (n9) 19-21, and Rauprich, *Comment* (n3) 64-67.

<sup>67</sup> As a complementary to this, it should be noted 'the central thesis of epistemological foundationalism, as understood here, is the twofold thesis: (a) that some empirical beliefs possess a measure of epistemic justification which is somehow immediate or intrinsic to them, at least in the sense of not being dependent, inferentially or otherwise on the epistemic justification of empirical beliefs; and (b) that it is these "basic beliefs" ... which are the ultimate source of justification for *all* of empirical knowledge' (BJ, *SEK* (n1) 17). Although the formulation set out above is applied to empirical knowledge, it can be just as easily applied, with little modification, to moral knowledge. It should also be noted here, as Susan Haack correctly notes, '[t]he main problem is that there is much variety and considerable vagueness in the way the terms "foundationalism" and "coherentism" are used in the literature' (Suan Haack, *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Blackwell 1992) 13 (hereafter *Evidence*)). The taxonomy above will at least try to clear up some of the confusion surrounding foundationalism.

<sup>68</sup> BJ, *SEK* (n1) 26 (emphasis in original).

<sup>69</sup> *ibid*. BonJour continues, noting '[t]hus, on this view, a basic belief, if true, is automatically an instance of knowledge ... and hence fully acceptable as a premise for the justification of further empirical beliefs' (*ibid*). A very similar formulation can be applied to moral beliefs. See also Richard Feldman's discussion of 'modest

In contrast, BonJour notes ‘[h]istorical foundationalist positions typically make stronger and more ambitious claims on behalf of their chosen class of basic beliefs. Thus, such beliefs have been claimed not just be adequately justified, but also *infallible*, *certain*, *indubitable*, or *incorrigible*’.<sup>70</sup> Last, BonJour highlights ‘many recent proponents of foundationalism have felt that even moderate foundationalism goes further than is necessary with regards to the degree of intrinsic or noninferential justification ascribed to basic beliefs. Their alternative is a view which may be called *weak foundationalism*’.<sup>71</sup> According to this view, the basic beliefs in question possess a degree of justification which is insufficient to satisfy the adequate-justification condition for knowledge on its own. This very low degree of epistemic justification means they fail to qualify as acceptable justifying premises for further beliefs. These “initially credible beliefs” are simply that, as opposed to fully justified. Nonetheless, weak foundationalism is still a version of foundationalism. It still holds there are basic beliefs which have a relatively low, but nonetheless some degree of, noninferential epistemic justification. However, the justification of basic beliefs (and nonbasic beliefs) in weak foundationalism *can* be amplified by appeal to the concept of coherence.<sup>72</sup>

Given this brief taxonomy, B&C’s position does not initially appear to sit within a strong foundationalist account. However, there are indications within B&C’s writings that may cast doubt on this. In their discussion of moral change as it relates to the common morality, B&C note ‘[i]t would be dogmatic to assert without argument that the basic norms of morality cannot change, but it is difficult to construct a historical example of a central moral norm that has been or might be valid for a limited duration’.<sup>73</sup> Further, ‘[a]s circumstances change, we find moral reasons for saying that a norm has new specifications or valid exceptions or can be

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foundationalism’ (Richard Feldman, *Epistemology* (Prentice-Hall 2003) 71) which is substantially similar to BonJour’s formulation above, at 70-78.

<sup>70</sup> BJ, SEK (n1) 26.

<sup>71</sup> ibid 28

<sup>72</sup> ibid.

<sup>73</sup> B&C, *PBE* 7<sup>th</sup> (n3) 413.

outweighed by other norms'.<sup>74</sup> Analysing these statements, it is arguable that as B&C assert that the norms *themselves* in the common morality are highly unlikely to change, the position B&C present is a version of strong foundationalism.

However, such a view would be incorrect, for two reasons. First, as Feldman notes when discussing strong foundationalism, (what he labels "Cartesian foundationalism" as he uses Descartes version of foundationalism as the prime example<sup>75</sup>) Descartes 'thought that everything else that is justified must be *deduced* from the justified basic beliefs. Thus, he held that to get justified beliefs...you must combine basic beliefs in ways that guarantee the truth of those [further] beliefs about the world'<sup>76</sup> as our basic beliefs are either indubitable or infallible.<sup>77</sup> However, this is not B&C's position. B&C, in justifying moral norms, 'accept a version of reflective equilibrium as [their] primary methodology and...join this model with [their] common-morality approach to considered judgements'.<sup>78</sup> There is no deduction in the required strong foundationalist sense. Further, whilst this passage does not tell us *directly* about the status of the norms of the common morality, it seems to imply the norms of the common morality are not to be regarded as 'in some sense indubitable, or free from all possibility of error'.<sup>79</sup> B&C readily admit 'In at least one notable respect moral change in the way we use norms in the common morality has occurred and will continue to occur. Even if the abstract norms do not change, the *scope* of their application does change'.<sup>80</sup>

However, B&C's position does not sit with weak foundationalism either. Although it is stated 'weak foundationalism represents a kind of hybrid between moderate foundationalism'<sup>81</sup> and coherentism, and this may look superficially similar to B&C's appeals to both the common

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<sup>74</sup> ibid.

<sup>75</sup> Feldman, *Epistemology* (n69) 52.

<sup>76</sup> ibid 54 (emphasis in original).

<sup>77</sup> ibid 52-53.

<sup>78</sup> B&C *PBE* 7<sup>th</sup> edn (n3) 408.

<sup>79</sup> Feldman, *Epistemology* (n69) 53.

<sup>80</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 413 (emphasis in original).

<sup>81</sup> BJ, *SEK* (n1) 29.

morality and reflective equilibrium, the key difference turns on the idea of basic beliefs (in B&C's case, the norms of the common morality) being 'sufficient...to satisfy the adequate-justification condition for knowledge'.<sup>82</sup> Whilst the basic beliefs in weak foundationalism are unable to satisfy such a condition,<sup>83</sup> B&C, in endorsing a 'hybrid approach to moral justification',<sup>84</sup> clearly think the norms of the common morality *can* be adequate justifying premises. This is a main claim of moderate, not weak, foundationalism.

This section has shown B&C's writings on the common morality do not sit with either a strong or weak foundationalist position. Therefore, the best interpretation of B&C's position so far regarding the common morality and moral justification is that they advocate a moderate foundationalism. This is despite the prominence B&C attach to the process of reflective equilibrium. This is because '[t]he central difference [between foundationalism and coherentism] is not over the possibility of indefeasible justification; it is over whether justification may be nonderivative in a sense implying that some beliefs have some degree of justification not based on coherence with one or more others'.<sup>85</sup> The foundationalist *is* able to appeal to the concept of coherence, *even for the justification of basic beliefs*.<sup>86</sup> What 'a coherentist will still deny [is] there is an epistemically privileged set of beliefs that enjoy their privilege independently of their inferential connections'.<sup>87</sup> Thus, as long as the basic beliefs have some degree of noninferential justification, this can be further augmented by an appeal to the concept of coherence, but is still classed as a foundationalist theory.<sup>88</sup> Thus, because of B&C's key claim that the considered judgements of the common morality are

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<sup>82</sup> ibid.

<sup>83</sup> ibid 26.

<sup>84</sup> Arras, *Borg* (n9) 14.

<sup>85</sup> Audi, *Structure* (n18) 112.

<sup>86</sup> BJ, *SEK* (n1) 28.

<sup>87</sup> Sayre-McCord, *Coherentist* (n1) 160 (emphasis omitted).

<sup>88</sup> BJ, *SEK* (n1) 29

justified without dependence on other judgements,<sup>89</sup> the best interpretation of their position so far, for the reasons above, is that they advocate a moderate foundationalism.

Therefore, though the critique that B&C's common morality does not sit well with standard coherentist accounts is interlinked with the stronger claim that this combination of common morality and coherentism is unnecessary and B&C should adopt a pure coherence theory of justification, we must take the second question on its own merits. B&C do defend a theoretically viable position.<sup>90</sup>

This second question can now be dealt with directly. In order to ascertain whether the common morality is able to make use of B&C's version of moderate foundationalism, foundationalism as a structural account of justification, independently of B&C's writings, needs to be explored. Though it is noted by Audi that '[f]oundationalism and coherentism each contain significant epistemological truths',<sup>91</sup> there may be arguments against foundationalism that mean B&C should give up the foundational role of their common morality approach. If the arguments below are correct, these go towards showing foundationalism is implausible as a structural account of justification.

#### **4. Arguments against foundationalism**

BonJour's arguments shall again be considered. These arguments shall also be broadened to show how they are sufficiently general in tenor to apply to moral beliefs as well. In its original formulation, BonJour contends 'there is no way for an empirical belief to have *any* degree of [epistemic] warrant which does not depend on the justification of other empirical

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<sup>89</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 407.

<sup>90</sup> Indeed, it seems to be a good thing B&C defend a version of moderate foundationalism, as there are arguments that can be made against both strong and weak foundationalism, regardless of whether foundationalism generally is acceptable (BJ, *SEK* (n1) 27). For arguments against strong foundationalism, see, for example, BJ, *SEK* (n1) 27-28. See also Feldman, *Epistemology* (n69) 55-60 and Dancy, *Introduction* (n2) 58-62. For arguments against weak foundationalism, see BJ, *SEK* (n1) 29.

<sup>91</sup> Audi, *Structure* (n18) 117.

beliefs'.<sup>92</sup> BonJour continues by noting ‘the fundamental role which the requirement of epistemic justification serves in the...concept of knowledge is that of a *means* to truth; and accordingly that a basic constraint on any account of the standards of justification for empirical knowledge is that there be good reasons for thinking that following those standards is at least likely to lead to truth’.<sup>93</sup> Therefore, ‘that feature, whatever it may be, by virtue of which a particular belief qualifies as basic must also constitute a good reason for thinking that the belief is true’.<sup>94</sup> More precisely, BonJour puts the argument in schematic form, with  $\varphi$  representing the distinguishing feature of basic belief B:<sup>95</sup>

(1) B has feature  $\varphi$ .

(2) Beliefs having feature  $\varphi$  are highly likely to be true.

Therefore, B is highly likely to be true.<sup>96</sup>

Whilst the argument above is in logical form, it may be expressed interpretively so it applies to moral beliefs by asking *why* it is ‘beliefs having feature  $\varphi$  are highly likely to be true’.<sup>97</sup> Even by BonJour’s *own* arguments, the idea of “having a feature” is misleading. The argument starts to look as if the “feature” itself is simply some conventional criterion, and that we simply need certain conventional criteria to be ‘justified in believing this feature is a truth indicator’,<sup>98</sup> when in fact these ideas are better explained by the notion of *reasons*, as seen when BonJour gives a ‘more explicit statement of this basic antifoundationalist

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<sup>92</sup> BJ, *SEK* (n1) 29 (emphasis in original). It should also be noted the argument made by BonJour here also appears in a substantially similar formulation in David O. Brink, *Moral Realism and the Foundations of Ethics* (CUP 1989) chapter 5.

<sup>93</sup> BJ, *SEK* (n1) 30.

<sup>94</sup> *ibid* 30-31.

<sup>95</sup> *ibid* 31.

<sup>96</sup> *ibid*.

<sup>97</sup> *ibid*.

<sup>98</sup> Feldman, *Epistemology* (n69) 76.

argument'.<sup>99</sup> For purposes here, premises (1)-(4) are most relevant, though the argument shall be set out fully. The argument is as follows:

- (1) Suppose that there are *basic empirical beliefs*, that is, empirical beliefs which are
  - (a) epistemically justified, and (b) whose justification does not depend on that of any further empirical beliefs.
- (2) For a belief to be epistemically justified requires there be a reason why it is likely to be true.
- (3) For a belief to be epistemically justified for a particular person requires that this person be himself of cognitive possession of such a reason.
- (4) The only way to be in cognitive possession of such a reason is to believe *with justification* the premises from which it follows that the belief is likely to be true.
- (5) The premises of such a justifying argument cannot be entirely *a priori*; at least one such premise must be empirical.

Therefore, the justification of a supposed basic empirical belief must depend on the justification of at least one other empirical belief, contradicting (1); it follows there can be no basic empirical beliefs.<sup>100</sup>

Applying this argument by analogy to moral beliefs, the argument shows a person must, in order for her belief to be epistemically justified, bring and be in possession of her own *independent convictions*<sup>101</sup>, ‘internal to the evaluative domain’<sup>102</sup> in question (in this case, the domain of moral beliefs). The analogy can be pushed by noting the “reason” BonJour is

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<sup>99</sup> BJ, SEK (n1) 32.

<sup>100</sup> ibid (emphasis in original).

<sup>101</sup> Ronald Dworkin, *Law’s Empire* (Hart 1986) 136.

<sup>102</sup> Ronald Dworkin, ‘Objectivity and Truth: You’d Better Believe It’ (1996) 25 (2) *Philosophy and Public Affairs* 87, 89 (hereafter *OT*).

discussing in premises (2) and (3) is to be correctly identified as the “feature” in the brief schematic argument set out above. Then, we can push the analogy with premise (4) by asking *why* the believer is ‘justified in believing this that this feature is a truth indicator’.<sup>103</sup> When this is asked, and when both the brief schematic argument and fuller argument are linked together, the “feature” which appears in the schematic argument functions as *a reason* itself for thinking that the belief is likely to be true, as well as the believer needing a *further* reason to ‘be justified in thinking that this feature [or reason] is a truth indicator’,<sup>104</sup> all the while both of these components being arguments for the belief in question. Again, these reasons must be internal to the evaluative domain.

In addition, given BonJour notes ‘the basic role of justification is that of a *means* to truth’,<sup>105</sup> this shows first the concept of justification has some point and, secondly, the requirements of the concept of justification are sensitive to this point.<sup>106</sup> Further, because ‘the fundamental role which the requirement of epistemic justification serves in the...concept of knowledge is that of a *means* to truth’,<sup>107</sup> the concept of knowledge is able to yet further explain why the concept of justification exists, and also what justification requires, so that ‘[v]alue and content have become entangled’.<sup>108</sup> The immediate point of justification is to achieve truth, yet it might also be put that justification is sensitive to its mediate point, which is to produce knowledge, or propositions we may know. Such an analysis makes use of ideas fundamental to Dworkin’s account of constructive interpretation.

BonJour continues by noting that ‘in order to reject the conclusion of this argument, as he obviously must, the foundationalist must reject one or more of the premises...a tenable version of foundationalism must apparently reject either premise (3) or premise (4). Both of

<sup>103</sup> Feldman, *Epistemology* (n69) 76.

<sup>104</sup> *ibid.*

<sup>105</sup> BJ, *SEK* (n1) 7.

<sup>106</sup> Dworkin, *Law’s Empire* (n100) 47.

<sup>107</sup> BJ, *SEK* (n1) 30 (emphasis in original).

<sup>108</sup> Dworkin, *Law’s Empire* (n100) 48.

these approaches have in fact been attempted'.<sup>109</sup> The first line of argument, which rejects premise (3), is known as externalism; some set of facts which are external to the believer and his conception of the situation may ultimately justify a belief. The second, and more traditional, line of argument is to reject premise (4). One approach contends that while the basic beliefs in question are indeed the most basic beliefs, they are not in fact the most basic cognitive *states* in question. These basic states, described often as “immediate apprehensions” or “direct awarenesses”, are said to be “given”. Indeed, it is these states, which do not require justification themselves and have the capacity to confer justification upon basic beliefs, that are involved with regards to the believer’s cognitive grasp of the premises required for justification.<sup>110</sup>

As B&C do not even consider the possibility of something like externalism, and also the limits of space, the discussion shall be confined to one counter argument against BonJour’s antifoundationalist argument. Geoffrey Sayre-McCord contends that ‘if a person’s holding of a belief is to count as justified, the belief must in fact be held because it is justified, but she needn’t have any beliefs to the effect that her belief is justified. What matters is that she believes as she does because of her evidence’.<sup>111</sup>

But we can agree with Sayre-McCord that ‘[w]hat matters is that she believes as does because of her evidence’;<sup>112</sup> her *moral beliefs* count as *both* the evidence, and the ‘reason why [the moral belief in question] is likely to be true’.<sup>113</sup> There is a consensus of independent

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<sup>109</sup> BJ, *SEK* (n1) 32.

<sup>110</sup> *ibid* 32-33. To see externalism’s responses to BonJour’s arguments, and the associated difficulties, see Laurence BonJour, ‘Can Empirical Knowledge Have a Foundation?’ (1978) 15 (1) American Philosophical Quarterly 1, 6-8 (hereafter *Foundation*), and also chapter 3 *SEK*. For BonJour’s arguments against ‘the given’ (BJ, *SEK* (n1) 58) see chapter 4 *SEK*. See also Feldman’s argument against BonJour’s contention in *Epistemology* (n69) at 76-77.

<sup>111</sup> Sayre-McCord, *Coherentist* (n1) 156. He continues by noting ‘[t]hus a person may have a set of well-justified beliefs even if she is unaware of herself as a believer—as long as her beliefs are, in fact, themselves appropriately sensitive to the evidence she has ... a system of justified beliefs needn’t have anywhere in it a belief to the effect that “My belief that \_\_\_ is \_\_\_”’ (*ibid*) (footnote omitted).

<sup>112</sup> *ibid*.

<sup>113</sup> BJ, *SEK* (n1) 26.

conviction with regards to moral beliefs, internal to the evaluative domain. The best way to understand the justification of moral beliefs is through the idea those beliefs and reasons function as the reasons for a belief's epistemic credibility (as the justification for believing a particular reason or feature is a truth indicator<sup>114</sup>), as those truth-indicators themselves (amongst with other conditions) and as a person's evidence, in a complex interpretive, coherentist interaction. This shall be shown more when discussing a response to the isolation problem below, and in the next chapter.

To conclude this section, the foregoing discussion has shown there are problems with the foundationalist account of justification, problems which apply to all versions of foundationalism.<sup>115</sup> The argument above was broadened to show how it was sufficiently general in tenor so as to pertain to moral beliefs as well. If this interpretation and rebuttal is correct, this argument seems to throw foundationalism as a structural account of justification into doubt. The key conclusion from the argument is 'there can be no basic...beliefs.'<sup>116</sup> Therefore, to answer the second question outlined earlier, whether B&C's common morality

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<sup>114</sup> Feldman, *Epistemology* (n69) 76.

<sup>115</sup> BJ, *SEK* (n1) 29.

<sup>116</sup> *ibid* 32. However, there may be another way to make use of a foundationalist moral theory, if B&C wish to do so. B&C may be able to make use of a 'moderate intuitionism' (Robert Audi 'Moderate Intuitionism and the Epistemology of Moral Judgement' (1998) 1 *Ethical Theory and Moral Practice* 15, 16 (hereafter *Intuitionism*)), as propounded by Robert Audi. B&C may be able to make use of this theory, as premise (4) of the basic antifoundationalist argument above states 'the only way to be in cognitive possession of such a reason is to believe *with justification* the premises from which it follows that the belief is likely to be true' (BJ, *SEK* (n1) 32). However, Audi notes 'the propositions expressing our general *prima facie* duties [those basic moral principles] are self-evident' (Audi, *Intuitionism* (n116) 16). Thus, while we may intuit them, the proposition being self-evident means that 'an adequate understanding of it is sufficient for being justified in believing it and for knowing it if one believes it on the basis of that understanding' (*ibid* 21). This therefore would seem to rebut premise (4) above. Audi also states that his intuitionism is 'a version intended to improve on the one proposed by W.D Ross (1930), in *The Right and the Good*' (*ibid* 15). B&C also note in the 5<sup>th</sup> edition of *PBE* that Ross has had 'more influence on the present authors than any twentieth-century writer' (B&C, *PBE* 5<sup>th</sup> edn (n3) 402). B&C further contend Ross's theory builds from foundations in the common morality and appeals to principles as the structural basis of his theory (B&C, *PBE* 5<sup>th</sup> edn (n3) 401-402). However, Audi's intuitionism faces some key objections. In particular, see Klemens Kappel, 'Challenges to Audi's Ethical Intuitionism' (2002) 5 *Ethical Theory and Moral Practice* 391 (hereafter *Challenges*). Indeed, the arguments Audi puts forward for thinking there are self-evident propositions seem to be better explained by that, with regards to moral matters, there is a consensus of independent conviction. This is because of the existence of '*theoretical disagreement* in moral theory' i.e., 'disagreement about the correct theoretical account of what we morally ought to do' (*ibid* 394). This idea neatly mirrors the idea of 'theoretical disagreement in law' (Dworkin, *Law's Empire* (n100) 5) as explicitly introduced in *Law's Empire* by Dworkin.

is able to make use of their version of moderate foundationalism, it is clear it cannot. Foundationalism (at least according to these arguments) is not an appropriate standard of epistemic justification. Thus, B&C's common morality theory cannot perform its foundational role.<sup>117</sup> Further, because B&C's common morality cannot fulfil the foundational role ascribed to it, this also impacts upon the common morality's first and third roles, as set out earlier; the common morality forming a basis for B&C's theory and the joining together of the foundationalist common morality together with reflective equilibrium.

But this argument has only shown what structural standard B&C's common morality *cannot* use/take. The second question/claim highlighted earlier goes on to state B&C's combination of foundationalist common morality and coherentism is unnecessary and B&C should adopt a pure coherence approach to justification. Therefore, a more positive case must be made for coherentism as the appropriate standard B&C's common morality theory should adopt. Whilst this involves a degree of reinterpretation of B&C's theory, this reinterpretation provides the best structure for B&C's common morality theory. This positive case shall be made by responding to B&C's version of the isolation problem. It shall be shown that, with regards to moral beliefs, the isolation problem for coherentism is no problem at all.

## **5. Coherentism and the isolation problem**

It is important to respond to B&C's version of the isolation problem because if this problem is not solved, it could mean something like foundationalism *has* to be accepted (as B&C do), *despite* the problems noted above.<sup>118</sup> Again, whilst B&C devote very little space to this

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<sup>117</sup> To see why it is doubtful in its original formulation B&C's common morality cannot perform the other element of the second essential claim, its justificatory (or normative critical) role, see footnote 66.

<sup>118</sup> B&C do also present another problem that leads them to reject a pure coherence account. B&C contend '[w]e cannot justify every moral judgment in terms of another moral judgement without generating an infinite regress or vicious circle of justification in which no judgement is justified. The way to escape this regress is to accept some judgements as justified without dependence on other judgments. Such claims are commonly associated with foundationalist moral theories' (B&C, *PBE* 7<sup>th</sup> edn (n3) 407-408). This is known as the 'epistemic regress problem' (BJ, *SEK* (n1) 17). See alternative formulations in, for example, Walter Sinnott-Armstrong, 'Moral

problem, nonetheless, the argument is powerful enough to persuade them to accept ‘reflective equilibrium as [a] primary methodology and to join it with [the] common-morality approach to considered judgements’.<sup>119</sup>

Initially, B&C note ‘[a]lthough justification is a matter of reflective equilibrium in [the model they accept], bare coherence never provides a sufficient basis for justification, because the body of substantive judgements and principles that cohere could themselves be morally unsatisfactory’.<sup>120</sup> However, the isolation problem can be turned into a stronger form. Whilst B&C note simply ‘*bare* coherence never provides a sufficient basis for justification’,<sup>121</sup> why consider the idea of foundationalism at all if all B&C are looking at is bare coherence? A stronger argument would go along the lines of how BonJour puts it. He states ‘such a view seems to deprive...knowledge of any *input* or contact with the nonconceptual world, making it extremely unlikely that it will accurately describe that world’,<sup>122</sup> *regardless* of the degree of

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Skepticism and Justification’ in Walter Sinnott-Armstrong and Mark Timmons (eds) *Moral Knowledge? New Readings in Moral Epistemology* (OUP 1996) at 9-14; BJ, SEK (n1) 17-25; Feldman, *Epistemology* (n69) 49-52; Audi, *Structure* (n18) 118-130 (who distinguishes ‘between two forms of the regress problem: a *structural* form and a *dialectical* one’ (*Audi Structure* (n18) 11 (emphasis in original))). It is widely recognised coherentism is able to mount a plausible response to this if the coherentist, instead of accepting the assumption within the regress argument that the reasons for a belief must constitute a chain (Haack, *Evidence* (n67) 23), adopts ‘a holistic and nonlinear conception of justification’ (BJ, SEK (n1) 25). See, for example, BJ, SEK (n1) 24; Haack, *Evidence* (n67) 23; Audi *Structure* (n18) at 137-138; Sayre-McCord, *Coherentist* (n1) at 153-161. Thus, the move is as follows: ‘[a]ccording to a holistic view, it is such a *system* of beliefs which is the primary unit of justification; particular beliefs are justified only derivatively, by virtue of membership in such a system. There is no relationship of epistemic priority ... but instead a *reciprocal* dependence within the system. In this way, such views attempt to avoid the epistemic regress problem entirely’ (BJ, SEK (n1) 24). See, alternatively another argument that can build upon the coherentist reply just discussed. This is presented by Sayre-McCord in *Coherentist* (n1) at 160-161.

<sup>119</sup> B&C, *PBE* 7<sup>th</sup> (n3) 408.

<sup>120</sup> ibid 407. B&C illustrate this with reference to ‘the “Pirates” Creed of Ethics or Custom of the Brothers of the Coast’. Formed as a contract between marauders circa 1640, this creed is a coherent set of rules governing mutual assistance in emergencies, penalties for prohibited acts, the distribution of spoils, modes of communication, compensation for injury and “courts of honour” that resolve disputes. ... This body of substantive rules and principles, although coherent, is a moral outrage’ (ibid) (footnote omitted).

<sup>121</sup> ibid (emphasis added). Indeed, this argument, by itself, has been taken as another point of contention by B&C’s critics. See Rauprich, *Comment* (n3) 66; Arras, *Borg* (n9) 19.

<sup>122</sup> BJ, SEK (n1) 25 (emphasis in original).

coherence. Whilst BonJour discusses this in relation to empirical beliefs, the problem needs to be looked at in relation to moral beliefs.<sup>123</sup>

### **5.1. Moral beliefs and the isolation problem**

First, as the common morality's norms cannot play a foundational role, and as B&C raise the isolation problem, B&C only have (seemingly) two other options available to them. B&C can either seek to embrace *non-moral* basic beliefs or, alternatively, B&C can accept a pure coherentist account with regards to moral beliefs. Either way, B&C must give up the foundational role of the common morality as they describe it. It shall now be argued that B&C should embrace a fully-fledged moral coherentist approach. They should not embrace non-moral basic beliefs.

The reason is found in preliminary form in Sayre-McCord's discussion of the problem. Sayre-McCord argues, 'whether being appropriately sensitive to the facts involves our views being sensitive to our experiences depends in large part on whether our beliefs concern matters that we believe to be discoverable through experience. When it comes to morals...the relevance of experience is at least questionable'.<sup>124</sup>

In order for moral coherentism to deal with the isolation problem there is a key premise that must be rebutted. That premise is as follows: in order to defuse the isolation problem as regards *moral beliefs*, we *must* allow a role for *empirical* experience in the way it is contended we need to defuse the problem as it relates to empirical beliefs. We *must* allow a role for noninferential, non-moral basic beliefs. But the validity of this premise depends upon the correct conception of objectivity we take towards moral beliefs. If moral truth is a matter

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<sup>123</sup> See BonJour's further discussion as it applies to empirical beliefs, and his attempted solution to the problem in *SEK* (n1) chapter 6, and 139-143. See also Laurence BonJour, 'The Coherence Theory of Empirical Knowledge' (1976) 30 (5) *Philosophical Studies* 281, at 289-295 (hereafter BJ, *CTEK*). However, see Haack's criticism of BonJour's attempt to deal with this problem in *SEK*, in *Evidence* (n67) 57-60.

<sup>124</sup> Sayre-McCord, *Coherentist* (n1) 175-176.

of moral argument,<sup>125</sup> then we do not *need* to allow a role for *empirical* experience in the way the premise contends; we can achieve moral truth *solely* through the use of moral argument. Therefore, if the foregoing is true, in relation to moral coherentism, the isolation problem actually presents no problem at all. Empirical experience is not necessary or required in the (admittedly vague here) pertinent sense for moral justification or moral truth. We need to defend this conception of objectivity of morality in two ways and against two arguments. The first defence is it needs to be shown in relying on this conception of moral objectivity, we still *are* able to make sense of better and worse ways of reasoning, in the sense that we can determine (in particular, in relation to moral values) which arguments are by their nature and content, objective.<sup>126</sup> The second defence is even if moral properties have no causal effects in our perception and formation of moral convictions, we can still have sound reasons for thinking moral properties and values objectively true.<sup>127</sup>

In order to decide which option is more appropriate to B&C, the discussion will look first at the ‘domain specificity of objectivity’<sup>128</sup> regarding morality (moral objectivity being purely a matter of moral argument<sup>129</sup>). The first argument at its most basic is as follows: we cannot really understand a discourse as actually being “objective” without relying on a sense of objectivity based on the natural sciences. One implication of this in relation to the isolation problem and moral coherentism is we *must* allow a role for empirical experience outside of our coherentist considerations, otherwise we can never be really sure we have reached an

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<sup>125</sup> Dworkin, *JFH* (n30) 9.

<sup>126</sup> Brian Leiter ‘Objectivity, Morality and Adjudication’ in Brian Leiter (ed) *Objectivity in Law and Morals* (CUP 2001) 85 (hereafter *Adjudication*).

<sup>127</sup> Kramer, *Realism* (n21) 190; 207; Dworkin, *JFH* (n30) 70.

<sup>128</sup> Brian Leiter, ‘Introduction’ in Brian Leiter (ed) *Objectivity in Law and Morals* (CUP 2001) 6 (hereafter *Introduction*).

<sup>129</sup> Dworkin, *JFH* (n30) 9.

objective truth or determination of a particular moral argument, at least when compared to other domains of discourse.<sup>130</sup>

One variant of this argument shall be considered, one which focuses on Dworkin's writings. It is important this is considered, as there would be little point integrating B&C's theory with Dworkin's theory of law and morality if Dworkin's reasoning was unsound. In addition, if this argument can be overcome, this is useful to the larger discussion in numerous ways. First, it will affirm reliance in previous parts of the chapter on the idea that arguments about moral truth are matters of moral judgment only.<sup>131</sup> Second, as will be seen later on, moral beliefs are causally inefficacious. Nonetheless, if we are able to show the domain specificity of objectivity holds, the objectivity of morality can be affirmed *regardless* of this quality. Last, the discussion will also show why a 'Naturalistic...Conception of Objectivity'<sup>132</sup> (a conception of objectivity based on the natural sciences) should not be relied on in relation to moral beliefs. These arguments all go towards defusing the isolation problem as it applies to coherentism and moral beliefs. Coupled with the arguments against foundationalism it is still able to be maintained the best interpretation of B&C's position regarding their common morality theory is a coherentist one.

## **5.2. Brian Leiter's challenge—The “Chocolate Convention”**

The argument comes from Brian Leiter. Leiter begins by stating 'I want to review what Dworkin has said about objectivity and why it has seemed to many philosophers to be wrongheaded'.<sup>133</sup> Leiter thinks what Dworkin is *really* getting at when distinguishing between internal arguments *of* or *within* morality and external arguments *about* morality

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<sup>130</sup> Leiter, *Adjudication* (n126) 67; 85. The alternative conclusion is if we rely on a sense of objectivity based on the natural sciences, because moral properties have no causal effects, people do not have 'sound reason to think that any of their moral judgements is a correct report of moral truth' (Dworkin, *JFH* (n30) 70). This is the second argument that shall be considered fully in the succeeding section.

<sup>131</sup> Dworkin, *JFH* (n30) 9.

<sup>132</sup> Leiter, *Adjudication* (n126) 67.

<sup>133</sup> *ibid.*

(when he distinguishes between internal and external scepticism<sup>134</sup>) is ‘really best understood as the difference between a Naturalistic versus a Non-Naturalistic Conception of Objectivity’.<sup>135</sup> The former claims ‘objectivity in any domain must be understood on the model of the natural sciences, whose objects of study are objective in the sense of being “mind independent” and causally efficacious (i.e., in making a causal difference to the course of experience)’,<sup>136</sup> whereas the latter ‘denies that the type of objectivity found in natural science is the relevant type of objectivity to aspire to in all domains’.<sup>137</sup> Last, Leiter asserts that he ‘will argue that the Non-Naturalistic Conception (at least the...Dworkin version) is not an adequate account of objectivity’.<sup>138</sup>

The most important argument Leiter analyses for our purposes is Dworkin’s contention external arguments *about* morality (those purporting to rely on no moral claims at all and thus stand outside of morality<sup>139</sup>) ‘make either preposterous [unintelligible] or question-begging demands on moral discourse’.<sup>140</sup> The demands are ‘preposterous because [they] would commit us to what Dworkin calls “the absurd moral field thesis”’<sup>141</sup>. The “moral field thesis” is as follows:

the universe houses, among its numerous particles of energy and matter, some special particles—morons—whose energy and momentum establish fields that at once

<sup>134</sup> For clarity, at their most basic, internal and external scepticism can be taken as follows: ‘[e]xternal scepticism is a metaphysical theory, not an interpretive or moral position. The external sceptic does not challenge any particular moral or interpretive claim ... His theory is rather a second level theory about the philosophical standing or classification of those claims ... His scepticism is external because disengaged: it claims to leave the actual conduct of interpretation [or morality] untouched by its conclusions’ (Dworkin, *Law’s Empire* (n100) 79-80). In contrast, ‘[t]he internal sceptic addresses the substance of the claims he challenges ... Internal scepticism, that is, relies on the soundness of a general interpretive [or moral attitude]’ (*ibid* 78). It is sceptical though, because it ‘denies some group of familiar positive claims and justifies that denial by endorsing a different positive moral claim—perhaps a more general or counterfactual or theoretical one’ (Dworkin, *OT* (n102) 90).

<sup>135</sup> Leiter, *Adjudication* (n126) 67.

<sup>136</sup> *ibid* (footnote omitted).

<sup>137</sup> *ibid*.

<sup>138</sup> *ibid* 67-68.

<sup>139</sup> Dworkin, *Law’s Empire* (n100) 78.

<sup>140</sup> Leiter, *Adjudication* (n100) 73. See also Leiter’s other arguments against Dworkin, in *Adjudication* (n100) at 70-75 (though these are also questionable).

<sup>141</sup> *ibid* 75.

constitute the morality or immorality, or virtue or vice, of particular human acts and institutions and also interact in some way with human nervous systems so as to make people aware of the morality or immorality or of the virtue or vice.<sup>142</sup>

From this, Leiter asks whether Dworkin is entitled to dismiss the externalist demand for conformity with a scientific epistemology on the grounds it supposes the moral-field thesis.<sup>143</sup> Leiter states ‘it seems he is not. If the demand that moral properties find a place within a scientific epistemology leads to the “absurd” moral-field thesis, the sceptic might well conclude that this just shows there can be no moral facts’.<sup>144</sup> The key point for discussion is ‘[w]hat Dworkin really needs is an argument against the sceptical demand that moral facts be made to fit the requirements of a scientific epistemology. This, in a nutshell, is the *crucial* issue for Dworkin’s whole position’.<sup>145</sup>

Leiter notes ‘perhaps there are the beginnings of such an argument in the writings under consideration. Consider, for example, one of the ways Dworkin frames his repudiation of the “best explanation” test of a scientific epistemology’.<sup>146</sup> Dworkin’s claim is:

Since morality and the other evaluative domains make no causal claims...such [scientific] tests can play no role in any plausible test for them. We do need tests for the reliability of our moral opinions, but these must be appropriate to the content of

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<sup>142</sup> Dworkin, *OT* (n102) 104.

<sup>143</sup> Leiter, *Adjudication* (n126) 76.

<sup>144</sup> *ibid.*

<sup>145</sup> *ibid* (emphasis in original).

<sup>146</sup> *ibid* 78. That test is as follows. Because ‘science has, as an a posteriori matter, “delivered the goods” by sending planes into the sky and eradicating diseases (for example) (*ibid* 71), the best way to explain why we hold most of our opinions about the world is because the way the world is causes us to hold those opinions we do about the way it is. We can verify and justify this causal explanation of a belief by using the traditional methods of science. This has the further consequence that the best explanation of why we hold our opinions also acts to validate and act as a justification of those beliefs. The truth of those opinions also plays an explanatory role (Dworkin, *OT* (n102) 119; Dworkin, *JFH* (n30) 69; 77). In short, because of the preceding, it is claimed that science is the highest tribunal to settle matters of truth (Leiter, *Adjudication* (n126) 71). A scientific epistemology ‘says—in part, and quite roughly—that: (a) only that which makes a causal difference to experience can be known; and (b) only that which makes a causal difference to experience is real’ (Leiter, *Adjudication* (n126) 75).

these opinions. That is why an epistemological challenge that comes to nothing more than insisting that moral properties are not physical properties must fail.<sup>147</sup>

Leiter takes Dworkin to endorse the idea that ‘[t]he epistemology of any domain must be sufficiently internal to its content to provide reasons, viewed from the perspective of those who begin holding convictions within it, for testing, modifying or abandoning those convictions’.<sup>148</sup> Leiter further interprets Dworkin as claiming this ‘covers those domains which don’t make causal claims; for these domains we need a Non-Naturalistic criterion of objectivity’.<sup>149</sup> Finally, Leiter tries to get at what Dworkin is really thinking in the following passage:

So you, Mr Sceptic, have shown that moral properties do not figure in our best explanatory picture of the world, that they do not deserve a place in a suitable scientific ontology—that is all well and good, but it is hardly of much concern to me. For even though “moral wrongness” is not a property that slavery possesses objectively (in your Naturalistic sense of that term) it is still the case that my arguments for the wrongness of slavery are strong and persuasive ones and that you have given me no argument to cease believing that slavery is wrong. Who cares (as it were) about the ontological status of moral facts: what I want to know is whether you have a good (i.e., internal) argument that slavery is not wrong?<sup>150</sup>

But, ‘[i]f this is what Dworkin’s view comes to, then it is important to recognise that his real position is not that external scepticism is unintelligible, but that it is irrelevant...The only objectivity that “counts”, as it were, resides in the potentialities of this moral argument’.<sup>151</sup>

The important issue at this point is Leiter’s contention that if Dworkin is a Non-Naturalist

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<sup>147</sup> Dworkin, *OT* (n102) 120.

<sup>148</sup> Leiter, *Adjudication* (n126) 83.

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid* 84.

<sup>151</sup> *ibid.*

about objectivity, he believes that Dworkin does not have a substantial argument against the Naturalist conception of objectivity, ‘against the sceptical demand that moral facts be made to fit the requirements of a scientific epistemology’<sup>152</sup>, except the irrelevance argument above. Leiter believes this argument does not suffice to defeat the external sceptic. He shows this by introducing his two main arguments against Non-Naturalism as a conception of objectivity. The most important for discussion is we will often be unable to make sense of better and worse ways of reasoning, and get no purchase on the idea of a discourse being “objective”, unless we implicitly rely on the Naturalistic sense of objectivity.<sup>153</sup>

Leiter asks us to imagine a practice arises involving making arguments about the merits of either chocolate or vanilla ice cream. He also asks us to imagine a hegemonic consensus (or convention) arises, in which everyone comes to find the reasons for chocolate ice cream being the better flavour more persuasive. The convention always supports the conclusion chocolate is the better flavour. This is known as the “Chocolate Convention”. Leiter believes ‘[a]ccording to Non-Naturalism we should have to say that it is an *objective* fact that chocolate is better than vanilla’,<sup>154</sup> precisely because everyone comes to find the reasons for chocolate more persuasive. But this conclusion strikes Leiter as odd, as intuitively, the taste of ice cream flavours is best understood as a subjective matter. However, the important thing for Leiter is he believes ‘we can only articulate this intuition by appeal to an *external* conception of objectivity, by appeal to the notion that any particular discourse...must ultimately answer to the facts, Naturalistically conceived’.<sup>155</sup> But, ‘[t]he Chocolate Convention simply can’t do that, since there are not objective facts about the “tastiness” of ice cream flavours to answer to’.<sup>156</sup> Leiter goes on to make the more general point that

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<sup>152</sup> ibid 76.

<sup>153</sup> ibid 85.

<sup>154</sup> ibid 86.

<sup>155</sup> ibid.

<sup>156</sup> ibid 86.

‘Naturalistic Objectivity is relevant to assessing the objectivity of most domains of discourse precisely because it is always *possible* for hegemonic conventions of argumentation...to grow up around nonfactual matters’.<sup>157</sup>

Whilst Dworkin has considered something very similar to this example already,<sup>158</sup> Leiter, however, would not seem happy with this response. He continues by noting ‘[t]he Non-Naturalist, however, has no resources for responding to this possibility, no way to say that a hegemonic convention of reasons is, in fact not, objective. Yet it seems quite implausible that objectivity should accrue to judgements solely in virtue of the fact that they are not *successfully challenged*; ‘[h]ow do we know that our “moral reasoning” is, itself, not a hegemonic convention like the Chocolate Convention? Isn’t that precisely what is at issue here?’ Leiter concludes by noting that he does not see a way the Non-Naturalist can answer this without begging the question.<sup>159</sup>

Nonetheless, there is a way out for Dworkin. Leiter’s claim is (in essence) that we must appeal to something *outside* the particular discourse, what might be called an ‘independent layer’,<sup>160</sup> or we risk a vicious circularity in trying to separate out cases of *mere* hegemony of subjective properties, and cases of actual objective properties.<sup>161</sup> But if this is the case, then this is a problem which has elements of the isolation problem built into it. Thus, one is able to respond in kind. Indeed, Dworkin has dealt with a similar problem when discussing Stanley Fish’s arguments. Put succinctly, ‘Fish raises the important question of whether Dworkin can continue to draw the distinction between “fit” and “substance”, once he admits that whether a matter is one of “fit” is itself an interpretive matter, so subject to similar, if not identical,

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<sup>157</sup> *ibid* 86-87.

<sup>158</sup> See *Law’s Empire* (n100) 81; 426, footnote 26

<sup>159</sup> Leiter, *Adjudication* (n126) 87 (emphasis in original).

<sup>160</sup> Arras, *Borg* (n9) 19.

<sup>161</sup> Leiter, *Adjudication* (n126) 86-87 (emphasis in original).

vagaries as to questions of substance. Both fit and substance are interpretive questions. So is there a distinction worth saving here?<sup>162</sup>

As Guest notes '[t]he answer is yes. Our judgements about interpretive matters such as literature and law, are complex, containing many elements of constraint. Overall judgments we make are the result of various sorts of judgments, some of which are independent judgments acting as a constraint on others'.<sup>163</sup> As Dworkin notes himself, '[i]t is a familiar part of our cognitive experience that some of our beliefs and convictions operate as checks in deciding how far we can or should accept or give effect to others, and the check is effective even when the constraining beliefs and attitudes are controversial'.<sup>164</sup> Just as coherentism (as seen in chapter three) adopts a 'holistic and nonlinear conception of justification',<sup>165</sup> whereby 'it is such a *system* of beliefs which is the primary unit of justification'<sup>166</sup> and there is 'no linear order of epistemic dependence',<sup>167</sup> such an approach can be adopted here.

Thus, the reason it *would be* hard to imagine a "Chocolate Convention" is not because access is needed to some '*external* conception of objectivity',<sup>168</sup> but because using this complex coherentist interaction, we are able to appeal to aesthetic claims *within the discourse*, regarding 'the character of a genuine aesthetic experience'.<sup>169</sup> If there is scepticism over whether ice cream can have objective aesthetic value, this scepticism is better explained as an internal scepticism, and therefore presupposes the truth of some positive aesthetic claim.<sup>170</sup> However, this is not a problem, as the aesthetic debate here is able to take on an inclusive and holistic character.

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<sup>162</sup> Guest, *Ronald Dworkin (Jurists: Profiles in Legal Theory)* (2<sup>nd</sup> edn, Edinburgh University Press 1997) 41.

<sup>163</sup> *ibid.*

<sup>164</sup> Dworkin, *Law's Empire* (n100) 235.

<sup>165</sup> BJ, *SEK* (n1) 24.

<sup>166</sup> *ibid* (emphasis in original).

<sup>167</sup> *ibid* (emphasis in original).

<sup>168</sup> Leiter, *Adjudication* (n126) 86 (emphasis in original).

<sup>169</sup> Dworkin, *Law's Empire* (n100) 426, footnote 26.

<sup>170</sup> Dworkin, *OT* (n102) 89.

Moreover, the “Chocolate Convention” example is misleading. It is misleading in that there are a number of features of morality that show Dworkin’s conception of objectivity is correct. First, morality has a *social character*; ‘morality...is the study of how we must treat other people’.<sup>171</sup> It would therefore be amenable to link Dworkin’s claims regarding interpretation, and the richness his theory of constructive interpretation possesses, into the debates concerning morality. The next chapter shall do this. To be sure, the way Leiter describes the “Chocolate Convention” shows it has a social character too.<sup>172</sup> But (predicated on the basis arguments about aesthetic styles and morality can be interpretive) we are able to show, even if we can imagine the “Chocolate Convention” arising, this agreement is better explained as one of *mere* hegemony, precisely because we have the resources in deploying interpretive arguments to show how debates concerning the various merits of ice cream flavours are not debates of objective (aesthetic) value, in the way that debates over (for example) justice are debates about the best way to express the value that people in social practices who share the concept of justice take that concept to describe.<sup>173</sup> Indeed, it seems that what Leiter really needs is an example of a concept (moral, political or otherwise) social practice, aesthetic experience, text, poem, painting etc., whereby such agreement or disagreement is best explained through sharing a single interpretive concept, but turns out to be a case of mere hegemony. But, even if such an example could be thought up, it *still* seems odd to say we would not have the resources to show this is the case in the first place.

Further dissimilarities are apparent. Regarding morality, it makes sense that we must consider each possibility of a moral issue as fully as we can and note its implications for the rest of

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<sup>171</sup> Dworkin, *JFH* (n30) 13.

<sup>172</sup> Leiter describes the “Chocolate Convention” in the following manner: “[w]hat distinguishes chocolate is the richness and seriousness of the flavour, in comparison to the fleetingness of the sensation of vanilla. Chocolate grips the palate, it takes over the mouth, it washes away all the prior flavours. It is a total and encompassing taste experience, unlike vanilla. The creaminess of chocolate—that quintessential trait of great ice cream—is so unlike the creaminess of vanilla, which is hard to distinguish from mere milkeness. Chocolate ice cream is just substantial, in a way that vanilla could never be” (Leiter, *Adjudication* (n126) 86).

<sup>173</sup> Dworkin, *Law’s Empire* (n100) 426, footnote 26; Dworkin, *JFH* (n30) 6; 160-161.

what we think and believe.<sup>174</sup> We must take a position of moral responsibility.<sup>175</sup> It does not make sense to say the same things about the flavours of ice cream. This position of moral responsibility has two implications. It means first, *pace* Leiter, if disagreements about morality do arise, they are genuine, and not merely illusory,<sup>176</sup> in the holistic and inclusive sense described above. Further, when discussing particular moral propositions and doctrines, ‘the main focus here is on the *moral* shortcomings of those doctrines’.<sup>177</sup> Thus, we can *only* get purchase on the idea of moral discourse being objective when we are internal in this way. The very content of the beliefs we are dealing with, coupled with the moral and interpretive resources at our disposal, allows us to show the disanalogies between the “Chocolate Convention” and morality, so we can say the discourse about morality is objective, and the “Chocolate Convention” is a case of mere hegemony. Morality, unlike the “Chocolate Convention”, has a substantial, meaningful impact upon our lives.

Thus, to conclude, it has been shown that in relying on the way coherentism functions, on the understanding of interpretive concepts, and on this conception of moral objectivity being a matter of moral argument, sense is still able to be made of particular discourses being objective and others being cases of mere hegemony, without recourse to a ‘Naturalistic...Conception of Objectivity’.<sup>178</sup> So, regarding moral beliefs and coherence, we do not *need* to allow a role for empirical experience in the way the isolation problem contends. All we have and need for thinking our moral reasons sound are further moral reasons.<sup>179</sup> This goes towards showing the best interpretation of B&C’s writings is in line with a moral coherentist position.

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<sup>174</sup> Dworkin, *OT* (n102) 118.

<sup>175</sup> Kramer, *Realism* (n21) 46.

<sup>176</sup> Dworkin, *JFH* (n30) 6.

<sup>177</sup> Kramer, *Realism* (n21) 40.

<sup>178</sup> Leiter, *Adjudication* (n126) 67.

<sup>179</sup> Dworkin, *OT* (n102) 118.

But, in order to fully rebut the key premise in the isolation problem and show this conception of moral objectivity is the correct conception to take, a second argument needs to be explored. This argument takes as its starting point something Leiter, Dworkin (and importantly for what follows, Kramer) all agree on. All agree moral properties and values are causally inefficacious, in that moral facts have no causal effects in people forming convictions matching those moral facts.<sup>180</sup> But, Leiter takes this argument to show that because moral facts have no causal effects ‘people...have no sound reason to think that any of their moral judgments is a correct report of moral truth’.<sup>181</sup> This is a sceptical implication of Leiter’s holding of the idea ‘objectivity in any domain must be understood on the model of the natural sciences’.<sup>182</sup> This argument links into the isolation problem regarding moral beliefs in a more indirect way; it argues against the conception of objectivity that enables us to argue we do not need to allow a role for empirical experience the way the isolation problem contends. What therefore needs to be shown is even if moral facts have no causal effects in our perception and forming of moral convictions, we can still have good reasons for thinking moral judgments objectively true.

### **5.3. Moral properties—causally inefficacious?**

This section will briefly show how moral properties are causally inefficacious. ‘Quite a few philosophers...have posed queries about the existence or knowability of moral properties, by pointing out that such properties do not play any causal role in our perceptions of them’.<sup>183</sup> The discussion shall make use of two examples Kramer and Dworkin give, for consistency.

Kramer begins by inviting us to ‘ponder a straightforward moral matter such as the moral impermissibility of an act of torturing a baby for pleasure. Any competent moral agent will

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<sup>180</sup> Dworkin, *JFH* (n30) 70.

<sup>181</sup> *ibid.*

<sup>182</sup> Leiter, *Adjudication* (n126) 67.

<sup>183</sup> Kramer, *Realism* (n21) 190 (footnote omitted).

recognise that such an act is morally impermissible'.<sup>184</sup> Most importantly here, Kramer notes 'any causal explanation entails counterfactuals that have to be intelligible if the explanation is to be satisfactory...However...things are not...unproblematic when we turn to the scenario of the moral agent and the torturing of a baby for pleasure'.<sup>185</sup> What should be asked is 'whether, if the occurrent act of torturing a baby for pleasure had not been wrong, the competent moral agent would still have arrived at the judgment, that that act was morally impermissible'. But 'in two respects, this counterfactual is deeply problematic'.<sup>186</sup> It is problematic because 'insofar as it can be answered, the correct reply to it is affirmative...Consequently, under any of the principal tests for causal efficacy, the moral property of wrongness would not be a cause of the agent's censorious response to the torture; his response is the same irrespective of the presence or absence of that property'.<sup>187</sup> Just as important is 'the counterfactual question is largely unintelligible because...[n]obody competently engaging in moral reflection can conceive of a world in which some act of torturing a baby for pleasure is morally permissible'. Therefore, 'the sheer inconceivability of the antecedent deprives the conditional of informativeness as a guide to causal efficacy'.<sup>188</sup>

Kramer then provides a more knotty example of affirmative action. He notes '[i]n one respect the situation of significant moral disagreement surrounding affirmative-action programs is less disquieting than a situation involving an utterly straightforward moral matter'.<sup>189</sup> This is because

any enquiry into the causal efficacy of the moral status of affirmative action does not generate any counterfactuals with inconceivable antecedents. The moral permissibility

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<sup>184</sup> ibid. Likewise to Kramer, Dworkin begins his analysis by looking at the example of 'someone beating a child' (Dworkin, *JFH* (n30) 72 (footnotes omitted)).

<sup>185</sup> Kramer, *Realism* (n21) 192.

<sup>186</sup> ibid.

<sup>187</sup> ibid 193.

<sup>188</sup> Ibid.

<sup>189</sup> ibid 195.

of affirmative action programs in particular contexts is plainly conceivable, because some reasonable people under optimal conditions for moral reflection do or would believe that such programs in those contexts are morally permissible. Much the same can be said, *mutatis mutandis*, about the moral *impermissibility* of such programs in those contexts.<sup>190</sup>

Thus, due to the complexity of the moral problem at hand, Kramer, believes ‘the pertinent counterfactual question generated by the application of a causal criterion to the moral properties of affirmative action is fully intelligible’.<sup>191</sup>

However, that the situation of affirmative action generates even an intelligible counterfactual question to test the causal efficacy of the truth of the matter (affirmative action’s fairness or unfairness) can be questioned.

First, it is important to point out that in knotty moral situations and straightforward moral scenarios, the property of (for example) fairness *supervenes* upon the ordinary, natural facts of the scenario. This relationship has two important implications. First, in both complex and simple moral situations, ‘we cannot vary moral attributes without varying the ordinary acts that make up the case for claiming those attributes’.<sup>192</sup> Second, this means the laws of nature do not govern the property of fairness, as is the case with those natural properties fairness supervenes upon.<sup>193</sup> Both in simple and complex moral scenarios, ‘moral truth has neither [a] mental nor physical dimension’;<sup>194</sup> ‘[u]nlike a proton, it is not a material entity or force’.<sup>195</sup>

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<sup>190</sup> ibid (emphasis in original).

<sup>191</sup> ibid.

<sup>192</sup> Dworkin, *JFH* (n30) 73. For Kramer’s discussion of how the relationship of supervenience between ethical and empirical features of any world is ethical in nature, see “Supervenience as an Ethical Phenomenon” in *Realism* (n21) 304-364.

<sup>193</sup> Kramer, *Realism* (n21) 192.

<sup>194</sup> Dworkin, *JFH* (n30) 73. This relationship also depends on the premise that ‘ethical properties are not reducible to empirical properties’ (Kramer, *Realism* (n21) 192). Whilst space precludes a detailed discussion, see Kramer, *Realism* (n21) 201-212, and Dworkin, *OT* (n102) 99-105.

<sup>195</sup> Kramer, *Realism* (n21) 192.

The characteristics of moral truth do not change because the moral scenario becomes more complex.

But, considering all of the foregoing, the idea that ‘[a]lthough the antecedent in that conditional question is false as a matter of moral necessity, it specifies a normative state of affairs that does not outlandishly elude all comprehension’,<sup>196</sup> can be further unpacked to show the counterfactual *is* unintelligible in the pertinent sense. This idea of the counterfactual being “intelligible” or not “eluding all comprehension” can be taken in two senses. To see this, as the pertinent issues surround moral truth, consider a situation where one person believes affirmative action is unfair, whereas another person considers it completely fair. In this scenario it is correct to say each person *cannot comprehend* the other’s belief is caused by the truth. If they could, what else could their own view depend upon to make it (even more?) true?<sup>197</sup> To be consistent in describing the relationship of supervenience between moral and natural properties across all moral problems, it is correct to state it is *unintelligible* that the same set of facts can give rise to two equally true circumstances. Just as is the case with torturing a baby for pleasure ‘the antecedent in that question is false as a matter of moral necessity’.<sup>198</sup> This is the pertinent sense which Dworkin is using when he states ‘[w]e can’t sensibly ask whether you would still think affirmative action unfair even if it wasn’t unfair, and it is [this] question we would need to ask to test [the] claim that the unfairness of affirmative action has made you think it unfair’.<sup>199</sup> In this sense Dworkin and Kramer are therefore agreeing.

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<sup>196</sup> ibid 196.

<sup>197</sup> Dworkin, *JFH* (n30) 74.

<sup>198</sup> Kramer, *Realism* (n21) 196.

<sup>199</sup> Dworkin, *JFH* (n30) 73. That is, ‘if we think affirmative action is unfair, we cannot produce or imagine a different world in which everything else is the same except affirmative action is fair’ (*ibid*). Note how ‘[w]e can certainly ask whether you would still think affirmative action unfair even if you discovered that it made no one unhappy. But a negative answer would only confirm that you hold some moral opinion that connects wrongness and suffering’ (*ibid*).

However, Kramer then takes things further, asserting the state of affairs regarding affirmative action in the counterfactual is imaginable, and because of this, the counterfactual *as a whole* is intelligible. Such a state of affairs is imaginable because of ‘the complexity and fine balance of the considerations involved’,<sup>200</sup> and ‘is [also] due to far-reaching differences among people concerning the identification and application of several major moral values’.<sup>201</sup> But, the idea of a normative state affairs being imaginable and the antecedent regarding moral truth being *unintelligible* can be separated out. Indeed, Kramer’s discussion lends support to this division. In such a *particular* context, as Kramer and Dworkin ascribe to the thesis that moral objectivity is matter of moral argument, the decision one person will reach regarding the fairness of affirmative action will be *through* the complex arguments and fine balancing of many moral values, as Kramer highlights. But, at this point, in order for a person’s view about the moral status of affirmative action to change, something nonmoral would have to change as well. This is not to disrespect the views of others, nor to claim that one’s view is not defeasible. Indeed, because several major moral values are applied and considered when deliberating about the fairness of affirmative action, it would be entirely *consistent* for one person to say, “I can imagine how affirmative action may be unfair in other particular contexts. But, in this particular scenario, as I have acted in the morally most responsible manner I can, I cannot comprehend a situation in which the moral status of affirmative action may be otherwise than what I believe it to be, all other nonmoral facts being equal”. Indeed, this is precisely why affirmative action, *as a whole*, is a more knotty moral problem; because of the consideration and application of many major moral values that may lead to right answers in other particular contexts. But it is consistent for a person to both be unable to fathom the antecedent in the counterfactual, and come to a morally responsible decision

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<sup>200</sup> Kramer, *Realism* (n21) 195.

<sup>201</sup> *ibid.*

regarding this *particular* context, *and* imagine *other* states of affairs in which the moral status of affirmative action may be the opposite to what she has concluded.<sup>202</sup>

Nonetheless, it may be contended Kramer is talking about *the same particular* state of affairs being imaginable in the counterfactual. But to see why this cannot be the case, consider further (for example) the person who states the above believes affirmative action to remedy past discrimination. It might then be the case another person queries her stance. The most natural form this query would take would be something like: “But what if it turns out affirmative action does not remedy past discrimination? How would you view the status of affirmative action if such a matter was proved (empirically)?” Even if the reply to this question were her view would change subsequently, this would not be an argument *against* the antecedent regarding the moral status of affirmative action being unintelligible; it simply would be an implication of the relationship of supervenience described earlier. It would not describe *precisely* the same state of affairs; a particularly important nonmoral fact has changed. Finally, it is in this sense that one’s view about the fairness of affirmative action would be defeasible. Because the moral status of affirmative action is more contestable than torturing a baby for pleasure, the counterfactual may initially appear more intelligible. In fact, in the pertinent sense surrounding moral status and moral truth, in situations of moral complexity as well as moral simplicity, this is not so.

Thus, although it has been shown Kramer’s conclusions regarding the intelligibility of counterfactuals in situations of moral complexity can be questioned (at least with regards to

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<sup>202</sup> Indeed, Dworkin seems to get at something like this when he states ‘[s]uppose you think [affirmative action] programmes are unfair. Why do you think this? That question is ambiguous. It might mean: What reasons could you offer in defense of your position? So understood, the question asks for a moral argument. Or it might mean: What is the best causal explanation of why you have come to hold that view, given that so many others in your political culture have come to the opposite conclusion?’ (Dworkin, *JFH* (n30) 70) (footnote omitted). With regards to this second question, ‘[a] psychologist or social scientist or biologist might respond to that question in a professional way. He might point to features of your subculture or upbringing or self-interest ... He assumes that some explanation of this sort is a complete answer to the question of why you hold the opinion you do’ (*ibid* 70-71). See also a similar discussion regarding counterfactuals of Hitler’s actions and personality, at *ibid* 438-439, footnote 3.

affirmative action), the conclusion is still the same for Kramer and Dworkin; ‘in a situation of moral controversy as much as in a situation of moral consensus, the moral properties of courses of conduct do not possess any causal efficacy’.<sup>203</sup> There is simply no way to test the causal efficacy of moral truths or properties, as we can make no sense of the counterfactual questions that must be asked in order to test causal claims, both in more simple and more complex moral problems.

To conclude this section, using examples of a simple moral matter and a more knotty problem, it has been shown moral properties have no causal effects in forming convictions which match those properties or facts. No sense can be made of how such causal interaction would operate, about how the fairness of affirmative action could produce thoughts about itself.<sup>204</sup> To link back to Leiter’s writings, he then uses these arguments to conclude “‘there are no objective facts about value’”<sup>205</sup>. It now needs to be shown how, using the conception of moral objectivity being a matter of moral argument, we can still have sound reasons for thinking moral convictions objectively true, despite the causal inefficacy of moral values. This will go towards showing we do not need to be ‘thorough-going empiricists’,<sup>206</sup> when it comes to moral beliefs. This in turn shows that the isolation problem, at least as it applies to moral beliefs, does not present a problem for coherentism.

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<sup>203</sup> Kramer, *Realism* (n21) 196. This is because even if Kramer’s line of reasoning was accepted and the counterfactual *was* intelligible and thus ‘a serviceable guide to causal efficacy’ (*ibid*), what then has to be asked is ‘whether, if the moral status of affirmative action had been the opposite of what it in fact is, a competent moral agent would still have formed the judgement about that status which he has in fact reached’ (*ibid* 195–196). As Kramer notes, ‘[g]iven that the participants in disputes over the moral permissibility of affirmative action programs are roughly evenly divided, approximately half of them have arrived at their judgments on the matter despite the fact that the actual moral status of those programs is the opposite of what they think it to be’ (*ibid* 196); ‘the application of a causal criterion to the moral status of affirmative-action policies is profoundly disconcerting. After all, the answer to our counterfactual question is clearly positive’ (*ibid*).

<sup>204</sup> Dworkin, *JFH* (n30) 72.

<sup>205</sup> Kramer, *Realism* (n21) 196. An important caveat should be noted here in conclusion: ‘[w]ere causal inefficacy a feature of moral facts that is genuinely disturbing, its troublesomeness would be independent of the occurrence or non-occurrence of moral discord’ (*ibid* 197).

<sup>206</sup> Sayre-McCord, *Coherentist* (n1) 176.

#### **5.4. Is causal inefficacy therefore a problem?**

To build on the discussions of the causal ineffectiveness of moral values and how we can still have sound reasons for thinking our convictions objectively true together, and to steer the discussion back to Leiter's writings, it is clear the former discussion 'is driven by a fear of external scepticism'<sup>207</sup> (or, in Leiter's case, the opposite) with this in turn being driven by the fear we can have no reliable grounds for our moral opinions if moral values do not cause these.<sup>208</sup> As Dworkin correctly contends (and as seen in Leiter's discussion) 'external sceptics embrace this second hypothesis', what Dworkin terms the 'causal dependence hypothesis'<sup>209</sup> (hereafter "CD"). Still, there is an important distinction between both hypotheses. The former claim, that moral facts do not cause our moral opinions, is a claim of scientific fact. The latter claim, however, is 'a moral claim: about what counts as an adequate reason for holding a moral conviction'.<sup>210</sup>

Whilst the foregoing discussed some of Leiter's arguments against Dworkin in relation the domain specificity of objectivity regarding moral beliefs, the nature of Leiter's scientific epistemology needs to be examined, in light of the foregoing arguments. This is important for many reasons. Firstly, Leiter's writings tie into the issue of causal inefficacy. Secondly, these discussions can then be tied back into refuting the key premise in relation to the isolation problem. Finally, the discussion will further affirm '[m]oral realism...is a moral doctrine'.<sup>211</sup>

Initially, we must note Dworkin's analysis of "CD":

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<sup>207</sup> Dworkin, *JFH* (n30) 76. For the definition of external scepticism, see footnote 134 above.

<sup>208</sup> *ibid.*

<sup>209</sup> *ibid* 70.

<sup>210</sup> *ibid.*

<sup>211</sup> Kramer, *Realism* (n21) 1.

A quick proof is available that CD is false: it refutes itself. I assume that CD cannot be restricted to the domain of morality. It can make sense, if at all, only as a general claim about knowledge. It must insist that we cannot form a reliable belief about anything...unless our belief has been caused by what it reports. So the hypothesis is victim to a paradox: if it is true, then we can have no reason for thinking it true.<sup>212</sup>

Fortunately, Dworkin's line of reasoning is applicable to Leiter's arguments. One main problem with Leiter's argument's is 'what he repeatedly labels as a "scientific epistemology" should instead have been characterised as a "scientistic epistemology, or "scientific imperialism." Though he articulates his scientistic approach incisively, it is in fact non-scientific and...self-impugning'.<sup>213</sup> 'Leiter's scientistic structures run afoul of their own injunctions. When Leiter queries the reality of moral properties, he is doing nothing that contributes to improving causal-explanatory accounts of the composition and workings of material entities and forces'.<sup>214</sup> In concluding, Kramer notes as 'Leiter takes causal efficacy or empirical viability to be the decisive hallmark of what is real he has to regard his own division between the real and unreal as lacking in genuineness. That division has no scientific cash value'.<sup>215</sup>

Moreover, despite Leiter's comments, the idea we can have no sound reasons for thinking certain moral propositions are objectively true unless moral facts causally influence your moral judgement is *not* a direct claim about the truth of moral judgments. It does impact directly upon claims about certain *reasons* people have to believe judgements true. It is simply a claim about what reasons *count* as good reasons for the judgement we make. But,

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<sup>212</sup> Dworkin, *JFH* (n20) 76.

<sup>213</sup> Kramer, *Realism* (n21) 203. That is, '[w]hen Leiter offers an account of ultimate reality by reference to the methods and successes of science, he... is going where scientists qua scientists do not tread ... They are not in the business of determining whether such entities and forces—and the various relationships among those entities and forces—are exhaustive of reality or not' (*ibid*).

<sup>214</sup> *ibid*.

<sup>215</sup> *ibid*.

what reasons count as good ones depends on the content of those judgments, meaning that any theory about adequate particular reasons for accepting a moral judgement must be moral itself.<sup>216</sup> Thus the argument turns out to be one which fits in with the character of debate discussed throughout the chapter. Most importantly, '[w]e can accept it only if we make a compelling moral case in its favour. But we cannot...nothing turns on the best causal explanation' of how we came to the opinions we may wish to test, or indeed, what tests we should use.<sup>217</sup>

To tie into the discussions of moral epistemology throughout the chapter, Dworkin states 'we might call a theory of moral responsibility by a grander name: we might call it a moral epistemology'.<sup>218</sup> He then notes '[m]oral responsibility is also a moral matter...no theory of moral responsibility can plausibly denounce someone as irresponsible just because some embarrassing feature of his personal history best explains why he came to think his moral arguments good ones, provided those arguments are reasonable and adequately deep'.<sup>219</sup> More specifically with reference to Leiter's writings, 'a genuinely scientific epistemology is fully consistent with an affirmation of the reality of moral values. Though scientific experimentation cannot lend any support to such an affirmation, it likewise cannot cast any doubt thereon'.<sup>220</sup> As science does not argue for or against the reality of moral properties, this allows the moral realist to have recourse to moral considerations and moral argumentation. Though Kramer sees this as question begging, in that it presupposes the reality of moral values while providing argumentative support for their reality, he is correct in noting the circularity is virtuous.<sup>221</sup> This is even more so if we adopt the holistic and inclusive conception of justification discussed earlier. Last, Kramer is also correct to assert there are

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<sup>216</sup> Dworkin, *JFH* (n30) 76-77.

<sup>217</sup> *ibid* 80.

<sup>218</sup> *ibid* 12.

<sup>219</sup> *ibid* 80.

<sup>220</sup> Kramer, *Realism* (n21) 204. See Dworkin's similar discussion in *JFH* (n30) at 85-86.

<sup>221</sup> *ibid* 204-205.

‘overwhelmingly strong moral reasons for the reality of many moral properties. A proposition affirming the reality of the wrongness of genocide, for example, is a proposition affirming the wrongness of genocide’.<sup>222</sup> Here, the position is one of moral and epistemic responsibility. All the arguments above shall now be tied together, to present a response to the isolation problem in favour of moral coherentism.

### **5.5. The isolation problem and B&C’s writings**

It was noted before B&C have a choice between embracing either non-moral basic beliefs, or accepting a pure moral coherentism. Either way, given the critique of foundationalism above and of the common morality throughout this chapter, B&C must give up the foundational role of the common morality as they describe it.

In order to defuse the isolation problem, the key premise needed to be rebutted was the contention we *must* allow a role for empirical experience. But this premise depends upon the correct conception of objectivity we take concerning moral beliefs. Therefore, the conception of moral truth being a matter of moral argument was defended in two ways. It was shown we can still determine moral arguments and discourse are objective in comparison to other domains of discourse without having to rely on a Naturalistic Sense of Objectivity. In addition, it was shown moral truths cannot cause moral judgements, yet we still are able to believe in the soundness of moral convictions concerning moral truth.<sup>223</sup> Further, the discussion has highlighted reasons why we should *not* ‘insist on causal efficacy or empirical viability as a necessary condition for the reality or knowability of any phenomenon’,<sup>224</sup> and that ‘CD, when applied in the moral domain, is itself a moral claim’.<sup>225</sup> More generally, the

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<sup>222</sup> ibid 205.

<sup>223</sup> Dworkin, *JFH* (n30) 70.

<sup>224</sup> ibid.

<sup>225</sup> ibid 77.

discussion has also analysed how ‘there are compelling moral grounds for a proposition affirming the reality of many moral values’.<sup>226</sup>

Given all these claims, the best interpretation of B&C’s writings with regards to moral justification and their common morality theory is in line with a moral coherentist approach. Moreover, these arguments above can deal with the isolation problem as it applies to moral beliefs. In order to show how these arguments can deal with the problem, the discussion needs to briefly return to BonJour’s formulation, as it applies to empirical beliefs. He notes ‘[n]othing about any requirement of coherence dictates that a coherent system of beliefs need receive any sort of input from the world or be in any way *causally influenced* by the world. But surely this is an absurd result. Such a self-enclosed system of beliefs...cannot constitute empirical knowledge of an independent world’.<sup>227</sup> Indeed, Haack’s main argument against BonJour’s escape from the problem was it did ‘not guarantee experiential input’.<sup>228</sup> But, the reason such input needs to be guaranteed is because of the *type* of belief in question. Here, there *is* an insistence ‘on causal efficacy or empirical viability as a necessary condition’,<sup>229</sup> because the beliefs being dealt with are empirical beliefs. But, when considering moral beliefs, the ideas surrounding the causal inefficacy of moral properties, and the arguments asserting ‘[m]orality is a distinct, independent dimension of our experience, and it exercises its own sovereignty’,<sup>230</sup> provide good reason to believe ‘[w]hen it comes to morals...the relevance of experience’,<sup>231</sup> is only important in the *explanatory* way Dworkin describes, and

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<sup>226</sup> Kramer, *Realism* (n21) 207.

<sup>227</sup> BJ, *SEK* (n1) 108 (emphasis added).

<sup>228</sup> Haack, *Evidence* (n67) 59 (emphasis added).

<sup>229</sup> Kramer, *Realism* (n21) 202.

<sup>230</sup> Dworkin, *OT* (n102) 128.

<sup>231</sup> Sayre-McCord, *Coherentist* (n1) 176.

has *nothing* to do when it comes to questions of justification regarding our moral beliefs.<sup>232</sup>

We do *not* need to be empiricists at all when it comes to the latter questions.

Therefore, the isolation objection has been successfully defused. What is more, coupled with the arguments against foundationalism, the best interpretation of B&C's writings with regards to moral justification is in line with a coherentist approach. To return to B&C's writings, whilst they note '[b]are coherence could be nothing more than a system of prejudices',<sup>233</sup> coherentism can also be maximally inclusive, holistic and even interpretive in character. It can more than adequately deal with the problem the way B&C formulate it.

## **6. Conclusion**

This chapter has set out to answer the specific research question: "What is the best interpretation of B&C's framework with regards to moral justification so as to come to an epistemically responsible decision regarding a moral course of action?" As highlighted throughout the chapter, B&C make three essential claims about the common morality: the common morality forms a basis for B&C's theory, the common morality plays a justificatory, foundational role in itself, and that B&C join the common morality together with reflective equilibrium in a compound approach to justification. The chapter then focussed on whether B&C's common morality is able to make use of foundationalist moral theories. Whilst it was shown B&C do defend a theoretically viable form of moderate foundationalism, foundationalism itself as a not an appropriate or viable standard as a structural account of justification.

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<sup>232</sup> See Dworkin, *JFH* (n30) 79-82. Put succinctly, '[m]oral reflection ... takes account of ordinary nonmoral facts as well, of course: facts about the impact of divorce on children's welfare, for instance. However, it appeals to such nonmoral facts only by way of drawing concrete implications from more general moral claims' (*ibid* 30-31).

<sup>233</sup> B&C, *PBE* 7<sup>th</sup> edn (n3) 407.

B&C's version of the isolation problem was then examined. It was noted in raising the isolation problem, B&C have two options available to them; they can either embrace non-moral basic beliefs or adopt a pure moral coherentism. It was shown that moral coherentism can deal with the isolation problem when taking seriously and considering in detail the way the system of beliefs interacts in coherentism, the nature and implications of interpretive concepts, and the conception of moral objectivity being a matter of moral argument.<sup>234</sup> Therefore, the best interpretation of B&C's framework with regards to moral justification so as to come to an epistemically responsible decision regarding a moral course of action is one in which they adopt a pure moral coherentist approach.

This conclusion is important for the larger aims of this thesis because we are now clearer about the underlying justificatory structure of the ethical decision-making framework to be integrated with Dworkin's theory of law. In turn, we can therefore be clearer in explaining the theoretical basis of, and showing how, judges have the ability to realise the possibility of taking a more proactive role in recognising the ethical nature of judicial decision-making, and confidently coming to a legal and ethically responsible decision in cases like *Sidaway* and *Chester*. The thesis is therefore closer to answering the central research question set because of the investigations undertaken in this chapter. But, in order to fully answer the central research question, B&C's ethical framework and Dworkin's theory of law actually need to be explicitly integrated with one another. The next chapter shall do this.

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<sup>234</sup> Dworkin, *OT* (n102) 128

## **Chapter 5**

### **1. Introduction**

#### **1.1. Conceptualisation**

First, the central research question of this thesis needs to be set out again:

“Can an appropriate decision-making framework be provided to judges that recognises the ethical nature of judicial decision-making so as to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics?”

The previous chapters answered further questions necessary to fully answer the central research question. After setting out the fundamental issues motivating this thesis in chapter one, chapter two answered the question “What role do moral principles play in hard cases?” It was established Ronald Dworkin’s theory of law is an appropriate framework to analyse current approaches by judges. Chapter three highlighted a greater interpretive understanding was needed regarding the underlying justificatory structure of Dworkin’s theory. Therefore, the question posed was “Is law best seen through the value of justice or integrity?”<sup>1</sup> It demonstrated integrity is interpretively best understood through the idea of coherence. It was also argued integrity is the value law *should* be seen through. The thesis then took Tom L Beauchamp and James F Childress’s (hereafter B&C’s) four-principles theory as a paradigm of an ethical decision-making framework, which led on to a more specific research question: “How should Beauchamp and Childress’s four-principles approach influence bioethical cases, when used as an example of Dworkinian principles in law?” Initially though, the thesis sought to gain a greater understanding of B&C’s four-principles approach by answering the

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<sup>1</sup> Stephen Guest, ‘How to Criticise Ronald Dworkin’s Theory of Law’ (2009) 69 (2) Analysis 1 <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how\\_to\\_criticize\\_ronald\\_dworkins\\_theory\\_of\\_law.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how_to_criticize_ronald_dworkins_theory_of_law.pdf)> 4 (online) accessed 27<sup>th</sup> June 2014 (hereafter *How to Criticise*)).

question “What is the best interpretation of Beauchamp and Childress’s framework with regards to moral justification, so as to come to an epistemically responsible decision regarding a moral course of action?” This investigation showed both Dworkin’s theory of law and B&C’s bioethical theory are best understood as structured by a coherentist framework. Given this common base, the question “How should Beauchamp and Childress’s four-principles approach influence bioethical cases, when used as an example of Dworkinian principles in law?” can be answered fully. This in turn will mean the central research question can be answered in the positive, and achieve the main aims of this thesis.

## **1.2. Aims of the current chapter**

In order to be clear about the aims of this chapter, it may be useful to summarise its conclusions in advance.

Some further account of the structure of moral arguments that recognises the differences and similarities between law and morality/ethics is needed. This will integrate B&C’s framework into Dworkin’s theory of law, and provide the further moral argument judges need to give them confidence they have acted responsibly.<sup>2</sup> In order for B&C’s four-principles approach to be integrated into Dworkin’s theory of law, it needs to have certain characteristics. It needs to be coherentist in character, interpretive in nature, and interpretive in the *right way* (in the sense explained below). B&C’s theory satisfies these characteristics. At the broadest level, ‘[m]orality as a whole, and not just political morality, is an interpretive enterprise’.<sup>3</sup> More specifically, B&C’s ‘common morality’<sup>4</sup> theory is based on a constructive interpretation. It is in this sense B&C’s theory is interpretive in the right way; their four

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<sup>2</sup> Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press of Harvard University Press 2011) 38 (hereafter *JFH*).

<sup>3</sup> *ibid* 12.

<sup>4</sup> Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (7<sup>th</sup> edn, OUP 2013) 3 (hereafter B&C, *PBE*).

principles secure the norms of the common morality.<sup>5</sup> Progressing with this specification,<sup>6</sup> though B&C define their theory as the four-principles approach, the four principles are better understood as *four interpretive concepts* and *four interpretive values*. They are ‘values [that] best justify what we accept as central or paradigm features of that practice’<sup>7</sup> of bioethics. In addition, to link the thesis together, the best way for B&C to address the question of moral responsibility, or the moral-epistemic question<sup>8</sup> is (as shown in chapter four) is by holding a coherentist framework.

The specific research question this chapter intends to answer is “How should Beauchamp and Childress’s approach influence bioethical cases, when used as an example of Dworkinian *principles* in law?” Though the answer given will deviate from the question in contending B&C’s principles are best *not* seen as principles, this is to show how they may best influence bioethical cases, thus providing confidence to judges in relying on their convictions in applying moral principles and medical ethics.

## **2. Supplementary features of Dworkin’s moral epistemology & why these are beneficial**

Initially though, further characteristics of Dworkin’s moral epistemology must be set out. This section shall progress on the claims made in chapters two (integrity is best understood through coherence) and four (‘there are compelling moral grounds for a proposition affirming the reality of many moral values’<sup>9</sup>). It shall then be shown why Dworkin endorses these characteristics. These supplementary features are beneficial for completing an integration of B&C’s bioethical framework into Dworkin’s theory of law that is mutually supportive

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<sup>5</sup> ibid 410.

<sup>6</sup> ibid 17.

<sup>7</sup> Dworkin, *JFH* (n2) 7.

<sup>8</sup> ibid 12. I shall follow Dworkin in treating these two terms as synonymous. He notes ‘[w]e might call a theory of moral responsibility by a grander name: we might call it a moral epistemology’ (ibid).

<sup>9</sup> Matthew H Kramer, *Moral Realism as a Moral Doctrine* (Wiley-Blackwell 2009) 297 (hereafter *Realism*).

between the two theories.<sup>10</sup> Later, the chapter will show because of B&C's other commitments of their (reinterpreted) theory, they also adhere to these further characteristics of Dworkin's moral epistemology.<sup>11</sup> If B&C's four-principles approach is interpretive, and is interpretive in the right way (in the sense discussed above), it is arguable B&C adhere to the same *type* of moral reasoning as Dworkin; moral reasoning is interpretive.<sup>12</sup> Thus, whilst it shall be highlighted in this section why this account of responsibility is beneficial, this account also depends on arguments made later in the chapter. However, if those arguments are successful, they reinforce the arguments made here concerning the supplementary features of this conception of moral epistemology, and vice versa.

## **2.1. Further characteristics of Dworkin's moral epistemology & why Dworkin endorses these characteristics**

Dworkin begins by stating '[w]e can best approach the crucial question of how to think about moral issues—the question of moral epistemology—by studying the ordinary concept of moral responsibility'.<sup>13</sup> Dworkin argues 'the nerve of responsibility is integrity and that the epistemology of a morally responsible person is interpretive'.<sup>14</sup> We need to pay attention to the question of moral responsibility because though others may be in disagreement with us, and we cannot compel them to be in agreement, we can expect that they have come to their decisions in a responsible manner. Our moral epistemology functions as piece in the jigsaw of our substantive moral theory, yet it must be *separate enough and distinct* to be able to utilise this theory in checking our reasoning in other parts of that jigsaw. Moral reasoning, indeed morality as a whole, is interpretive, with basic moral concepts being interpreted in our

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<sup>10</sup> Dworkin, *JFH* (n2) 255.

<sup>11</sup> ibid. It is also important to emphasise here (as was the case with chapter two) the analysis will not explicitly discuss how moral reality (or truth) is constituted, in terms of whether it is constituted by coherence or not. It is the concept of justification that shall be looked at.

<sup>12</sup> ibid 12.

<sup>13</sup> ibid 101.

<sup>14</sup> ibid.

moral judgments. These interpretations are tested by situating them in a large network of value to see if they satisfy the dimensions of fit and substance in regards to the best interpretations and conceptions of other concepts.<sup>15</sup> ‘This requires that we seek a thorough *coherence* of value among our convictions. It also requires that we seek *authenticity* in the convictions that cohere: we must find convictions that grip us strongly enough to play the role of filters when we are pressed by competing motives that also flow from our personal histories’.<sup>16</sup>

Many distinct characteristics of Dworkin’s theory of value lead him to this conception of moral epistemology, including his defence of ‘the metaphysical independence of value’<sup>17</sup>. Further, Dworkin’s commitment to the interpretive method means he ‘must try to show how the account of truth and responsibility [he offers]...fits not only moral interpretation but interpretation in general’.<sup>18</sup>

Dworkin’s account of moral responsibility fits and is interpretive in the following way. Because moral properties supervene on ordinary properties (two worlds must differ in some nonevaluative manner as well if they differ in some evaluative way), there must be a *reason why* those moral judgements are true. A case for a particular moral proposition must be made, and our case helps to constitute or make true the particular moral proposition. Moral propositions cannot be *just true* in virtue of a brute fact. Further, given Dworkin’s adherence to moral truth being a matter of moral argument, that case must contain additional

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<sup>15</sup> ibid 11-12.

<sup>16</sup> ibid 108 (emphasis added). For a further discussion regarding integrity, coherence and authenticity, see footnote 34 in chapter three.

<sup>17</sup> ibid 9 (footnote omitted). The interlink between Dworkin’s endorsement of moral objectivity being a matter of moral argument, and this conception of moral epistemology is summarised nicely and succinctly in the following quote: ‘Many people and some philosophers ... hope to find a litmus stick: a test for good moral argument that does not beg the question it tries to answer by already presupposing some controversial moral theory...that is not a reasonable hope. Our moral epistemology—our account of good reasoning about moral matters—must be an integrated rather than an Archimedean epistemology, and it must therefore be itself a substantive, first-order moral theory ... There is no way I can test the accuracy of my moral convictions except by deploying further moral convictions’ (ibid 100).

<sup>18</sup> ibid 127.

propositions and judgements of value. The important question then becomes at what point this practice of justification comes to an end. Dworkin contends it is not that moral justification *must* end in virtue of a fundamental principle that is just true, but this process of justification ends when and *if* the argument ever meets itself.<sup>19</sup>

This conception of moral responsibility fits with Dworkin's larger interpretive commitments in the following manner. In an important taxonomy, Dworkin notes 'I argue, then, that political morality depends on interpretation, and that interpretation depends upon value'.<sup>20</sup> Regarding interpretation, Dworkin asks himself two fundamental questions. First, '[w]hen do people share a concept so that their agreements and disagreements are genuine?'.<sup>21</sup> Second, whether a theory of interpretation general enough can be provided that covers various genres beyond politics including law, history, poetry and religion.<sup>22</sup>

The former question is most significant for this chapter's purpose. Dworkin's response is 'we share some of our concepts, including the political concepts in a different way: they function for us as *interpretive* concepts'.<sup>23</sup> The characteristics of this type of concept are important, as it shall be argued later in the chapter the four principles in B&C's theory are best understood as four interpretive values and four interpretive concepts. Therefore, it is important to provide a brief exposition of the characteristics of an interpretive concept, so this exposition can be implemented later in the chapter.

There are five key elements of an interpretive concept. Some of these characteristics have received a more sustained analysis in previous chapters, and therefore some elements will

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<sup>19</sup> ibid 9; 113-117. See also Kramer, "Supervenience as an Ethical Phenomenon" in *Realism* (n9) at 304-364. Further, See Dworkin's discussion and contrast between science and interpretation in *JFH* (n2) 152-156.

<sup>20</sup> Dworkin, *JFH* (n2) 7.

<sup>21</sup> ibid 6.

<sup>22</sup> ibid 7. In regards to this latter question, Dworkin believes it can be answered in the positive and leads him to the following idea: '[i]nterpreters have critical responsibilities, and the best interpretation of a law or poem or epoch is the interpretation that best realises those responsibilities on that occasion' (ibid 7).

<sup>23</sup> ibid (emphasis in original).

receive more analysis here than others. Dworkin introduces the idea of an interpretive concept in the following way. He notes people share interpretive concepts because:

[People] share social practices and experiences in which these concepts figure. We take the concepts to describe values, but we disagree, sometimes to a marked degree about what those values are and how they should be expressed. We disagree because we interpret the practices we share rather differently: we hold somewhat different theories about which values best justify what we accept as central or paradigm features of that practice.<sup>24</sup>

Building on the claims made at point 5.2 in chapter four, the first key element of an interpretive concept is they have a *social dimension*. This is further reinforced when Dworkin notes ‘[w]e share an interpretive concept when our *collective behaviour* in using that concept is best explained by taking its correct use to depend on the best justification of the role it plays for us’.<sup>25</sup> This characteristic is important because B&C also make clear that ‘morality...refers to norms about right and wrong human conduct that are so widely shared that they form a stable social compact’.<sup>26</sup> This idea of morality’s social dimension will become important when discussing how B&C’s theory is both interpretive and interpretive in the right way. An interpretive concept has a social dimension, ‘in the further sense that people who use them are best understood as interpreting the practices in which they figure’.<sup>27</sup>

The second element of an interpretive concept is the *type* of agreement needed, known here as “agreement on paradigms”. Regarding interpretive concepts, Dworkin states we do not agree about how the “value” which people treat certain concepts (when they participate in

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<sup>24</sup> ibid 6-7.

<sup>25</sup> ibid 158 (emphasis added).

<sup>26</sup> B&C, *PBE* (n4) 2-3 (emphasis omitted).

<sup>27</sup> Dworkin, *JFH* (n2) 163-164 (footnote omitted) (emphasis added). This builds on the idea that ‘[t]hough the distinctions we draw among criterial, natural-kind and interpretive concepts are justified by usage ... these distinctions are interpretations of usage, not themselves part of usage’ (ibid 163).

social practices) as serving should be portrayed. Further, regarding moral concepts, we agree that whilst these are values, we do not agree precisely about the character of these values.<sup>28</sup>

However

we agree sufficiently about what we take to be paradigm instances of the concept and paradigm cases of appropriate reactions to those instances, to permit us to argue, in a way intelligible to others who share the concept with us, that a particular characterisation of the value or disvalue best justifies these shared paradigms.<sup>29</sup>

Further, ‘the kind of agreement that is required in the case of an interpretive concept is very different: it is not agreement on a decision procedure as a decisive test for instances. On the contrary, sharing an interpretive concept is consistent with very great and entirely intractable differences of opinion about instances’.<sup>30</sup> It is the *reasons behind* the agreement that are important, not the fact of agreement itself. This shall be elaborated on with element four below.

The third element is what shall be called the element of “different tests”. This goes to the heart of Dworkin’s idea of ‘theoretical disagreement’,<sup>31</sup> but when brought back to its very basic idea is easy to explain. Consider the following quotes: ‘what about...the issue of law? Lawyers and judges seem to disagree very often about the law governing a case; they seem to disagree *even about the right tests to use*’.<sup>32</sup> Further, ‘we must recognise at least one more family of concepts—a family that we share in spite of not agreeing about *a decisive test*. These are our interpretive concepts’.<sup>33</sup> The common theme running through these quotes is

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<sup>28</sup> ibid 160.

<sup>29</sup> ibid 160-161 (footnote omitted).

<sup>30</sup> ibid 161.

<sup>31</sup> Dworkin, *Law’s Empire* (Hart 1986) 5.

<sup>32</sup> ibid 3 (emphasis added).

<sup>33</sup> Dworkin, *JFH* (n2) 160 (emphasis added). See also Scott Shapiro’s discussion of theoretical disagreement in Scott J. Shapiro ‘The “Hart-Dworkin” Debate: A Short Guide for the Perplexed’ in Arthur Ripstein (ed) *Ronald Dworkin* (CUP 2007) 22-55.

although we share the concept, we may use *different tests* to decide what that concept requires. To use a legal example, consider the differing tests used by various members of the House of Lords regarding how clear an “assurance” needs to be to found a claim of proprietary estoppel in *Thorner v Majors*.<sup>34</sup>

However, simply using different tests whilst sharing the same concept is not enough for a concept to be justifiably labelled interpretive. For the main use of such a concept is as ‘a device for making sense of the inquiry, reflection, arguments and strategies that mark that domain’.<sup>35</sup> This leads to the fourth element of an interpretive concept; the element of a “better account”. ‘It is in each case itself an interpretive question whether we make *more sense* of how the concept functions there on [the] assumption [the concept is interpretive] than we do on any competing assumption that declares agreement or disagreement spurious’.<sup>36</sup> Because the analysis of a concept as interpretive is *itself* an interpretation, it is not enough participants in a social practice use different tests. Sense has to be made of the disagreement regarding a concept itself. We look to the practice using that concept to make the best sense of that disagreement. Just as the reasons behind the agreement were important for the element of “agreement on paradigms”, the reasons for *disagreement* relating to the concept are important too. As Dworkin notes:

The question always remains, in spite of even very radical disagreement, whether the pattern of that disagreement is better explained by the hypothesis that those who

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<sup>34</sup> [2009] UKHL 18. For example, Lord Walker held the assurance should be “clear enough” and this would be largely dependent on context (at [56]). This test was also adopted by Lord Roger (at [26]). Lord Hoffman emphasised past events as providing context for the clarity of assurances, noting ‘[t]he owl of Minerva spreads its wings only with the falling of the dusk’ (at [8]). Lord Scott maintained the assurance must be ‘clear and unequivocal’ (at [18]) a test he had previously advocated in *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55. Lord Neuberger was to maintain the “clear and unequivocal” test, but diluted it by adding three qualifications: (1) words or actions must be assessed in their context (at [84]); (2) application of the test must not be ‘unrealistically rigorous’ (at [85]) and (3) if an assurance is ambiguous, if all the other requirements for an estoppel are satisfied, this ambiguity should not defeat the claim (at [86]). See also Jessica Uggioni ‘The Resurrection of Proprietary Estoppel’ [2009] LMCLQ 436.

<sup>35</sup> Dworkin, *JFH* (n2) 163.

<sup>36</sup> *ibid* 161 (emphasis added).

disagree share a single interpretive concept and disagree about its character, or by the alternative hypothesis that the disagreement is illusory.<sup>37</sup>

Dworkin then uses the example of justice. He notes:

We fight campaigns, even wars about justice, and it is obviously false that if we only reflected on what we mean by the term, we would see that we really had nothing to disagree about. Because we share the interpretive concept of justice, we can recognise the theories of a great variety of political philosophers as competing conceptions of that concept.<sup>38</sup>

Here, Dworkin is appealing not just to philosophical but practical usage of the concept to provide an analysis of why it is better to understand the concept of justice as interpretive. This idea of providing different conceptions of a concept shall become important later on, as this will be a big indicator the four principles in B&C's bioethical framework are better seen as four interpretive concepts and values.

The last element is perhaps the most vital element of an interpretive concept, but has received the greatest analysis in chapters two and three. That is the element of value. Put simply, '[i]nterpretivism advocates a way of "seeing" concepts, apparent from human practices, through values'.<sup>39</sup> It is in this sense facts figure as part of the moral case to be made for that value. Facts are not significant in themselves, but are part of and embedded within moral judgments.<sup>40</sup> The chapter shall later look at the interplay between an interpretive concept and

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<sup>37</sup> ibid.

<sup>38</sup> ibid. Finally, one key caveat regarding the element of a "better account" is that 'these distinctions are interpretations of usage, not themselves part of usage' (ibid 163). These discussions of types of concepts 'are philosophers ideas: they are not recognised in practice by justified by their role in making sense of practice' (ibid 163).

<sup>39</sup> Guest, *How to Criticise* (n1) 4 (online) (emphasis in original). Further, it is also the case the requirements of the practice in which the concept, and thus value, figures, are indeed *sensitive* to that value, so that the requirements of that practice must be understood, developed or specified by that value (Dworkin, *Law's Empire* (n31) 47).

<sup>40</sup> Guest, *How to Criticise* (n1) 3 (online).

an interpretive value, as it seems a concept can be an interpretive concept and value *at the same time*. For example, B&C's principle or concept of 'respect for autonomy'<sup>41</sup> can be seen *through* values itself, but is also a value that forms part of an 'analytical framework of general norms derived from the common morality that form a suitable starting point for biomedical ethics'.<sup>42</sup>

Finally, this conception of moral epistemology is beneficial for completing an integration of B&C's bioethical framework into Dworkin's theory of law, for three reasons; two theoretical, and one more practical in nature.

First, the discussion above sets up certain arguments for rest of the chapter. If the epistemology of a moral person is interpretive and a person is morally responsible to the degree their various interpretations achieve an overall coherence, this means moral reasoning interprets moral concepts. Therefore new questions need to be asked; does it make sense to suggest there is a best interpretation of a moral concept or principle? As moral reasoning is a special case of a more general interpretive method, this suggestion *does* make sense.<sup>43</sup> Both the arguments here and later in the chapter are therefore mutually supporting.

This conception of responsibility is also beneficial because it makes very similar fundamental demands like those of integrity in law. As was seen in contending justice does not work as well as integrity as the value law should be seen through, the value of integrity accords better with arguments of substance surrounding the fundamental principle of equality of respect. Integrity itself is a key component of equality of respect.<sup>44</sup> Dworkin makes many similar claims of substance regarding what it means to be morally responsible. He frames many of

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<sup>41</sup> B&C, *PBE* (n4) 101.

<sup>42</sup> *ibid* 13.

<sup>43</sup> Dworkin, *JFH* (n2) 101-102.

<sup>44</sup> Ronald Dworkin, 'Réponse aux articles de Ronald Dworkin' (2005) 3 (233) *Revue International De Philosophie* 435, 436-437 (hereafter *Response Guest*). See further, chapter 3, point 3.3., "Integrity, justice, and the snail darter".

these claims in terms of “evenhandedness”. For example, in discussing how rationalisation is a morally irresponsible course of action, Dworkin notes a person’s ‘behaviour is in fact determined by self-interest, not any principle that recognises the importance of other people’s lives. His alleged commitment does not promise evenhandedness because he will follow the principles he cites only when these serve his own interests’.<sup>45</sup> In the most explicitly similar statement to integrity in law, Dworkin also notes:

Community and civility nevertheless require a high level of tolerance. We cannot treat everyone who disagrees with us as a moral outlaw. We must respect the contrary opinions of those who accept the equal importance of all human lives but who disagree with us, in good faith, about what that means in practice. We must respect them, however, only so far as they accept the burden of responsibility we have canvassed...because only then do they *really* accept that equal importance.<sup>46</sup>

The point in highlighting these and other points<sup>47</sup> which Dworkin talks about “evenhandedness” and how we should treat others in a genuinely respectful, principled manner,<sup>48</sup> is it shows on this conception of responsibility treating others with equality of respect is a fundamental demand. Therefore, if B&C’s theory makes similar fundamental demands, then this makes for a seamless integration of their ethical framework and Dworkin’s theory of law, as there are similar demands made across the concepts of both law and morality. This conception of responsibility shows how both Dworkin and B&C have common roots in the interpretive concept of morality, and how that interpretive concept and its demands can be specified so as to both differentiate between and integrate Dworkin’s

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<sup>45</sup> Dworkin, *JFH* (n2) 104.

<sup>46</sup> ibid 113 (emphasis in original).

<sup>47</sup> See “Ways Not to Be Responsible” in ibid 104-107.

<sup>48</sup> ibid 107.

theory of law and B&C's framework. This point shall form the basis of the discussion of how B&C's theory is interpretive in the right way.<sup>49</sup>

Third, the more practical aims of this thesis are to provide judges with a decision-making procedure that gives confidence in applying medical ethics and relying on their moral convictions. The account of moral epistemology presented here and in other chapters rescues our confidence, despite the complexity of legal problems with an intrinsically ethical substance, that the particular legal and ethical propositions that seem best justified are in fact true. Judges can also prudently accept certain *concepts* have a best interpretation, and are able to test these interpretations by placing them in a network of value when addressing the legal and ethical issues in a particular case.<sup>50</sup> Further, although judges may not analyse and evaluate their discussions in terms of interpretive concepts and interpretive moral reasoning, it is still important to highlight the concepts in use are in fact interpretive. It needs to be understood how and why judges argue and disagree, and whether these arguments and disagreements are genuine or not. Finally, the recognition of the explicitly interpretive and coherentist character of judges' arguments acts as a guide in our own arguments when we test conceptions of concepts, such as shall be done later with B&C's theory, and as was done in chapter three with the value of integrity.<sup>51</sup>

Overall, this section has highlighted further features of Dworkin's moral epistemology, and has shown why Dworkin endorses this conception of interpretive epistemology. It has shown how Dworkin's theory of moral responsibility is interpretive, and how it fits in with his larger interpretive commitments. This latter discussion allowed the elements of an interpretive concept to be separated out, elements that will become important later in showing how and

<sup>49</sup> Indeed, Dworkin seems to envisage an extension of the 'community of principle' (introduced in *Law's Empire* as a community that accepts integrity and therefore can claim moral legitimacy) (Dworkin, *Law's Empire* (n31) 214) to not just the domain of law, but across all domains. See "The Value of Responsibility" in *JFH* (n2) 111-113.

<sup>50</sup> Dworkin, *JFH* (n2) 151.

<sup>51</sup> *ibid* 164.

why B&C's theory is interpretive. This section has also shown why this conception of responsibility is beneficial. The main purpose behind both outcomes is to enable the chapter to show how and why B&C's bioethical framework best integrates with Dworkin's theory of law. However, in order to fully integrate B&C's account into Dworkin's theory of law, B&C's theory needs to be shown to be interpretive and is interpretive in the right way. This will provide further reasons of substance regarding why B&C framework fits well with Dworkin's theory of law and why it is the best decision-making framework for judges to use that recognises the ethical nature of judicial decision-making. The case for B&C's theory being interpretive in nature shall now be made.

### **3. B&C's theory is interpretive in nature**

The previous section highlighted that if it is shown B&C's theory is interpretive in nature, then important consequences follow; because of these commitments it is also sensible for B&C to embrace the same type of moral reasoning set out in the previous section, with all the benefits that conception brings. Further, if sense can be made of the idea the epistemology of a moral person is interpretive, then new questions need to be asked; whether it makes sense to suggest there can be a best interpretation of a moral principle or concept. This suggestion does make sense.<sup>52</sup> This section shall show in detail how sense can be made of this claim, and will therefore progress from the conclusions in chapter four (a moral coherentist approach is the best interpretation of B&C's framework with regards to moral justification<sup>53</sup>) to be able to fully integrate this framework with Dworkin's theory of law.

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<sup>52</sup> Dworkin, *JFH* (n2) 101-102

<sup>53</sup> Though it was argued in chapter 4 the best interpretation of B&C's writings was based on a moral coherentist structure, it was not discussed explicitly and in detail what elements of justification this structure committed them to. However, it was discussed in chapter 3 what the essentials of coherentism are and what coherence requires. Though space precludes a detailed analysis, it is clear B&C's reinterpreted ethical framework shares the same *characteristics* of coherentism and conception of coherence as does Dworkin's theory of law. That B&C share the same characteristics is most explicitly seen in their chapters "Moral Theories" and "Method and Moral Justification" in *PBE* (n4). See specifically, *PBE* (n4) 351-354; 404-410.

This section shall focus on making a case for one main claim: although B&C define their theory as the four-principles approach, the four principles in B&C's theory are better understood as *four interpretive concepts* and *four interpretive values*. They are 'values [that] best justify what we accept as central or paradigm features of that practice'<sup>54</sup> of bioethics. This in turn shows the concept of bioethics is an interpretive concept.

Given constraints of space, this section shall consider only one of B&C's four principles as a representative analysis of their bioethical theory to show their four principles are best understood as four interpretive concepts and values, linking back into the elements highlighted in the previous section regarding interpretive concepts. Though it does not necessarily follow that *all* four principles are best understood as interpretive concepts and values if only one principle is shown to be, the discussion will be substantiated with reference to B&C's analysis of their other principles where appropriate to provide further context. The principle of respect for autonomy shall be considered. This principle is the main purpose the practices of informed consent are taken to serve and are sensitive to.<sup>55</sup> It also underpins the discussion of the inherent ethical issues in the cases considered in chapter one (in particular *Sidaway v Bethlem Royal Hospital Governors*<sup>56</sup> and *Chester v Afshar*<sup>57</sup>). This principle shall also be subject to further analysis and applied to re-interpret *Chester* in the next chapter, to

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<sup>54</sup> Dworkin, *JFH* (n2) 7. Before this claim is looked at in any detail, one key caveat needs to be highlighted. This chapter shall not look at whether B&C's theory is best understood as *teleological* in nature, nor at the differences between a teleological claim and an interpretive claim. B&C's theory *might* be understood as teleological in nature, given how Beauchamp himself talks about how 'the object of morality is to prevent or limit problems of indifference, conflict, hostility, scarce resources, limited information and the like' (Tom L Beauchamp, *Standing on Principles* (OUP 2010) (hereafter BC, *SOP*) 176). However, whilst the arguments in this chapter do establish a strong claim for the best understanding of B&C's theory being interpretive in nature, for the purposes of looking to integrate B&C's framework into Dworkin's theory of law, Dworkin's argument against law and morality as a teleological concept (what Dworkin calls "'natural-kind' concepts' (Dworkin, *JFH* (n2) 159)) shall be accepted. This is despite the fact Dworkin's arguments and comparisons between a teleological concept and an interpretive concept, especially as the claim relates to morality (where morality as a teleological concept is readily treated as a sensible claim) is quite cursory. See, for example, Ronald Dworkin, *Justice in Robes* (Belknap Press of Harvard University Press 2006) 154-155, 166, 223-230 (hereafter *JIR*); Dworkin *JFH* (n2) 168-169, 428-430, footnote 6.

<sup>55</sup> Dworkin, *Law's Empire* (n31) 47.

<sup>56</sup> [1985] AC 871.

<sup>57</sup> [2004] UKHL 41.

show how judgments may be constructed under this decision-making framework. Further, there is obviously much more to B&C's theory than simply a discussion of their four principles. Though B&C's theory in its most complete sense is interpretive through and through, equally important aspects of their theory, such as their discussion of the issues of moral character and moral status, cannot be examined. Again though, no doubt if reference was made to the elements above regarding interpretive concepts, the discussions in both those chapters would be found to be interpretive in nature as well<sup>58</sup>. Last, this section shall look at some criticisms the four-principles approach, even in its reinterpreted version, needs to deal with. However, given constraints of space, general objections to seeing moral concepts as interpretive concepts cannot be discussed here.<sup>59</sup>

### **3.1. B&C's general interpretive commitments**

Initially, specific quotes can be introduced to show B&C accept the interpretive method in deriving their four principles, and accept the concept of bioethics is an interpretive concept. B&C derive their set of pivotal moral principles from the common morality. These principles function as a framework that forms the best starting point for the analysis of problems in biomedical ethics. In linking back into the elements of an interpretive concept, B&C have reached the conclusion these four principles are central features of the practice of bioethics via an interpretive exercise. B&C examine the coherence of moral beliefs and our considered moral judgments. Thus, B&C take it the practice of bioethics has value, that analysis of the paradigms of that practice leads to these values and that we make more sense of bioethics by

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<sup>58</sup> See, for example, B&C's discussion of "The Problem of Moral Status" in *PBE* (n4) 62-64, which shows B&C treat the disagreement as to who has moral status as anything but spurious. See also B&C's discussion of "Theories of Moral Status" at *ibid* 64-79.

<sup>59</sup> See Dworkin's discussion and rebuttal to these objections in *JFH* (n2) 166-170. See also Dworkin's discussion of 'When Concepts Migrate', at *ibid* 164-166.

using these four principles as an analytical framework, looking at the way our moral beliefs cohere.<sup>60</sup>

Specifically, B&C note regarding their four principles, '[m]ost classical ethical theories accept these norms in some form, and traditional medical ethical codes presuppose at least some of them'.<sup>61</sup> Further, '[n]onmaleficence and beneficence have played a central role in the history of medical ethics. By contrast, respect for autonomy and justice were neglected in traditional medical ethics and have risen to prominence only recently'.<sup>62</sup> Finally, B&C also note '[t]he four *clusters* of principles that we propose as a moral framework derive from the common morality, but when specifying and balancing these principles in later chapters, we will also call upon *historical experience* in formulating professional obligations and virtues in health care, public health, biomedical research and public policy'.<sup>63</sup>

These quotes highlight many points. First, they show bioethics has a *social dimension*. B&C speak of the history of medical ethics, of ethical theories that are classical, of traditional codes of medicine. All of these terms presuppose we must look to the *past* and present for venerable paradigms, each of which tries to identify, in some circumstances more specifically than others, the character of the value bioethics manifests. These quotes also show B&C, in looking at these paradigms, are undertaking an exercise in which these codes and theories (collectively under the concept of "bioethics") are seen in their best light. This is done by deriving their four principles, implicit in both older and recent paradigms, from practice itself. They are seeking to explain our collective behaviour in using the concept of "bioethics" by taking the correct use of the concept of bioethics to depend on these four

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<sup>60</sup> B&C *PBE* (n4) 13; Dworkin, *JFH* (n2) 160-162.

<sup>61</sup> B&C, *PBE* (n4) 13.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid* 25 (emphasis added). See also similarly Gerald Postema's discussion of 'Temporally Extended Values' in 'Integrity: Justice in Workclothes' in Justine Burley (ed) *Dworkin and his Critics: with replies by Dworkin* (Blackwell 2004) 308-312.

principles as a framework of general moral norms.<sup>64</sup> In describing their principles as four *clusters* of principles, this provides further evidence an analysis of these principles as interpretive concepts and values is amenable to B&C's theory. Further, that the various requirements of, say, respecting autonomy, may be sensitive to the value that that concept itself serves. B&C also note '[p]rinciples are more general and comprehensive norms than rules'<sup>65</sup> and '[p]rinciples do not function as precise guides in each circumstance in the way that more detailed rules and judgements do'.<sup>66</sup> Here again, B&C are alive to the possibility that because these principles are quite abstract, there might be the possibility of different tests being used to specify the principles themselves.

In discussing the process of specification, B&C state '[s]pecification is not a process of producing or defending general norms such as those in the common morality; it assumes that the relevant norms are available. Specifying the norms with which one starts...is accomplished by narrowing the scope of the norms, not by explaining what the general norms mean'.<sup>67</sup> Here, B&C leave open the possibility of using different tests for specification, and in doing so show the four principles are value-laden concepts. Yes, specification does not explain what general norms mean, but it is reasonable to infer *some* idea .of what value best exemplifies one of the four principles, in order to specify it at all. This idea is further reinforced with the example of specification B&C highlight regarding the rule ““Doctors should put their patients interests first””.<sup>68</sup> B&C highlight one study in which

most physicians in the study apparently did not operate with the definition of deception favoured by the researchers, which is “to deceive is to make another believe what is not true, to mislead”. Some physicians apparently believed that “deception”

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<sup>64</sup> Dworkin, *JFH* (n2) 158; B&C, *PBE* (n4) 13.

<sup>65</sup> B&C, *PBE* (n4) 14.

<sup>66</sup> *ibid.*

<sup>67</sup> *ibid* 17.

<sup>68</sup> *ibid* 18.

occurs when one person *unjustifiably* misleads another, and that it was justifiable to mislead the insurance company in [the study's] circumstances.<sup>69</sup>

Here there are competing interpretations of an initially specified norm. Further, given the context of the disagreement (whether it is deception to falsify information on insurance forms to ensure patients receive the best treatment available<sup>70</sup>) it is better to state this disagreement is *not* spurious. It is wrong to state ‘if we only reflected on what we mean by the term [deception] we would see that we really had nothing to disagree about’<sup>71</sup> and the researchers and physicians in the study were simply talking past one another. Indeed, B&C explicitly recognise when disagreement involving moral problems does occur it is not spurious. They state:

Conscientious and reasonable moral agents understandably disagree over moral priorities in circumstances of a contingent conflict of norms... Such disagreement does not indicate moral ignorance or moral defect. We simply lack a single, entirely reliable way to resolve many disagreements, despite methods of specifying and balancing.<sup>72</sup>

Last, in stating ‘[d]ifferent parties may emphasise different principles or assign different weights to principles even when they agree on which principles are relevant’,<sup>73</sup> here B&C

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<sup>69</sup> ibid (emphasis added).

<sup>70</sup> ibid.

<sup>71</sup> Dworkin, *JFH* (n2) 162. B&C also link specification to their process of reflective equilibrium in the following way. They note ‘[w]hen competing specifications emerge, we should seek to discover which is superior. Proposed specifications should be based on deliberative processes of reasoning’ (B&C, *PBE* (n4) 19) with this process of reasoning being the one highlighted in the previous chapters of this thesis.

<sup>72</sup> B&C, *PBE* (n4) 24. Note also how B&C state ‘[m]oral disagreement can emerge because of ... disagreements about appropriate forms of specification or balancing... scope disagreements about who should be protected by a moral norm ... and [ ] conceptual disagreements about a crucial moral notion’ (ibid).

<sup>73</sup> ibid. They also note ‘[o]ne person’s conscientious assessment of his or her obligations may differ from another’s when they confront the same moral problem. Both evaluations may be appropriately grounded in the common morality ... In such cases, we can assess one position as morally preferable to another only if we can show that the position rests on a more coherent set of specifications and interpretations of the common morality’ (ibid 25) (footnote omitted). First, this quote re-affirms B&C’s commitment to a coherence theory of justification. Secondly, again, it highlights B&C countenance the idea different tests might be used in relation to the same moral problem. Last, in re-affirming their commitment to coherence, this also shows they do not take

come closest to Dworkin's idea of theoretical disagreement in law, whereby lawyers and judges disagree about the right tests to use in ascertaining the law governing a case.<sup>74</sup> All of the foregoing passages make a strong case for the claim B&C accept the interpretive method with regards to their four-principles theory, that they impose purpose on the practices of bioethics to provide the best justification of the paradigm features of those practices.<sup>75</sup> It will now be shown how their discussion of the principle of respect for autonomy is interpretive in nature.

### **3.2. Respect for Autonomy**

When looking at the principle of respect for autonomy, B&C highlight the importance of the principle at many different points. They note '[w]e employ the concept of autonomy and the principle of respect for autonomy in this chapter largely to examine individuals' decision making in health care and research, both as patients and as subjects'.<sup>76</sup> B&C also implicitly bring out the importance of the principle when giving an overview of the concept of autonomy. They note '[a]t a minimum, personal autonomy encompasses self-rule that is free from both controlling interference by others and limitations that prevent meaningful choice, such as inadequate understanding. The autonomous individual acts freely in accordance with a self-chosen plan'.<sup>77</sup> More explicitly, when discussing the demands of the principle of respect for autonomy, B&C note:

To respect autonomous agents is to acknowledge their right to hold views, make choices and to take actions based on their values and beliefs. Such respect involves respectful *action*, not merely a respectful *attitude*. It also requires more than

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the disagreement in these moral cases to be spurious; otherwise, a recourse to a detailed coherence theory of justification would be superfluous in many instances.

<sup>74</sup> Dworkin, *Law's Empire* (n31) 3.

<sup>75</sup> Dworkin, *Law's Empire* (n31) 52; Dworkin, *JFH* (n2) 7.

<sup>76</sup> B&C, *PBE* (n4) 101.

<sup>77</sup> *ibid.*

noninterference in others' personal affairs. It includes, in some contexts, building up or maintaining others' capacity for autonomous choice while helping to allay fears and other conditions that destroy or disrupt autonomous action.<sup>78</sup>

Although this discussion is quite content-thin, B&C contend these demands support a number of more specific rules that act as paradigms of what it means to respect autonomous agents and the decisions they make.<sup>79</sup> In addition, B&C also note the *scope* of the principle of respect for autonomy is limited to those who can act in a sufficiently autonomous manner.<sup>80</sup> All of the foregoing passages show there is the potential for "agreement on paradigms" in regards to the principle of respect for autonomy. They also show if disagreement does arise regarding the concept, it is likely (given the importance B&C ascribe to the principle) this pattern of disagreement is better explained by the idea this disagreement stems from the sharing of a single interpretive concept whose value and character is disputed.<sup>81</sup>

Interestingly, B&C also point out how some writers view the current prominence attached to autonomy as *problematic*. These critics 'charge that autonomy's proponents sometimes disrespect patients by forcing them to make choices, even though many patients do not want to receive information about their condition to make decisions'.<sup>82</sup> Such disagreement is

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<sup>78</sup> ibid 106-107. B&C go on to introduce the three other principles in their theory in *precisely* the same manner, by highlighting the practical importance of these principles. For example, regarding the principle of nonmaleficence, see generally ibid 150-153. See, more specifically regarding nonmaleficence, B&C's discussion of the distinction between killing and letting die, and the legal, moral, theoretical and practical importance B&C attach to examining whether this distinction is sound, at ibid 175-178. B&C introduce the principle of beneficence in perhaps the most explicitly interpretive and integrated way, in comparison with the introduction of the other three principles they discuss; see ibid 202-204. Finally, regarding the principle of justice, see ibid 249-253. Their introduction to the principle of justice and exposition of its importance is very similar in manner to that of Dworkin's in *Law's Empire*. For comparison, see Dworkin, *Law's Empire* (n31) 165. These similarities are not surprising, given (as Hart notes) justice 'is both a virtue specially appropriate to law and the most legal of the virtues' (HLA Hart, *The Concept of Law* (2<sup>nd</sup> edn, OUP 1994) 7).

<sup>79</sup> See B&C, *PBE* (n4) 107.

<sup>80</sup> ibid 108. Similar discussions surrounding the scope of other principles in B&C's framework further show these principles to be interpretive in nature. For example, see B&C's discussion of the distinction between general and specific principles of beneficence, so as to work out the limits of obligatory principles of beneficence, at ibid 204-205.

<sup>81</sup> Dworkin, *JFH* (n2) 161. Indeed, see also B&C's explicit acknowledgement of the possibility of interpretive disagreement surrounding the values of justice and beneficence, at B&C, *PBE* (n4) 249 and 203 respectively.

<sup>82</sup> B&C, *PBE* (n4) 108.

interesting because one way to view this disagreement is critics might be arguing bioethics is *not* best interpreted by including a norm of respect for autonomy. Alternatively, this is one instance of a clear difference between theorists regarding their own sense of what value(s) is central to bioethics, and the critics own roles in identifying and articulating those values central to the concept of bioethics.<sup>83</sup> This is supported by B&C further arguing:

The duty of respect for autonomy has a correlative *right* to choose but there is no correlative *duty* to choose. Several empirical studies of the sort cited by [critics] seem to misunderstand...how autonomous choice functions in a theory such as ours and how it should function in clinical medicine.<sup>84</sup>

In articulating how critics' arguments are misguided, B&C repeatedly emphasise one of the main purposes of the practice of bioethics is to ensure at least *the choice*, with regards to initial provision of information regarding medical circumstances and medical decision-making, is the patients to make, whilst being sensitive to both cultural and worldview differences. Therefore, the concept of autonomy is fully consistent with, and enriched by, the idea of delegated authority to others to make medical decisions for the patient and inquiry by doctors about whether persons wish to make decisions and receive information. Thus, it is clear B&C impose this purpose (respecting the patients autonomy) on bioethical practices to make them the best possible example of practices they can be.<sup>85</sup> Moreover, this shows it would not make sense to say if we only reflected on what we mean by “autonomy” we really have nothing to disagree about, because we are just using different criteria.<sup>86</sup> It is better to see the principle of respect for autonomy as an interpretive concept and value.

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<sup>83</sup> Dworkin, *JFH* (n2) 134. See also how B&C treat the distinction between the principles of nonmaleficence and beneficence in a similarly interpretive manner (much like the way Dworkin treats various forms of “external scepticism” in chapter three of *JFH* (n2) 40-68). See B&C, *PBE* (n4) 151-153.

<sup>84</sup> B&C, *PBE* (n4) 108.

<sup>85</sup> B&C, *PBE* (n4) 109-110; Dworkin, *Law's Empire* (n31) 52.

<sup>86</sup> Dworkin, *JFH* (n2) 162.

A similar argument is highlighted by B&C when they note other writers have sought to interpret autonomy through the idea of relationships. Relational autonomy questions the model of autonomy which views the self as independent and having a rationally controlling will. These critics believe environmental interaction and certain determinants such as gender and race shape a person's identity much more than is realised by the former model, which is charged with being unmindful of matters such as communal life and social context. This model highlights there is potential danger for persons to have their competencies and capacities impaired by certain relationships, and that we need to be on guard against this. B&C note they will analyse these problems through their three other principles of beneficence, nonmaleficence and justice, and this conception of autonomy is defensible as long as it does not pass over the key features of autonomy they discuss.<sup>87</sup> Again though here, there is a difference between writers as to which values best address certain issues in bioethics, and how those values themselves are best characterised. Though B&C may come to the same conclusions as the relational autonomy critics, it is still important here to map out the distinctions in value and conceptions of concepts. It goes toward showing both bioethics and the principle of respect for autonomy are interpretive concepts. These distinctions may also be able to explain the reasons why writers may disagree on certain other issues, as bioethicists (and analogously, judges) disagree on the articulation of values central to bioethics, and therefore what responsibility they have in interpreting this and related concepts.<sup>88</sup>

Furthermore, a clear instance of theoretical disagreement regarding the concept of autonomy and the principle of respect for autonomy can be seen in the way B&C initially articulate these concepts themselves. They introduce this discussion by noting first:

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<sup>87</sup> B&C, *PBE* (n4) 106 (footnote omitted).

<sup>88</sup> Dworkin, *JFH* (n2) 142.

Virtually all theories of autonomy view two conditions as essential for autonomy: *liberty*...and *agency*...However, disagreement exists over the meaning of these two conditions and whether additional conditions are required. How a theory can be constructed from these basic conditions is the first subject we will consider.<sup>89</sup>

B&C go on to consider two theories: ‘split-level theories of autonomy’<sup>90</sup> and their ‘three-condition theory’.<sup>91</sup> The former theory ‘requires having the capacity to reflectively control and identify with or oppose one’s basic (first-order) desires or preferences through higher level (second-order) desires or preferences’.<sup>92</sup> B&C reject this in favour of their own account of autonomy, whereby they present three nonideal conditions to analyse autonomous action; choosers have to act intentionally, with understanding and without controlling influences. B&C believe this account is more coherent with the premise that the ordinary choices of competent persons (such as cheating on one’s partner or selecting indulgent snacks) are autonomous than the split level account. Reflective higher order identification can render many actions generally considered autonomous to be *nonautonomous* on the split-level theory<sup>93</sup>.

There are clear elements of the interpretive concept built in to B&C’s argument that their interpretation of autonomy is the best interpretation of this moral concept and also part of the best interpretation of the principle of respect for autonomy. First, there is a clear discussion of different *tests* being used, even though the concept in question is shared. Second, B&C appeal to certain instances taken to be paradigms of the concept which allows them to argue in an intelligible manner with those who share the concept of autonomy their characterisation

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<sup>89</sup> B&C, *PBE* (n4) 102 (footnote omitted).

<sup>90</sup> ibid 102 (emphasis omitted)

<sup>91</sup> ibid 104 (emphasis omitted)

<sup>92</sup> ibid 102 (footnote omitted).

<sup>93</sup> ibid 103-104. See also Beauchamp’s discussion of split level theories of autonomy in *SOP* (n54) at 89-97, in particular his contention that ‘[p]roponents of metaphysical theories often spread confusion by moving from a metaphysical claim about persons to one about moral status or moral worth. This move can be baffling because metaphysical properties have no moral implications’ (ibid 94).

best justifies these paradigms.<sup>94</sup> In addition, it has already been shown how the better account of the concept of autonomy and the principle of respect for autonomy is one in which disagreement is not spurious, given the important implications of the concept. Last, it is clear B&C, in presenting their three ‘nonideal conditions’<sup>95</sup> also take the concept of respect for autonomy *itself* to signify certain values. It is not just the case the interpretive concept of “bioethics” is seen through a number of values, but that the concept of autonomy and the principle of respect for autonomy are best seen as value laden, potentially with (and through) a number of other values as well.<sup>96</sup>

Like the claim in chapter three (integrity is best understood via coherence) was intelligible and interpretive in nature, it is clear from the rest of B&C’s chapter that whilst the practice of bioethics is best seen (partly) through the *value* of respect for autonomy, this value is also an interpretive concept that can be further interpretively specified as well. As B&C note:

The intimate connection between autonomy and decision making in health care and research, especially in circumstances of consent and refusal, unifies this [discussion’s] several sections. Although we have justified the obligation to solicit decisions from patients and potential research subjects by the principle of respect for autonomy, we

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<sup>94</sup> Dworkin, *JFH* (n2) 160-161. More specifically, see in B&C’s discussion of the principle of beneficence, when discussing both the justification of paternalism itself and certain paternalistic policies, how B&C point to a number of different positions regarding the justification of paternalism. These include theories, groups and justifications such as ‘neopaternalists’ (B&C, *PBE* (n4) 218) ‘[l]ibertarian paternalism’ (*ibid*) ‘antipaternalism’ (*ibid* 220) and paternalism that appeals to either the principle of respect for autonomy or the principle of beneficence (*ibid*). All of these different theories, justifications and tests regarding which actions of paternalism are justified show the concept is interpretive in nature. There is scope for both agreement on paradigms (See *ibid* 215), justification of the concept by appeal to different moral principles and tests, and a social dimension to the concept that allows us to see disagreement (over, for example, transfusing blood to a patient who has explicitly refused) as genuine rather than spurious (B&C, *PBE* (n4) 215; Dworkin, *JFH* (n2) 6; 162).

<sup>95</sup> B&C, *PBE* (n4) 104

<sup>96</sup> See also how B&C note ‘[t]he concept of nonmaleficence has been explicated by the concepts of *harm* and *injury*, but we will confine our analysis to *harm*’ (*ibid* 153). This shows it makes sense to suppose whilst nonmaleficence is an interpretive *value*, it is also an interpretive concept that can be interpreted according to further values as well.

have also acknowledged that the principle's precise demands remain unsettled and open to legitimate interpretation and specification.<sup>97</sup>

The foregoing quote shows B&C envisage there are going to be certain concepts linked to the value of respect for autonomy that might give rise to further competing tests. Such agreement and disagreement is again going to be interpretive and moral all the way down, given the large network of value that can be applied when discussing the best conception of these concepts.<sup>98</sup> For example, B&C go on to discuss competing conceptions and varieties of autonomous consent,<sup>99</sup> noting also '[c]ompetence in decision making is closely connected to autonomous decision making, as well as to the validity of consent',<sup>100</sup> and '[c]ompetence judgements have the distinctive *normative* function of qualifying or disqualifying persons for certain decisions or actions, but those in control sometimes incorrectly present these judgments as empirical'.<sup>101</sup> B&C also discuss how 'the primary justification advanced for requirements of informed consent is to protect autonomous choice',<sup>102</sup> and how Onora O'Neill has argued the concept of informed consent is best understood through the ideas of preventing coercion and deception, *not* respecting patients' autonomy.<sup>103</sup> Here, there is further interpretive disagreement if we link this discussion back to the elements of an interpretive concept, just as there is when B&C discuss certain standards relating to the concept of disclosure and which standard is morally preferable,<sup>104</sup> and when presenting more

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<sup>97</sup> B&C, *PBE* (n4) 140.

<sup>98</sup> Dworkin, *JFH* (n2) 11-12.

<sup>99</sup> B&C, *PBE* (n4) 110-114.

<sup>100</sup> *ibid* 114.

<sup>101</sup> *ibid* 115 (emphasis in original).

<sup>102</sup> *ibid* 121.

<sup>103</sup> *ibid*. See also the interpretive disagreement between B&C and Franklin Miller and Alan Wertheimer regarding whether the conception of informed consent as autonomous choice should serve as the point of reference for whether institutional policies of consent are morally satisfactory or not, at *ibid* 123.

<sup>104</sup> *ibid* 125-127. See further how B&C engage in this interpretive, evaluative project (showing why the practice of bioethics is valuable and how the practice should be continued so as to enhance this value) (Dworkin, *JIR* (n54) 141) when they reject 'several leading distinctions and rules about foregoing life-sustaining treatment and causing death that are accepted in some traditions of medical ethics' (B&C, *PBE* (n4) 168) in their discussion concerning the scope and implications of the interpretive value of nonmaleficence. See, for example their discussion between withholding and withdrawing treatments at *ibid* 158-162, and their argument concerning the

controversial aspects of the principle of autonomy when discussing the concept of understanding.<sup>105</sup>

Overall then, the principle of respect for autonomy (and associated concepts) is better seen as an interpretive concept and value. The best way to interpret B&C's discussion regarding the principle of respect for autonomy is one showing they take the principle to have a social dimension (as it figures in bioethical practices), and there is sufficient agreement on paradigm instances of respecting autonomy that allows B&C to discuss different theories of autonomy (which informs the principle of respect for autonomy). This disagreement is also best explained through the idea of a sharing of a single interpretive concept whose value is disputed.<sup>106</sup> These elements allow them to further discuss what values are central to biomedical ethics, whether bioethics *is* best interpreted as including a norm of respect for autonomy, and finally how the value of respect for autonomy can be further interpretively specified and linked to other concepts in a network of value. Indeed, as this discussion has substantiated this analysis by highlighting similarities with B&C's discussion of the other three principles in their theory, this shows it is best to see *all* of B&C's principles as interpretive concepts and values. B&C's bioethical theory is interpretive all the way down.

### **3.3. Criticisms of B&C's theory**

Given the foregoing discussion, a number of criticisms levelled at B&C's theory can be quickly dismissed. First, there has been a supposed lack of explanation as to why the four

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distinction between ordinary and extraordinary treatments, at ibid 162-163. Here we see B&C using moral judgements about the moral status of venerable distinctions to argue that the best justification of the role that nonmaleficence plays for us in bioethics is one that does not accept these distinctions, but accepts B&C's test surrounding a quality of life criterion (Guest, *How to Criticise* (n1) 3 (online); Dworkin, *JFH* (n3) 158; B&C, *PBE* (n4) 163).

<sup>105</sup> See B&C, *PBE* (n4) 131-137. See also B&C's discussion of the concept of "Voluntariness" at ibid 137-142.

<sup>106</sup> Dworkin, *JFH* (n2) 161.

principles have not been ‘lexically ordered’.<sup>107</sup> Given the reinterpretation above, an explanation is readily available. As the four principles are better seen as four interpretive concepts and values, this means a defence of some particular conception of one of the four principles must draw upon values beyond itself. It would be circular to appeal to the value itself in its own defence.<sup>108</sup> Just as coherentism rejects the idea of linear justification, linear dependence and epistemic priority for a better account of a systematic relation of justification,<sup>109</sup> B&C’s framework on this reinterpretation rejects a lexical ordering *because it does not make sense* to lexically order the principles. Their true nature and how they function means we must see them as holistically and interpretively related in the fashion of a jigsaw, or geodesic dome.<sup>110</sup>

However, this response may be inconsistent with another commitment seen as uncontroversial by B&C but often highlighted as a criticism; B&C’s four principles can conflict with one another.<sup>111</sup> B&C allow for value conflict at the most fundamental level. They note ‘we maintain throughout this book that various moral principles, rules and rights can and do conflict in the moral life. These conflicts sometimes produce irresolvable moral dilemmas’.<sup>112</sup> B&C provide us with a number of instructive cases in their section entitled “moral dilemmas”, to show conflicts may arise. But, on reading *PBE*, it is unclear that B&C address *why* these conflicts arise. Given the tone of their book, it seems B&C accept this to be accommodating: ‘[e]xplicit acknowledgement of such dilemmas helps deflate unwarranted

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<sup>107</sup> Jeffrey Brand-Ballard, ‘Consistency, Common Morality and Reflective Equilibrium’ (2003) 13 (3) Kennedy Institute of Ethics Journal 231, 241.

<sup>108</sup> Dworkin, *JFH* (n2) 6-7.

<sup>109</sup> Laurence BonJour, *The Structure of Empirical Knowledge* (HUP 1985) 90-92; Jonathan Dancy, *Introduction to Contemporary Epistemology* (Blackwell 1985) 110.

<sup>110</sup> Dworkin, *JIR* (n54) 160.

<sup>111</sup> As B&C’s note, Gert, Clouser and Culver argue that ‘the *prima facie* principles and other action guides in our framework often conflict, and our account is too indeterminate to provide a decision procedure to adjudicate the conflicts’ (B&C, *PBE* (n4) 394).

<sup>112</sup> *ibid* 12.

expectations about what moral principles and theories can do'.<sup>113</sup> But this never addresses *how* or *why* such conflict occurs. As such, their adherence to the idea principles can conflict begins to look like the following thesis:

Moral conflict is real, and any theory that denies this is false to moral reality. Once we understand the nature of [for example, beneficence and respect for autonomy] we see that, in cases...they just *do* conflict. That conflict is not an illusion produced by incomplete moral interpretation; it is a matter of plain fact..<sup>114</sup>

But on this reinterpretation of their theory B&C ascribe to the idea that the reality of moral judgements is a matter of moral argument,<sup>115</sup> and the interpretive account of moral responsibility put forward earlier. Thus, the correct response to this line of reasoning is it is wrong to assert conflict is just a matter of plain fact. Moral claims cannot just be true in virtue of a bare fact. The better way to explain such conflict is to see our quest for moral responsibility as a constant reinterpretation and process. But this process sometimes seems to highlight apparent conflicts. This is not to say this conflict is deep and genuine. If we are committed to the interpretive conception of moral responsibility, the best way to try to work out that responsibility is to refine our conceptions of the two conflicting values. We seek coherence and not conflict. We confront this conflict by working towards eliminating it, hoping (in some circumstances, inevitable) conflict is merely temporary. The other possibility is when interpreting our values, the best interpretation is one in which it is *required* that they

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<sup>113</sup> ibid. Indeed, when discussing Gert's accusation (at footnote 111 above), B&C seem to evade the accusation, and again do not really discuss *why* their principles conflict. They note 'we have acknowledged that the frameworks of principles do not themselves resolve conflicts among principles and determinative rules. No framework of guidelines could reasonably anticipate the full range of conflicts, but the Gert and Clouser system does no more to settle this problem than our framework does. It does not follow that our principles are inconsistent or that we encounter incompatible moral commitments in embracing them. Our theory calls for balancing and specification, whereas their account assumes that its "more concrete" rules escape the need for specification' (ibid 395).

<sup>114</sup> Dworkin, *JFH* (n2) 120.

<sup>115</sup> ibid 10.

conflict. But this does not collapse into the matter of plain fact thesis. It would show there is collaboration at a deeper level of two values that realises conflict as a substantive outcome.<sup>116</sup>

This section has shown B&C's theory is interpretive in nature. Although B&C define their theory as the four-principles approach, the four principles in B&C's theory are better understood as four interpretive concepts and values. The section also dealt with criticisms levelled at B&C's theory; it was shown that given their interpretive commitments, these criticisms could be overcome. Having shown B&C's theory is coherentist (in chapter four) and interpretive, it remains to be shown B&C's theory is interpretive in the right way. This

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<sup>116</sup> ibid 119-120. This notion of conflict links into another feature of B&C's theory. B&C accept in some circumstances two specifications can be given, each equally meritorious as the other—a form of moral relativism in particular moralities (B&C, *PBE* (n4) 4; 19). But again, the important question is *why* B&C accept this form of moral relativism. They note '[i]n any problematic case, competing specifications are likely to be offered by reasonable and fair minded parties, all of whom are committed to the common morality' (ibid 19). It seems again B&C wish to be accommodating. But, as B&C reject the idea historical facts about the commonality of a belief can contribute to its normative authority (ibid 419), why then accept the converse situation of diversity as contributing towards some form of relativism? 'People, in their diversity, must decide what is true, and this is a matter of the justification of the conviction, not the best explanation of convergence or divergence' (Dworkin, *JFH* (n2) 48). B&C need a *positive* argument for why they adhere to relativism in particular moralities. Relativism implies the 'correct standards of interpretation are relative to different schools or communities of interpreters' (ibid 145). This view is therefore 'internally sceptical' because it relies on the conviction that morality rises only out of the practices of particular communities' (ibid 34 (emphasis added)). For the definitions of internal and external scepticism, see footnote 134 in chapter 4). This sceptical stance needs to be contrasted with the *true* default position, that of uncertainty (Dworkin, *JFH* (n2) 91). Even without looking at the flaws of relativism as a moral position See, for example, Dworkin's discussion in *JFH* (n2) at 146-147 and 170-171. See also Kramer, *Realism* (n9) at 30-46), in the absence of a positive argument B&C's commitment to relativism seems not to be a commitment to relativism at all, but a consequence of B&C trying to be *overly* accommodating. Further, until B&C *provide* a positive argument, it is better (given the above analysis) to see their theory as committed to the reality of moral judgements as a matter of moral argument, and the interpretive account of moral responsibility put forward earlier that forces us to work through apparent conflicts in value (Dworkin, *JFH* (n2) 10; 120. Finally and more specifically to this thesis, it may also be contended by way of criticism if B&C endorse the further characteristics of moral epistemology set out above, this may lead to giving up their four principles in favour of *one* vale, integrity, as Dworkin's conception of responsibility leads him to the conclusion that 'the nerve of responsibility is integrity' (Dworkin, *JFH* (n2) 101). However, this is not the case. Dworkin makes it very clear, using the concept of law as an example, that although a certain concept may be interpretive, it does not follow Dworkin's own theory of (legal interpretation or) truth conditions of propositions must be adhered to (Ronald Dworkin, 'Response' in Scott Hershovitz (ed) *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 307 (hereafter *Response ELE*)). Indeed, Dworkin is at pains to emphasise this throughout *Law's Empire*, where he also considers the theories of legal pragmatism and conventionalism, as well as law as integrity. Dworkin concludes law as integrity is the best conception of law because it provides the best interpretation of contemporary legal practice, not simply because the concept of law is an interpretive one (Dworkin, *JIR* (n54) 226. See also, in summary, *Law's Empire* (n31) 94-46). Thus, the correct question to ask is whether the four principles in B&C's theory provide the best interpretation of the concept of bioethics, so that the truth conditions of a particular proposition in that domain are not only interpretive, but also interpretive with regards to the four values of respect for autonomy, beneficence, nonmaleficence and justice. This has been answered in the positive. Finally, see also B&C's interesting discussion of the moral virtue of integrity, which is very similar to Dworkin's formulation regarding coherence and authenticity (Dworkin, *JFH* (n2) 108), and the conception of integrity discussed in chapter two, in *PBE* (n4) at 40-42.

will complete the integration of B&C's bioethical framework into Dworkin's theory of law, and provide judges with a decision-making framework that best recognises the ethical nature of judicial decision-making, and give them confidence in relying on their convictions in applying moral principles and medical ethics.

#### **4. B&C's theory is interpretive in the right way**

This section shall now go on to make the further case that '[m]orality is a whole, and not just political morality, is an interpretive enterprise'<sup>117</sup>. It shall do so by showing B&C's theory is interpretive in the right way. B&C's common morality theory is based on a constructively interpretive project. Further, just as integrity secures those fundamental principles of equality which make a community's exercise of political power morally justified,<sup>118</sup> B&C's four interpretive concepts and values also secure these fundamental norms of the common morality, making the decisions and justifications in question more secure and genuine in an analogous way.<sup>119</sup> B&C's four principles are intrinsically linked to the common morality. The four-principles framework assumes the demand to solve problems in bioethics by reference to that morality shared by all persons committed to morality, applicable to all persons in all places, and all human conduct can be judged by is sensible. Further, solving bioethical problems using these four principles is the best way of implementing the norms of the common morality with regards to problems of bioethics, *precisely* because of their pertinence to bioethics. This latter conclusion has been reached through an interpretive exercise, by analysing the paradigms of bioethical practices (in a broad sense encompassing, though not limited to, traditional and contemporary professional medical ethics codes, traditional and contemporary ethical theories, various moral and bioethical methodologies, paradigms of what it means to act ethically in micro- and macro-level bioethical scenarios, and issues of

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<sup>117</sup> Dworkin, *JFH* (n2) 12.

<sup>118</sup> Dworkin, *Law's Empire* (n31) 96. See also chapter 2.

<sup>119</sup> Dworkin, *Law's Empire* (n31) 96; B&C, *PBE* (n4) 410.

moral status and moral character). Our considered judgments, the way our moral beliefs cohere, and the best way to explain the disagreement that occurs when competing tests, theories and specifications are proposed to solve bioethical problems have also been analysed. These four principles are the best principles for solving problems in bioethics, and have been selected because they best express the values that the concept of bioethics should be seen through, having analysed those practices in which the concept figures.<sup>120</sup>

This section shall first briefly look at the similarities between law and morality on the interpretive account developed in this thesis. This will partly show how morality is an interpretive enterprise,<sup>121</sup> as highlighting the similarities between the concepts of law and morality will show there is a clear possibility this claim fits our practices. This section will then go on to discuss why ethics should inform the law.<sup>122</sup> More specifically, the section shall discuss why it is important B&C's theory is interpretive in the right way. This again will show there are benefits to seeing morality as an interpretive enterprise, and will show the fundamental principles this claim is built upon. Last, this section will show B&C's common morality theory in the 7<sup>th</sup> edition of *PBE* is based on an interpretive project. This will not only clarify the structure of B&C's reinterpreted bioethical framework, but the relationship between Dworkin's theory of law and B&C's bioethical framework. In addition, this claim will also show the benefits to Dworkin's interpretive theory of law and moral epistemology are prevalent throughout the entire framework constructed throughout this thesis.

#### **4.1. The similarities between law and morality on this interpretive account**

This section can only very briefly treat the similarities between law and morality, and will do so in a way amenable to the integration of Dworkin's theory of law and B&C's reinterpreted

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<sup>120</sup> Guest, *How to Criticise* (n1) 4 (online); Dworkin, *JFH* (n2) 6; B&C, *PBE* (n4) 13; 410.

<sup>121</sup> Dworkin, *JFH* (n2) 12.

<sup>122</sup> Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (MQUP 2009) 40 (hereafter *Imagination*).

bioethical theory. One very basic, but very important similarity on these accounts is both law and morality are argumentative.<sup>123</sup> As it was shown above B&C's four principles are best seen as interpretive values, B&C adhere to the same type of moral reasoning as Dworkin, that there can be a *best* interpretation of a moral concept or principle,<sup>124</sup> it also reasonable to say, as is the case with law, the ““interpretive” attitude<sup>125</sup> holds for morality, the common morality (to be argued), and the concept of bioethics. Second, though it is clear we can take other domains of value seriously<sup>126</sup>, Dworkin also brings out the important practical points of the philosophical discussions about law and morality, and how the decisions we take in both these domains of value matter gravely. He notes: ‘[w]e want to live well and behave decently; we want our communities to be fair and good and our laws to be wise and just. These are very difficult goals, in part because the issues at stake are complex and puzzling and in part because selfishness so often stands in the way’.<sup>127</sup> Likewise, B&C note generally practical ethics is the attempt to interpret general norms, and to use those norms in the course of deliberation for the purpose of addressing particular problems and contexts, be it practices and/or policies in professions, institutions, or government.<sup>128</sup>

Whilst these arguments are uncontroversial, they rely upon a more important premise that needs to be made explicit; the relationship between the concepts of law and morality themselves. It was argued in chapters two and three that Dworkin’s theory of law, with its

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<sup>123</sup> As Dworkin notes, ‘law is a social phenomenon. But its complexity, function and consequence all depend on one special feature of its structure. Legal practice unlike many other social phenomena is *argumentative*’ (Dworkin, *Law’s Empire* (n31) 13) (emphasis in original). Indeed, John Finnis notes ‘*Law’s Empire* will shape jurisprudence by its admirably resourceful attention to understanding a community’s law “internally”. It promotes reflective understanding of the *practical argumentation* constitutive of the attitude(s) in which that law subsists’ (John Finnis, ‘On Reason and Authority in *Law’s Empire*’ (1987) 6 (3) *Law and Philosophy* 357, 357). See also Finnis’ interesting suggestion of Dworkin’s ‘neo-classical identification [ ] of the ontological basis of law in an attitude (*voluntas, habitus*) rather than in propositions, processes or persons as such’ (*ibid*, footnote 1) (emphasis in original).

<sup>124</sup> Dworkin, *JFH* (n2) 101-102.

<sup>125</sup> Dworkin, *Law’s Empire* (n31) 47. That attitude is one whereby, first, it is assumed that the practice has a particular point, and second, that the requirements of that practice are sensitive to this point (*ibid*).

<sup>126</sup> See, at the broadest level, Dworkin’s treatment of the domains of Ethics, in *JFH* chapters 9-10, Politics in *JFH* chapters 15-19, and concepts including Aid, Harm and Obligations in *JFH* chapters 12-14.

<sup>127</sup> Dworkin, *JFH* (n2) 68. See also *ibid* 95.

<sup>128</sup> B&C, *PBE* (n4) 2.

interpretive commitments, is a better theory because it explains the intricacies of hard cases and gives critical direction to judges in resolving arguments about what the law requires.<sup>129</sup>

These arguments are important here because the best analysis of the concept of law is therefore as an interpretive concept. Dworkin's interpretive methodology is also most appropriate for analysing the practice of law.<sup>130</sup> This concept cannot be properly analysed except by seeing it located within an integrated web of political value and morality, as well as noticing the (other) social practices in which the concept figures.<sup>131</sup> More explicitly, law and morality should not be seen as two separate systems, *but as one continuous single system*; law is a part of political morality, just as political morality flows from a more general personal morality. Political morality flows from personal morality because whilst political obligation is borne out of a relationship which holds among subjects of a political community, those subjects discharge these obligations through a separate collective entity. Political morality therefore looks at what is owed to others as individuals when we act, as a community, on behalf of and in that entity.<sup>132</sup> However, as Dworkin notes, '[t]he more difficult question is how [law] should be distinguished from the rest of political morality – how these two interpretive concepts should be distinguished to show one as a distinct part of the other'.<sup>133</sup> This question highlights the differences Dworkin believes persists, despite believing that law and morality form a single system. He notes '[a]ny plausible answer will centre on the

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<sup>129</sup> E. Phillip Soper, 'Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute' in Marshall Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth 1983) 19.

<sup>130</sup> Andrew Halpin, 'The Methodology of Jurisprudence: Thirty Years Off the Point' (2006) 19 Can J L & Jurisprudence 67, 76 (hereafter *Thirty Years*).

<sup>131</sup> Dworkin, *JFH* (n2) 404.

<sup>132</sup> *ibid* 405; 327-328. For Dworkin's discussion regarding the "fatal flaw" in the two-systems picture of law and morality, whereby '[o]nce we take law and morality to compose separate systems of norms, there is no neutral standpoint from which the connections between these supposedly separate systems can be adjudicated' (*ibid* 402-403) see *JFH* 402-405. See also Hugh Baxter's issue that 'Dworkin needs to elaborate and make consistent the various metaphors he uses in presenting this model' (Hugh Baxter, 'Dworkin's "One-System" Conception of Law and Morality' (2010) 90 (2) B U L Rev 857, 857).

<sup>133</sup> Dworkin, *JFH* (n2) 405.

phenomenon of institutionalisation'.<sup>134</sup> Specifically, 'the integrated account...distinguishes law from political morality, in effect, by defining a legal right to a right as a judicial decision'.<sup>135</sup>

Therefore, given these similarities and this premise, there is a clear possibility of integrating a bioethical framework into an interpretivist theory of law. 'Interpretivism...argues that law includes not only the specific rules enacted in accordance with the community's accepted practices but also the principles that provide the best moral justification for those enacted rules'.<sup>136</sup> However, in saying principles provide moral justification *for those rules*, these principles are going to be principles of *political* morality, as these principles are directed at those rules of law themselves. As Dworkin notes 'any plausible conception of law...must suppose that local decisions have a force in fixing what law requires that they do not have in fixing what is just or unjust...any competent theory assigns such decisions much greater force in law than in morality'.<sup>137</sup> This shows there is clear space for a bioethical component to be integrated into a theory of law that talks about the best justification of legal rules via principles of *political* morality, given the similarities and premise adverted to above. It now needs to be shown why it is important B&C's theory is interpretive in the right way, and argue for this claim itself.

#### **4.2. Why it is important B&C's theory is interpretive in the right way**

First, it has been argued that B&C adhere to the further characteristics of interpretive moral responsibility, with all the benefits this conception brings. In particular, one of those benefits

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<sup>134</sup> ibid. See also B&C's implicit acceptance of the distinction between law and ethics along much the same lines when discussing issue of justification in *PBE* (n4) at 390-391.

<sup>135</sup> Dworkin, *JFH* (n2) 410. That is, practices in which the concept of law figures 'assume that people have, among other political rights, rights with a special feature: these are legal rights because they are enforceable on demand in an adjudicative political institution such as a court ... a conception of law [is] and account of the grounds needed to support a claim of right enforceable on demand in that way' (ibid 404-405). See also Dworkin's emphasis on the 'special structuring principles that separate law from the rest of political morality' (ibid 413) throughout chapter 19 *JFH*, in particular 408-409, 411, 413-415.

<sup>136</sup> ibid 402.

<sup>137</sup> ibid 171.

was this conception of responsibility makes very similar fundamental (moral) demands to those of integrity in law, those being we should treat others in a genuinely respectful, principled manner.<sup>138</sup> In showing B&C's theory of the common morality is based on a constructive interpretation and B&C's four interpretive concepts and values *secure* the norms of the common morality in an interpretive way, this completes the integration of B&C's bioethical framework and Dworkin's theory of law. This is not only because it explicitly affirms B&C's commitment to similar fundamental principles as Dworkin's theory of law, but also because it makes explicit the network of value we are able to situate B&C's and Dworkin's theories in, relative to each other. There is the extension of a 'community of principle'<sup>139</sup> across both the domains of law and bioethics. A community has both a moral responsibility, and more specifically a medical moral responsibility and a political moral responsibility. That is 'a community or a culture has moral responsibilities of its own: its collective arrangements must show a disposition towards realising that responsibility'.<sup>140</sup> Further, '[p]olitics is for most people among their most important moral theatres and challenges. So a community's political philosophy is a major part of its conscience and claim to collective moral responsibility'.<sup>141</sup> Last, and more specifically, it is clear judges must also show a disposition towards realising these responsibilities. Given the problems identified in chapter one, the main way in which they can acquit these responsibilities is by engaging with the inherently ethical issues in particular cases using a framework that recognises the ethical nature of judicial decision-making, so they can confidently rely on their own convictions in applying moral principles and medical ethics. Thus, the claim that B&C's theory is

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<sup>138</sup> ibid 107.

<sup>139</sup> Dworkin, *Law's Empire* (n31) 214

<sup>140</sup> Dworkin, *JFH* (n2) 110.

<sup>141</sup> ibid.

interpretive in the right way is therefore a significant one for this thesis. It now needs to be set out.<sup>142</sup>

#### **4.3. B&C's theory of the common morality is based on a constructive interpretation;**

##### **B&C's four interpretive values secure the norms of the common morality**

It is first necessary to outline any additions to B&C's common morality theory in the 7<sup>th</sup> edition of *PBE*. Whilst B&C's most recent common morality theory is virtually the same as in the 6<sup>th</sup> edition of *PBE*, there are a few noteworthy additions to B&C's common morality theory that impact upon the integration of B&C's and Dworkin's theories. First, as well as B&C noting there are certain character traits and rules of obligation in the common morality, B&C add in the 7<sup>th</sup> edition that '[i]n addition to the vital obligations and virtues just mentioned, the common morality supports human rights and endorses many moral ideals such as charity and generosity'.<sup>143</sup> This quote is interesting because the concept of "human rights" can be plausibly said to be quite content *thick*, despite B&C re-affirming the common morality 'contains moral norms that are abstract, universal and content-thin'.<sup>144</sup> If this is the case, this seems to add a lot more content to the common morality than is perhaps warranted, or in line with the rest of B&C's comments.

B&C link the common morality to their four principles in now familiar ways; they note '[t]he moral norms that are central for biomedical ethics *derive* from the common morality, though they certainly do not exhaust the common morality'.<sup>145</sup> Further, '[t]he set of pivotal moral principles defended in this book functions as an analytical framework of general norms

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<sup>142</sup> For independent reasons of substance as to why, in assessing the (moral) acceptability of decision regarding health care, we must start from an ethical, rather than legal position, and why ethics should inform the law and not vice versa, see Margaret Somerville, *The Ethical Canary: Science, Society and the Human Spirit* (MQUP 2004) 288 (hereafter *Canary*). See also Professor Somerville's discussion of how '[o]ne way to put into practice the principles and values enshrined in human rights is through law, but it is not the only way' (Somerville, *Imagination* (n122) 32) in *Imagination* (n122) 31-34; 40.

<sup>143</sup> B&C, *PBE* (n4) 4.

<sup>144</sup> *ibid* 5.

<sup>145</sup> *ibid* 13 (emphasis added).

*derived* from the common morality that form a suitable starting point for biomedical ethics'.<sup>146</sup> This is different to the language used in the 6<sup>th</sup> edition of *PBE*.<sup>147</sup> The language suggests, in *deriving* their four principles from the common morality, there is a degree of specification occurring. This is much like how Dworkin distinguishes law as part of political morality, which in turn is part of the still larger concept of morality.<sup>148</sup> This idea shall become important later when looking to clarify the overall schema this chapter seeks to present.

What also seems to be new to the 7<sup>th</sup> edition (or at least made more explicit) is B&C's adherence to an "impartiality criterion" in regards to deciding which persons are committed to morality.<sup>149</sup> For example, B&C note '[m]ere coherence is an inadequate criterion, so on what basis can we be confident that considered judgements are sufficiently free of bias and constitute justified beliefs?'.<sup>150</sup> They go on to state '[m]oral judges are entitled to claims to have reached considered judgements only if those judgements have been framed from an impartial perspective that reins in conflicts...of self-interest'.<sup>151</sup> In addition, when discussing the possibility of empirically proving the existence of the common morality, B&C state 'the persons to be included in a study that investigates [their] hypothesis are (1) persons who pass a rigorous test of whether their beliefs conform to some critical considered judgement...and

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<sup>146</sup> ibid (emphasis added) (footnote omitted).

<sup>147</sup> Where they note '[t]he common morality contains moral norms that are basic for biomedical ethics' and '[t]he set of moral principles defended in this book functions as an analytical framework intended to express general norms of the common morality that are a suitable starting point for biomedical ethics' (Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (6<sup>th</sup> edn, OUP 2009) 12 (emphasis added).

<sup>148</sup> Dworkin, *JFH* (n2) 5. See also how B&C note '[a]lthough there is only one universal common morality, there is more than one theory of the common morality' (B&C, *PBE* (n4) 25, footnote 3). In addition, they also note that the common morality has authority 'in all cultures where there is the requisite core of morally committed persons' (ibid 26, footnote 7). This is an important, yet vague analysis of the degree of consensus or agreement needed in order for the common morality to have moral authority, analogous to Dworkin's 'stages of interpretation' in *Law's Empire* (n31) 65-66, and his discussion of the type of agreement needed in relation to interpretive concepts in *JFH* (n2) 160-163. More worryingly, it suggests that if there is *not* the 'requisite core of morally committed persons' (B&C, *PBE* (n4) 26, footnote 7), then the common morality *does not* have moral authority in these societies. This statement would seem to render the common morality useless just at the point when it is needed most.

<sup>149</sup> B&C, *PBE* (n4) 416.

<sup>150</sup> ibid 409

<sup>151</sup> ibid.

(2) persons who qualify has having the ability to take an impartial moral point of view,<sup>152</sup>.

B&C's hypothesis is that '[a]ll persons committed to morality and to impartial moral judgment in their moral assessments accept at least the norms that we have proposed as central to the common morality'.<sup>153</sup> In speaking of how the impartiality criterion tries to ensure that persons behave in accordance with their moral commitments and avoid temptations of self-interest,<sup>154</sup> analogies can be drawn with how our moral responsibility must act as a way to filter out our unprincipled convictions.<sup>155</sup> Therefore, this specific analysis is beneficial here. This condition provides another example of how B&C's and Dworkin's moral commitments are similar in substance.

In addition to outlining B&C's latest common morality position, in order to show how B&C's theory is interpretive in the right way, it is important to highlight Dworkin's rebuttal of the (morally) sceptical implications of John Rawls's constructivism. On one understanding of Rawls's 'original-position device'<sup>156</sup> it provides a solution to the problem of how those persons in a political community who disagree regarding moral matters are able to live together in a coercive state. That solution is to collect together those principles of justice common to the community, so as falling within an "overlapping consensus". Then, using the device of the original position,<sup>157</sup> this allows these persons to model the common convictions into a suitable device of representation, allowing them to then construct principles of justice that everyone in the political community can accept. But, the sceptical implications of this approach are seen when it is noted these principles have been selected not because they are *true*, but because they are *common*. Thus, whilst this position may not provide a directly

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<sup>152</sup> ibid 416.

<sup>153</sup> ibid (emphasis added).

<sup>154</sup> ibid 409; 406.

<sup>155</sup> Dworkin, *JFH* (n2) 108.

<sup>156</sup> ibid 63.

<sup>157</sup> The original position is a thought experiment whereby people come together to establish a political community, but each person lacks knowledge of pertinent personal factors such as their own age, sex, talent and economic standing (ibid).

sceptical argument, it may show moral truth does *not* have to play a role in defending a robust theory of political justice.<sup>158</sup>

But, Dworkin contends this sceptical marginalisation of moral truth is in fact impossible. Rawls aimed to identify this “overlapping consensus” by emphasising the political traditions of a particular historical community. However this project is unfeasible, even if a sociological approach is taken. Rawls would simply not be able to find an overlapping consensus that is helpful for the purposes above in, for example, what all Britons accept on reflection. The issue of abortion itself would render the project unachievable given the deep divisions regarding the legal and ethical principles behind such a sensitive issue.<sup>159</sup> Instead, Dworkin contends ‘Rawls plainly had in mind, however, not a sociological, but an interpretive search for overlapping consensus. He hoped to identify conceptions and ideals that provide the best account and justification of the liberal traditions of law and political practice’.<sup>160</sup> This type of project however cannot help *but* rely on morality (as opposed to marginalising moral truth) as it must choose among competing interpretations of a political tradition by taking some conceptions to provide a better justification for that tradition than others.<sup>161</sup>

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<sup>158</sup> ibid 63-65. That is, ‘[c]onstructivism challenges the ordinary view [of morality] not directly but by trying to shove it aside’ (ibid 65). For Rawls’ discussion of the original position, see (in particular, but not limited to) John Rawls, *A Theory of Justice* (rev ed, OUP 1999) 10-19 & chapter 3, “The Original Position”. See also John Rawls, *Justice as Fairness: A Restatement* (Universal 2001) part 3, “The Argument from the Original Position”. More specifically, for discussions surrounding the veil of ignorance, see *A Theory of Justice* 118-123, and *Justice as Fairness* 85-89.

<sup>159</sup> Dworkin, *JFH* (n) 66. The briefest of reflections goes towards supporting this: for example, The Society for the Protection of Unborn Children is purported to have over 45,000 members throughout the United Kingdom (Society for the Protection of Unborn Children, *About Us: Structure* <<http://www.spu.org.uk/about/structure>> accessed 08th July 2013), as well as the ProLife Alliance gaining over 20,000 votes in the 2004 European Parliament Election (BBC News, *European Election: United Kingdom Result* (last updated 14<sup>th</sup> June 2004) <[http://news.bbc.co.uk/1/shared/bsp/hi/vote2004/euro\\_uk/html/front.stm](http://news.bbc.co.uk/1/shared/bsp/hi/vote2004/euro_uk/html/front.stm)> accessed 08th July 2013). See further how the Christian People’s Alliance, and Christian Party (both pro-life political parties) gained 56,771 votes and 21,056 votes respectively in the 2004 European Parliament Election (*European Parliament election, 2004 (United Kingdom)* <[http://en.wikipedia.org/wiki/European\\_Parliament\\_election,\\_2004\\_\(United\\_Kingdom\)](http://en.wikipedia.org/wiki/European_Parliament_election,_2004_(United_Kingdom))> (accessed 5<sup>th</sup> May 2014)), and 249,493 votes together on a joint ticket in the 2009 European Parliament Election (*European Parliament election, 2009 (United Kingdom)* <[http://en.wikipedia.org/wiki/European\\_Parliament\\_election,\\_2009\\_\(United\\_Kingdom\)](http://en.wikipedia.org/wiki/European_Parliament_election,_2009_(United_Kingdom))> (accessed 5<sup>th</sup> May 2014)).

<sup>160</sup> Dworkin, *JFH* (n2) 66.

<sup>161</sup> ibid.

It is important to highlight this critique against Rawls's constructivism because the same sort of argument can be invoked to support B&C's common morality theory and how the four interpretive concepts and values secure the norms of the common morality. B&C note (consistent with the 6<sup>th</sup> edition of *PBE*) they 'accept both the normative force of the common morality and the object of studying it empirically'.<sup>162</sup> Nonetheless, whilst B&C devote space to showing how the common morality could be empirically justified,<sup>163</sup> B&C also accept that '[w]hatever might be established empirically about the existence of universal norms of a shared common morality, nothing normative would follow directly from this finding. Neither historical facts...nor social science facts of the sort envisaged in the previous section serve to justify moral norms'.<sup>164</sup>

These passages lead to two main arguments that make a case for it being better to see B&C's common morality theory as based on an interpretive project. Substantively, we are concerned with the normative force of the common morality. The main aim of this thesis is to provide judges with a framework that recognises the ethical nature of judicial decision-making, and allow them to use it as a normative tool to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics. Whilst there does have to be a degree of fit in order for this idea truly to be a constructive interpretation (as discussed below), the point here is there are several moral reasons that argue in favour of seeing B&C's theory of the common morality as based on a constructive interpretation.

The first is in seeing the common morality as based on an *interpretive* project, this means the argument B&C highlight, that '[s]ome critics of our theory of common morality have asserted

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<sup>162</sup> B&C, *PBE* (n4) 4.

<sup>163</sup> ibid 415-418.

<sup>164</sup> ibid 418. In their section on empirical justification, B&C further note '[w]e have not claimed in this section that empirical confirmation of the hypothesis that there exists a common morality constitutes a normative justification of the norms of the common morality. A strictly empirical finding by itself cannot do so' (ibid).

that scant anthropological or historical evidence supports the empirical hypothesis that a common morality exists’,<sup>165</sup> cannot affect the normative force of the common morality *at all*:

we cannot take the fact of disagreement itself to count as an argument that our moral convictions are mistaken. We would not count the popularity of any of our other convictions as evidence for their truth...In any case, because diversity is just a matter of anthropological fact, it cannot on its own show that all positive moral judgements are false. People, in their diversity, must still decide what is true, and this is a matter of the justification of conviction, not the best explanation of convergence or divergence.<sup>166</sup>

In basing their formulation of the common morality on a constructive interpretation, B&C do not need to worry about the arguments (for example) Leigh Turner highlights in ‘Zones of Consensus and Zones of Conflict: Questioning the “Common Morality” Presumption in Bioethics’.<sup>167</sup> On this interpretive reconceptualisation, B&C’s claim above about empirical conclusions and the normative force of the common morality can be developed, as it can now be properly explained why such claims cannot affect the normative force of the common morality. The best way to see these claims is as “externally sceptical”: they ‘rely entirely on second-order, external statements about morality’.<sup>168</sup> Though these claims could be revised to be internally sceptical, this would mean they would have to rely on some very general moral claim in order to be sceptical about further moral claims. They would therefore have to assume, and *not* deny, that moral judgments are capable of being true and having normative force.<sup>169</sup> Moreover, as it has been shown B&C adhere to the same type of interpretive moral

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<sup>165</sup> ibid 4 (footnote omitted).

<sup>166</sup> Dworkin, *JFH* (n2) 47-48.

<sup>167</sup> (2003) 13 (3) Kennedy Institute of Ethics Journal 193.

<sup>168</sup> Dworkin, *JFH* (n2) 31- 34. See further footnote 134 in chapter 4.

<sup>169</sup> Dworkin, *JFH* (n2) 31. The revised, internally sceptical version of the arguments above might look something like the following: ‘if moral truth does not cause moral opinion, then people can have no reliable or responsible grounds for those opinions’ (ibid 76, footnote omitted). Because there is a great degree of

epistemology as Dworkin, and B&C's four principles are best understood as four interpretive concepts and values, it is clear the best interpretation of B&C's theory is one that also relies on this premise. Again, this is not to say facts about the common morality cannot figure in this interpretive reconstruction, simply those facts are part of the moral judgement about the common morality itself, about the moral significance of the common morality.<sup>170</sup> Seeing B&C's common morality theory as based on an interpretive project places that theory on a stronger footing, not just because of the benefits of seeing their theory as interpretive in the right way, but because arguments purporting to rely on anthropological evidence to refute their normative claims simply cannot do so (with it also being best explained *why* they cannot do so). 'A non-empirical thesis of this sort cannot be undermined by empirical means'.<sup>171</sup>

However, these empirical claims might impact upon this reinterpretation of B&C's common morality in another way. They may potentially defeat the claim B&C's theory of the common morality is based on a constructive interpretation, because they may go towards showing this idea does not *fit* B&C's theory. Nonetheless, it must be remembered that 'convictions about fit contest with and constrain judgements of substance...The interpretive judgment must notice and take account of these several dimensions...it must also meld these dimensions into an overall opinion'.<sup>172</sup> As the question of fit is still an *interpretive* question,<sup>173</sup> there are still moral reasons underlying the discussion as to whether a particular proposition (B&C's theory of the common morality is based on a constructive interpretation) fits in the pertinent sense (in this case, whether the proposition above fits with B&C's claims about the common morality). Given this, whilst there are doubts about whether B&C can empirically prove the

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disagreement regarding positive moral claims, moral conviction is therefore not caused by moral truth. If it was, it would be reasonable to suppose there would be less disagreement. Therefore, people can have no reliable or responsible grounds for those opinions (*ibid* 47). A variation regarding this argument was dealt with when considering the isolation problem in chapter 4.

<sup>170</sup> Guest, *How to Criticise* (n1) 3 (online).

<sup>171</sup> Peter Herisone-Kelly 'The Principlist Approach to Bioethics and its Stormy Journey Overseas' in Matti Häyry and Tuja Takala (eds) *Scratching the Surface of Bioethics* (Rodopi 2003) 67 (hereafter *Stormy Journey*).

<sup>172</sup> Dworkin, *Law's Empire* (n31) 410-411.

<sup>173</sup> Stephen Guest, *Ronald Dworkin* (2<sup>nd</sup> edn, Edinburgh University Press 1997) 40 (hereafter *RD*).

existence of the common morality<sup>174</sup> (as was the case with Dworkin's criticism of Rawls), on this interpretive account of B&C's theory, it is not fully responsive to descriptive criticisms of this sort,<sup>175</sup> given the discussion of the not-significant-in-themselves status of facts in moral judgements. Furthermore, there is evidence to *support* the view B&C do envisage the sort of interpretive project being put forward here.

Before this evidence is explored though, one issue needs to be examined which may reveal a large split between B&C's and Dworkin's theories. When discussing the possibility of change in the common morality, B&C note:

Changes in the way slaves, women and so forth are regarded seem more to be changes in either particular moralities or in ethical and political theories in the common morality. The most defensible view, we suggest, is that the common morality *does not now, and has never, included a provision of equal moral consideration for all individuals.*<sup>176</sup>

This is in sharp contrast to Dworkin, who states:

No government is legitimate unless it subscribes to two reigning principles. First, it must show equal concern for the fate of every person over whom it claims dominion.

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<sup>174</sup> See for example, Peter Herissone-Kelly, 'Determining the Common Morality's Norms in the Sixth Edition of *Principles of Biomedical Ethics*' (2011) 37 (10) J Med Ethics 585 (hereafter, *Determining*), and the sources cited in B&C, *PBE* (n4) 26, footnote 8, and 428, footnotes 54 and 55.

<sup>175</sup> Guest, *RD* (n173) 56.

<sup>176</sup> B&C, *PBE* (n4) 414. Indeed, it is inferable here B&C are using the term "individuals" to mean human beings, rather than as a wider term to encompass, for example, non-human animals. They note, before the quote above, '[s]ome might argue that the common morality has already been refined ... by the changes in the way slaves, women, people from different ethnicities and persons from many groups who were once denied basic human rights have come to be acknowledged as owed equal moral consideration' (*ibid*). Thus, the contrast to be drawn with Dworkin is still the sharp one above, rather than it being the case B&C may have meant "individuals" as a large group, with a norm of equal consideration amongst *human beings* existing within the common morality.

Second, it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.<sup>177</sup>

One tentative solution to this problem is as follows. By showing how B&C's theory is interpretive in nature, a case can be made that, interpretively, there is a norm of equality or equal consideration in the common morality. However, as B&C point out (correctly, in my opinion) there are likely to be societies which still discriminate on the basis of arbitrary grounds,<sup>178</sup> there are facts counting against this interpretation. This is not to subscribe to, in an analogous way legal positivists do, the idea facts are significant-in-and-of-themselves. However, facts have to act as some sort of check, or else such a proposition would then not be an interpretation, but instead a normative assertion.<sup>179</sup> This then brings up important questions as to how far facts can operate as checks in interpretation, when they occupy this not-significant-in-itself status Dworkin ascribes to them in the interpretive enterprise. Dworkin does not answer this question head on.<sup>180</sup> Overall though, it is the commitment to the same *enterprise* that is as important. Further, B&C do assert throughout their book how important a norm of equality is. They note:

Even if abstract norms do not change, the *scope* of their application does change. That is, to whom many or all of these principles are deemed to apply has changed and we may anticipate still further change. Our arguments in Chapter 3 regarding moral status anticipate this problem: "Who qualifies as belonging to the moral community?" may be the same question as, "Who qualifies for moral status?" It is possible that we might radically alter our understanding of who or what qualifies for moral status.<sup>181</sup>

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<sup>177</sup> Dworkin, *JFH* (n2) 2.

<sup>178</sup> B&C, *PBE* (n4) 414.

<sup>179</sup> Guest, *How to Criticise* (n1) 3-6 (online).

<sup>180</sup> Though it seems Dworkin does discuss these issues indirectly in discussing the idea of evil law, in *Law's Empire* (n31) at 101-113 and *JFH* (n2) at 410-412.

<sup>181</sup> B&C, *PBE* (n4) 413-414.

In addition, this commitment to the interpretive enterprise in turn leads to a commitment to objectively true moral norms, the reality of which is reached through moral argument. It is a reasonable proposition B&C are committed to a norm of equality this way. Indeed, B&C come extremely close to such a position, *and* state this flows from the common morality in the following passage:

can we confidently assert that norms that prohibit practices such as slave owning are justified by the common morality, even though these norms cannot be said to be themselves included in the common morality (in the sense that the common morality has no explicit standards of this sort)? We think the common morality does have this capacity. The justification is that the explicit commitments of the common morality to respect for autonomy, nonmaleficence, and the like contain implicit commitments to norms that prohibit practices such as slave owning...a rule allowing this practice would leave the common morality in a state of moral incoherence, *whether or not slave-owning societies recognise this fact.*<sup>182</sup>

Whilst this may look like an initially odd formulation, in the sense B&C say the common morality has the *capacity* to condemn such practices, even though those norms are *not in* the common morality, this oddity is dissolved when taken in the way above.

With this problem discussed, evidence to support the view B&C do envisage this interpretive project can be highlighted. This argument would apply most readily to B&C's common morality theory in the 4<sup>th</sup> edition of *PBE*.<sup>183</sup> However, in the 7<sup>th</sup> edition of *PBE*, it is a

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<sup>182</sup> B&C, *PBE* (n4) 415 (emphasis added). Another interesting point this passage raises is why should moral coherence even be needed *in the common morality*, if those norms (according to B&C's original theory) are noninferentially justified?

<sup>183</sup> Given B&C's formulation of the common morality in this edition, whereby '[a] common-morality theory takes its basic premises directly from the morality shared in common *by the members of a society*' (Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (4<sup>th</sup> edn, OUP 1994) 100) (emphasis added), is closest in structure to Rawls's idea of 'finding shared principles within a particular historical community' (Dworkin, *JFH* (n2) 65-66).

reasonable inference B&C interpret the interpretive concept of morality *itself* to arrive at the common morality. They note ‘the word *morality* [is] a much broader term than *common morality*’,<sup>184</sup> and ‘we learn to distinguish *the part* of morality that holds for everyone from moral norms that bind only members of specific communities’.<sup>185</sup> In addition, B&C state ‘[n]o particular way of life is morally acceptable unless it conforms to standards in the common morality’,<sup>186</sup> and ‘[i]t would be absurd to assert that all persons do, in fact, accept the norms of the common morality, because many amoral, immoral or selectively moral persons do not care about or identify with moral demands’.<sup>187</sup> B&C also continue to draw their distinction between the common morality and particular moralities, but also make it clear a particular morality is not morally viable if it violates the norms of the common morality.<sup>188</sup> This latter passage also has many similarities to Dworkin’s distinction between the concept and different conceptions of law.<sup>189</sup> B&C then join the common morality to their four interpretive concepts and values, the selection of these four interpretive concepts and values best justifying the central or paradigm features of bioethical practices.<sup>190</sup> Therefore to clarify, given the foregoing quotes, the concept of morality functions for B&C so as to include the common morality and the many particular moralities that can be specified from the common morality. In addition, the concept of morality includes those four interpretive concepts and values that justify the central or paradigm features of the more specific interpretive concept and practices of bioethics, which are in turn *derived from* and secure the norms of the common morality themselves.<sup>191</sup>

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<sup>184</sup> B&C, *PBE* (n4) 2.

<sup>185</sup> *ibid* 3.

<sup>186</sup> *ibid* 4.

<sup>187</sup> *ibid* 5.

<sup>188</sup> *ibid*.

<sup>189</sup> Dworkin, *Law’s Empire* (n31) 90-96.

<sup>190</sup> Dworkin, *JFH* (n2) 7. See also discussion of the ‘favoured subset model’ (Herrissone-Kelly, *Stormy Journey* (n171) 68) in chapter 4, point 2., “B&C’s common morality position outlined”.

<sup>191</sup> Dworkin, *JFH* (n2) 7; B&C, *PBE* (n4) 13.

This process of specification is best explained as interpretive in nature if this process is related to the elements of an interpretive concept above. For example, B&C note ‘[a]lthough there is only one universal common morality, there is more than one theory of the common morality’,<sup>192</sup> and when discussing the limitations of Bernard Gert’s common morality theory, note ‘some substantive requirements of the common morality are better expressed in the language of principles than the language of rules’.<sup>193</sup> B&C go on to state:

no more central moral content exists as a starting point for biomedical ethics than the kinds of norms from which we have formulated our four clusters of principles... “No more central” should not be understood here as an assertion that the principles provide the sole moral content...these principles are *drawn from* the territory of the common morality, however small or large it may be, a matter we do not try to resolve in this book. Our thesis is merely that the principles and rules are a reasonable formulation of some vital norms of the common morality and that the principles we analyse are particularly suited to biomedical ethics.<sup>194</sup>

Given B&C highlight there are different *theories* of the common morality, the common morality can vary in size according to theory, the common morality might be analysed in *better ways* than others, this disagreement is not to be seen as spurious,<sup>195</sup> and derived from the common morality are four interpretive concepts and values, this implies a degree of interpretive, theoretical disagreement over the concept of the common morality *itself*. These different theories can be seen as an instance of a most fundamental disagreement regarding

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<sup>192</sup> B&C, *PBE* (n4) 25, footnote 3.

<sup>193</sup> *ibid* 397.

<sup>194</sup> *ibid* 410 (emphasis in original).

<sup>195</sup> Dworkin, *JFH* (n2) 162. Again, when discussing the limitations of Bernard Gert’s common morality theory, B&C state that ‘[c]onsider respect for autonomy, which Gert and his colleagues find as problematic as principles of justice and beneficence. This disregard of this principle renders their assessments of some cases convoluted and puzzling’ (B&C, *PBE* (n4) 397). See, for further discussion, *PBE* 397

‘the values [ ] critics assign to a practice they take themselves to share’<sup>196</sup> or alternatively, ‘conflict in deeper divergent understandings of the critical responsibilities in play’.<sup>197</sup>

Therefore, to conclude: in trying to articulate a theory of the common morality that best justifies paradigms central to the concept of morality, applicable to all persons committed to morality and who are impartial in their moral judgements,<sup>198</sup> and from which four interpretive concepts and values are derived which best justify paradigm features of bioethics *and* secure the norms of the common morality, on this reading it is clear the concept of the common morality is interpretive in nature. Further, B&C’s formulation of the common morality is based on a constructively interpretive project. Just as Dworkin notes ‘law is a branch of political morality, which is a branch of a more personal morality’<sup>199</sup> and ‘[t]he more difficult question is how that concept should be distinguished from the rest of political morality – how these two interpretive concepts should be distinguished to show one as a distinct part of the other’,<sup>200</sup> a similar structure is apparent in B&C’s theory. The four values which deal with bioethics are part of the common morality, which in turn is part of the larger concept of morality. In addition, as both theories have their starting points in the interpretive concept of morality, it is clear we are able to integrate and situate both Dworkin’s theory of law and

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<sup>196</sup> Dworkin, *JFH* (n2) 141.

<sup>197</sup> ibid 147. Indeed it has been noted by Ronald Lindsay (as highlighted in chapter 4) that discussion regarding the common morality ‘has been hindered by different understandings of the common morality’ (Ronald A. Lindsay, ‘Slaves, Embryos and Nonhuman Animals: Moral Status and the Limitations of Common Morality Theory’ (2005) 15 (4) Kennedy Institute of Ethics Journal 323, 323). Further, see B&C’s discussion regarding Bernard Gert’s and Danner Clouser’s contention the common morality does not include moral rules of beneficence in *PBE* (n) at 396-397. See also how B&C contend that ‘[o]ne tier less abstract than principles, [Gert and Clouser’s common morality] rules are at the level of *specified* principles (B&C, *PBE* (n4) 395) (emphasis in original). Last, see Arras’s discussion of B&C & Gert’s conceptions of the common morality in John D Arras, ‘The Hedgehog and the Borg: Common Morality in Bioethics’ (2009) 30 Theor Med Bioeth 11 (hereafter *Borg*), in particular his criticism of Gert’s conception at 21-29. Ultimately he concludes that ‘common morality figures so prominently in the respective projects of Gert and Beauchamp-Childress, but their accounts differ so radically in motivation, content and scope that one might wonder whether they are talking about the same thing’. In addition, he also concludes ‘certain elements of Gert’s magisterial conception of common morality are controversial at best and woefully inadequate at worst’ (Arras, *Borg* (n197) 29). Again, both these quotes show the potential for an analysis between B&C’s and Gert’s conceptions of the common morality as a form of fundamental, theoretical disagreement regarding the concept of the common morality, an analysis that cannot (sadly) be undertaken within this thesis.

<sup>198</sup> B&C, *PBE* (n4) 416; Dworkin, *JFH* (n2) 7.

<sup>199</sup> Dworkin, *JFH* (n2) 5.

<sup>200</sup> ibid 405.

B&C's bioethical framework in the same network of value, relative to each other. Last, given the four interpretive concepts and values secure the norms of the interpretive concept of the common morality, this completes the integration of B&C's bioethical framework into Dworkin's theory of law, as it explicitly affirms B&C's commitment to similar fundamental principles of Dworkin's theory of law. There is an extension of a community of principle across the domains of law and bioethics.

## **5. Conclusion**

This chapter has established many claims in seeking to provide some further account of the structure of moral arguments that recognises the differences and similarities between law and morality/ethics. It has established B&C's bioethical framework as well as being coherentist in character, is interpretive in nature and interpretive in the right way. This means we can achieve an integration of B&C's bioethical framework into Dworkin's theory of law that is mutually supportive and interdependent.<sup>201</sup> Both theories form a single continuous system that follows a tree structure. For Dworkin, the concept of law branches from political morality, which in turn branches from the even more general interpretive concept of morality.<sup>202</sup> For B&C, on this reinterpretation, their four interpretive values branch out from the common morality, which in turn branches out from the general interpretive concept of morality as well. Therefore, we can locate B&C's bioethical framework and Dworkin's theory of law in the same network of value and as having the same structure. Further, they both adhere to the same type of interpretive moral reasoning and moral epistemology. This in turn means both theories make extremely similar, fundamental moral demands. This claim is reinforced by showing B&C's four interpretive values secure the fundamental norms of the common morality.

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<sup>201</sup> ibid 255.

<sup>202</sup> ibid 405.

However, one issue still remains. Whilst this theory is theoretically coherent, the main aim of this thesis is to provide judges with *an appropriate* or *the best* decision-making framework that recognises the ethical nature of judicial decision-making so as to provide judges confidence in relying on their convictions. One important component of this is the framework has to be practicable. This is what the final chapter in this thesis will seek to prove. It shall implement this framework by looking to analyse the cases considered at the beginning of the thesis. The chapter will seek to provide an outcome which is not only satisfactory in terms of providing a right answer, but by also showing judges can rely on the framework, as it recognises the ethical nature of judicial decision-making and shows them how to apply moral principles and medical ethics in a particular case.

## Chapter 6

### **1. Introduction**

The previous chapter established an interdependent integration of Tom L Beauchamp's and James F Childress's (hereafter B&C's) reinterpreted framework and Ronald Dworkin's theory of law.<sup>1</sup> This chapter's aim is to apply this decision-making framework to an actual case. It was noted in the conclusion of chapter five in order to fully answer the central research question, it needs to be shown this framework is practicable. Though it may be contended the relationship between law and ethics in the risk disclosure scenario is effective, this has not occurred deliberately because of the construction of an integrated legal and ethical framework, but by chance.<sup>2</sup> The current framework is not ethically sophisticated. Therefore, it is clear from a judicial point of view, judges must be willing and able to rely on the soundness of their own moral convictions to recognise and deal appropriately with the inherent ethical content in certain cases.<sup>3</sup>

Due to constraints of space, only one case can be re-interpreted in light of this decision-making framework: *Chester v Afshar*.<sup>4</sup> Finally, this chapter shall provide a comparative analysis with the original judgements in *Chester*. This is to show the differences in approach in the Law Lords' judgments and under the decision-making framework here. It is also to show why the approach under the decision-making framework here is to be preferred (it highlights just how important coming to the right *legal* decision depends on the *ethical* case made) than the approaches in *Chester*.

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<sup>1</sup> Ronald Dworkin, *Justice For Hedgehogs* (Belknap Press of Harvard University Press 2011) 255 (hereafter *JFH*).

<sup>2</sup> José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) 210 (hereafter *Symbiotic*).

<sup>3</sup> Miola, *Symbiotic* (n2) 8; Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 124 (hereafter *TRS*).

<sup>4</sup> [2004] UKHL 41, and as analysed in chapter 1.

## **2. From construction to application: Chester**

### **2.1. The facts**

*Chester* shall be analysed because the judicial attitudes regarding deference to the medical profession in ethical matters were evaluated in chapter one. Further, as this case occurred some 19 years after *Sidaway v Bethlem Royal Hospital Governors*,<sup>5</sup> intervening cases can also be taken into account to show how case law surrounding risk disclosure/informed consent has developed.

The facts of *Chester* are as follows. Ms Chester consented to an operation to relieve her lower back pain due to the degeneration of her spinal discs. She was not warned by Mr Afshar (the consultant neurosurgeon) of the small but unavoidable 1-2% risk of nerve damage resulting from the procedure. Ms Chester did then suffer nerve damage resulting from the procedure. It was claimed by Ms Chester that Mr Afshar's negligence had caused her injury and she was entitled to recover damages. However, it was also found had Ms Chester been duly warned, she would not have consented to surgery three days after consultation with Mr Afshar. She would have sought further discussion with others and looked at alternative options. It could not be shown on the balance of probabilities Ms Chester would not have subsequently consented at all to the operation. The question was whether the "but for" test for causation (the conventional rules/approach to causation) could be relaxed to allow Ms Chester to recover, because on traditional causation principles, Ms Chester would fail that test.<sup>6</sup>

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<sup>5</sup> [1985] AC 871.

<sup>6</sup> Miola, *Symbiotic* (n2) 73; Kenneth Veitch, *The Jurisdiction of Medical Law* (Ashgate 2007) 80 (hereafter *Jurisdiction*); (n4) at [1]; [5]; [7]. For the full facts of the case see (n4) at [41]-[48] per Lord Hope.

## **2.2. Application**

There are two possible propositions of law. It has to be determined which is true, to determine what concrete legal right Ms Chester does (or does not) have.<sup>7</sup> Those two propositions can be put quite specifically. First, though Mr Afshar has a legal duty to warn a patient of a small but inherent risk of surgery, he is not liable to pay damages to Ms Chester where it cannot be established on the balance of probabilities “but for” Mr Afshar’s negligence, Ms Chester would not have consented to the surgery. Alternatively, Ms Chester has a right to recover damages following Mr Afshar’s negligent failure to warn her of the small but inherent risk of surgery, and that risk occurs, despite the fact it cannot be asserted “but for” Mr Afshar’s negligence, Ms Chester would not have consented to the surgery.

But before the grounds of these legal propositions are looked at, it is clear this case has an ethical component. It is vital this aspect is examined. It is only by analysing this aspect the real rationale behind potentially relaxing the rules of causation can be understood, and how that rationale really *is* ethical in nature. Further, this analysis will show *why* the rationale behind relaxing the rules of causation (respecting Ms Chester’s autonomy) is so important (‘why autonomy is considered worthy of respect’<sup>8</sup>). It will also set out precisely what respecting a person’s autonomy entails, including the more positive steps to be taken.<sup>9</sup> This will then be applied to Ms Chester’s situation to show how her autonomy should have been respected, which ethical proposition is true, and how the injury that has occurred (the infringement of her right to make an autonomous decision) could have been prevented. It will then be analysed whether the ethically true proposition is explained by the GMC’s guidance

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<sup>7</sup> Ronald Dworkin, *Justice in Robes* (Belknap Press of Harvard University Press 2006) 17 (hereafter *JIR*).

<sup>8</sup> Stephen W Smith, *End of Life Decisions in Medical Care: Principles and Policies for Regulating the Dying Process* (CUP 2012) 102.

<sup>9</sup> Tom L Beauchamp & James F Childress, *Principles of Biomedical Ethics* (7th edn, OUP 2013) 107 (hereafter *PBE*).

on consent. The guidance will also be examined to see if it is suitable as a regulatory tool for the medical profession, and *why*. This investigation will go towards ensuring the creation of a hierarchy of medical ethics discourse. This will lead to less fragmentation, and recognising confidence *can* be placed in the GMC's guidance to perform an effective regulatory function.

### **2.2.1. Ethical application**

The ethical framework to be used is the reinterpretation of B&C's four principles theory established in chapter five. This reinterpretation shows morality is an interpretive concept, just as moral reasoning is interpretive through and through.<sup>10</sup> Interpretive concepts have five key elements.<sup>11</sup> More specifically, the common morality is based on an interpretive project. Progressing with this specification, the four interpretive concepts and values of respect for autonomy, nonmaleficence, beneficence, and justice are derived from the common morality and secure its norms. This framework is committed to certain fundamental principles, including the principle we should treat others in a genuinely respectful, principled manner.<sup>12</sup> These four interpretive concepts and values best justify paradigm features of bioethical practices. However, in order for this framework to be applicable practically, we need to constructively specify these four interpretive concepts.<sup>13</sup> As argued throughout chapters four and five, it is best to see this framework as coherentist in nature. The framework here also

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<sup>10</sup> Dworkin, *JFH* (n1) 12.

<sup>11</sup> Those elements are as follows: interpretive concepts have a social dimension; there must be “agreement on paradigms”; they permit argument about “different tests” about what the concept requires in a given instance; interpretive concepts allow us to see disagreement as meaningful as opposed to trivially talking past one another (Dworkin, *JFH* (n1) 162); and finally, interpretive concepts are value laden—they allow us to see concepts through a particular value or values (Stephen Guest, ‘How to Criticise Ronald Dworkin’s Theory of Law’ (2009)

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(2)

Analysis

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<[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how\\_to\\_criticize\\_ronald\\_dworkins\\_theory\\_of\\_law.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/how_to_criticize_ronald_dworkins_theory_of_law.pdf)> 4 (online) accessed 27<sup>th</sup> June 2014 (hereafter *How to Criticise*). For a greater discussion regarding these elements of an interpretive concept, see chapter 5, point 2.1., “Further characteristics of Dworkin’s moral epistemology & why Dworkin endorses these characteristics”, and more generally chapter 3, point 3., “Justice does not work as well as integrity”.

<sup>12</sup> Dworkin, *JFH* (n1) 107.

<sup>13</sup> B&C, *PBE* (n9) 17. That is, we analyse whether the specific ethical proposition fits with what we take to be the best conceptions of other concepts and further specific propositions that flow from these other concepts. In addition, the specific ethical proposition in question is also analysed to see whether it provides a substantive justificatory force to support (and is supported by) other specific ethical propositions taken to be true or justified (Dworkin, *JFH* (n1) 12).

adheres to an interpretive moral epistemology. This means more concrete moral propositions are determined in this framework by a coherent scheme of principle that provides the best justification of bioethical practices, specifically through the four interpretive concepts and values. This scheme recognises bioethics is best understood through these four interpretive concepts and values, and the requirements of bioethical practices are sensitive to these values.<sup>14</sup> The moral epistemology here is integrated into the jigsaw of our substantive moral theory. Nonetheless, it needs to be separate enough to check our reasoning in other parts of that jigsaw.<sup>15</sup> Finally, B&C's adherence to fundamental conflicts in value has been rejected, as it is based on a philosophically weak claim.<sup>16</sup> Thus, their version of balancing must be modified.<sup>17</sup> As the ethical framework here is interpretive, and the reality of moral judgements is a matter of moral argument, balancing (or something like it) will come into play in the process of refining our moral conceptions as we work toward eliminating the conflict that has occurred and bringing our values into a coherent whole.<sup>18</sup>

Thus, there is a pertinent ethical question: specifically, the question is whether Mr Afshar has infringed Ms Chester's right to have her autonomy respected.<sup>19</sup>

Initially, a few matters must be clarified. Though Mr Afshar was found to have legally breached his duty in not warning Ms Chester of the small inherent danger in the surgery,<sup>20</sup> the ethical concept of informed consent is only minimally constituted by and concerned with

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<sup>14</sup> Dworkin; *JFH* (n1) 12; 100; Nicos Stavropoulos, 'Interpretivist Theories of Law' in Edward N. Zalta (ed) *Stanford Encyclopaedia of Philosophy* (Fall 2008 edition) <<http://plato.stanford.edu/archives/fall2008/entries/law-interpretivist/>> accessed 06<sup>th</sup> September 2013 (hereafter *Interpretivist*).

<sup>15</sup> Dworkin; *JFH* (n1) 12.

<sup>16</sup> See chapter 5, point 3.3., "Criticisms of B&C's theory".

<sup>17</sup> For B&C, '[b]alancing is the process of finding reasons to support beliefs about which moral norms should prevail. Balancing is concerned with the relative weights and strengths of different moral norms, whereas specification is concerned primarily with their scope' (B&C, *PBE* (n9) 20). See further, *ibid* 20-24. Though B&C maintain a distinction between specification and balancing, it seems like this distinction is blurred during the moral interpretive process.

<sup>18</sup> Dworkin, *JFH* (n1) 119-120.

<sup>19</sup> Miola, *Symbiotic* (n2) 55.

<sup>20</sup> (n4) at [5]; at [50].

professional liability regarding disclosure.<sup>21</sup> To be sure, issues of professional liability are not unimportant. But, the ethical analysis will focus upon the interpretive reasons of principle behind the concept of informed consent.

Second, though legally the question is whether the rules of causation can be relaxed the *real, ethical*, issue is what constitutes the concept of informed consent, and whether the ethical proposition Ms Chester ought to have been informed about the small but inherent damage in the spinal operation is true, or subject to any exceptive clauses. Interpretively, it is arguable the best way to see Ms Chester's case is as litigation to gain compensation not for the physical damage resulting from the operation, but because of the affront to Ms Chester's autonomy, due to the loss of her ability to make an autonomous choice. This argument is more pressing given her honesty about her potential course of action had she been non-negligently warned of the risk.<sup>22</sup> Precisely because of this ethical issue we must identify the values latent in the concept of respect for autonomy and in the practices of informed consent. It is *only* once this ethical analysis has been undertaken can the pertinent legal question *really* be determined.

Let us first look at what common morality principles might inform the demands of respect for autonomy. Principles such as we ought to tell the truth and the concepts (or moral character traits) of honesty, truthfulness, caring, and compassion can be appealed to. However, they do not fully capture the point of respecting the choices of those who are autonomous, and the practices of informed consent.<sup>23</sup> One fundamental principle that provides more justificatory

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<sup>21</sup> B&C, *PBE* (n9) 125.

<sup>22</sup> Miola, *Symbiotic* (n1) 75.

<sup>23</sup> B&C, *PBE* (n9) 3; 34; 37. However, these arguments do suggest a full discussion as to the point of the value of respect for autonomy and the practices of informed consent might locate these arguments within a wider network of the values of veracity and beneficence. As B&C note, '[v]eracity in health care refers to accurate, timely, objective and comprehensive transmission of information, as well as to the way that the professional fosters patient's or subject's understanding' (*ibid* 303). This idea will become important when looking at the ethical guidance from the GMC concerning consent later in the chapter. Further, though B&C do not explicitly state the virtues of caring and compassion are in the common morality, they do note they treat the virtue of

force however is the principle we should treat others in a genuinely principled, respectful manner, otherwise known as ‘equality of respect’.<sup>24</sup> In order to treat Ms Chester with equality of respect, regardless of how small the inherent risk, Mr Afshar ought to have supplied this information to Ms Chester. The risk was inherent *regardless* of the degree of care taken when performing the operation. In placing ourselves in Ms Chester’s position, we would not have been able to make the best possible decision whether proceed with the surgery or follow alternative treatments unless this vital piece of information had been provided.

As Ms Chester’s *legal* claim is based upon the premise her *ethical* right of respect for autonomy, it is essential to understand the “point” of the principle of respect for autonomy. A clear instance of theoretical disagreement was highlighted in chapter five in B&C’s discussion of different theories of autonomy. B&C go on to reject ‘split-level theories of autonomy’<sup>25</sup> in favour of their own ‘three-condition theory’.<sup>26</sup> The most important reason they do so is on the basis the split-level theory presents an *ideal*. B&C’s theory is able to account for many ordinary actions as autonomous, and thus deserving of respect.<sup>27</sup> From this reason there is at least an indication B&C take the practices in which respect for autonomy functions to serve the purpose that, through our actions and attitudes we ought to acknowledge, not interfere, prevent interference with, and in some circumstances build up and/or maintain, autonomous agents’ capacities to hold views and make choices on their

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caring ‘as fundamental in relationships, practices and actions in health care’ (*ibid* 34-35), and that compassion is one of the ‘five focal virtues for health professionals’ (*ibid* 37).

<sup>24</sup> Stephen Guest, ‘Integrity, Equality and Justice’ (2005) 3 (233) *Revue Internationale De Philosophie* 335 <[http://www.ucl.ac.uk/~uctlfd/papers/integrity\\_equality\\_and\\_justice.pdf](http://www.ucl.ac.uk/~uctlfd/papers/integrity_equality_and_justice.pdf)> 7 (online) accessed 27<sup>th</sup> June 2014 (hereafter *IEJ*). For a discussion and outline as to the meaning of this principle, see chapter 3, point 3.1., “Equality of respect”. In addition, see the previous chapter for a discussion as to how this reinterpreted theory might be committed to a norm of equality of respect, and how important such a fundamental principle is. In particular, see point 4.3., “B&C’s theory of the common morality is based on a constructive interpretation; B&C’s four interpretive values secure the norms of the common morality”.

<sup>25</sup> B&C, *PBE* (n9) 102 (emphasis omitted).

<sup>26</sup> *ibid* 104.

<sup>27</sup> *ibid* 103-104.

belief-systems and values.<sup>28</sup> The interpretive fact central to respect for autonomy is it is *right* autonomous agents should be able to make their own decisions. As Dworkin explains:

The most plausible [account of the point of autonomy] emphasises the integrity rather than the welfare of the choosing agent; the value of autonomy on this view, derives from the capacity it protects: the capacity to express one's own character—values, commitments, convictions and critical as well as experiential interests—in the life one leads.<sup>29</sup>

As B&C measure how well these theories *fit* with the central character of respect for autonomy, this shows the foregoing principle is the point of the value of respect for autonomy; '[a] theory should not be inconsistent with pretheoretical assumptions implicit in the principle of respect for autonomy'.<sup>30</sup> The requirements of respect for autonomy are clearly sensitive to its point.<sup>31</sup> Coupled with the statement that:

The principle of respect for autonomy can be stated as both a negative obligation and as a positive obligation. As a *negative* obligation, the principle requires that autonomous actions not be subjected to controlling constraints by others...as a *positive* obligation, the principle requires both respectful treatment in disclosing information and actions that foster autonomous decision making[,]<sup>32</sup>

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<sup>28</sup> ibid 106-107.

<sup>29</sup> Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (HarperCollins 1993) 224 (hereafter, *Life's Dominion*). A fuller version of this passage was also used by *Lord Steyn in Chester* (n4) at [18] to define the nature of autonomy. It was also noted at the beginning of the thesis, in chapter 1.

<sup>30</sup> B&C, *PBE* (n9) 104.

<sup>31</sup> Ronald Dworkin, *Law's Empire* (Hart 1986) 47.

<sup>32</sup> B&C, *PBE* (n9) 107 (emphasis in original).

the concept of respect for autonomy on B&C's account is best understood via the idea of protecting the capacity to express one's own character-values through the views, choices and actions they take.<sup>33</sup>

Testing this conception against our substantive moral theory, this conception fits within the network of the other three interpretive concepts and values. For example, B&C note 'the principle of positive beneficence supports an array of *prima facie* rules of obligation', including protecting and defending the rights of others, and preventing harm occurring to others.<sup>34</sup> However, these rules are consistent with, and mutually explained by, the value of respect for autonomy. Put simply, we ought to protect the rights of others and prevent harm occurring to others so they are able to express their own character-values unimpeded, as well as doing so because we ought to act for the benefit of others.<sup>35</sup> In addition, this conception of respect for autonomy is a satisfactory, mutually explanatory elaboration<sup>36</sup> of the fundamental principle of equality of respect highlighted earlier. Protecting the capacity to express one's value-systems *is* one way we treat others in a genuinely principled, respectful manner. This strengthens the explanatory force of the fundamental principle of equality of respect. Placed in another's position, we would wish not wish this capacity to be retarded in any way, in order to make something worthwhile of our lives according to our own value-systems. This conception of respect for autonomy is sensitive to fundamental principles underpinning bioethical practices and found in the common morality, meaning this conception can be embraced authentically in our network of value.

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<sup>33</sup> ibid 6; Dworkin, *Life's Dominion* (n29) 224. Though it might be thought that this conception of respect for autonomy is relatively uncontroversial, it can be seen that there are potentially competing specifications of the value of respect for autonomy. For example, see Veitch, *Jurisdiction* (n6). See also the analysis regarding B&C's discussion of relational autonomy in chapter 5, point 3.2., "Respect for autonomy".

<sup>34</sup> B&C, *PBE* (n9) 204.

<sup>35</sup> ibid 202-203; Dworkin, *Life's Dominion* (n29) 224.

<sup>36</sup> Dworkin, *TRS* (n3) 107.

This conception of respect for autonomy also serves to further explain paradigm cases of respecting autonomy in bioethical practices, including practices of informed consent.<sup>37</sup>

Though there is interpretive disagreement between B&C and Onora O'Neill regarding whether informed consent practices are best understood through the ideas of preventing deception and coercion or protecting patient autonomy,<sup>38</sup> a strong case can be argued informed consent practices are best understood through this value because of the demands respect for autonomy makes. The prevention of deception or coercion provides a much more limited interpretive justification for practices of obtaining patients' consent.

Respect for autonomy not only demands consent procedures are designed so they 'give patients and others control over the amount of information they receive and opportunity to rescind consent already given',<sup>39</sup> but also more *positive* obligations, such as attempting to reduce situational or institutional factors that may control a person's choices and actions, and aiding a subject's understanding of a particular procedure.<sup>40</sup> These more positive obligations are not fully captured in terms of preventing deception and coercion. Indeed, B&C get at something like this, noting 'respect for autonomy in health care relationships requires much more than avoiding deception and coercion. It requires an attempt to instill relevant understanding, to avoid forms of manipulation and to respect persons' rights'.<sup>41</sup> It is better to see the prevention of deception and coercion as *part* of the value of respect for autonomy. In

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<sup>37</sup> B&C, *PBE* (n9) 122. To refine the discussion of the value of shared decision-making in chapter one, informed consent can be understood in this scenario to involve '(1) informational exchanges and communication through which patients elect interventions, often based on medical advice [and] (2) acts of approving those authorisations' (*ibid*). Although informed consent as a shared decision-making process might be appropriate in the context of a fully autonomous adult consenting to surgery, '[p]rofessionals obtain and will continue to obtain informed consent in many contexts of research and medicine in which shared decision making is a misleading model' (*ibid* 121). Also, though it may be thought that the analysis here begs the question by using B&C's version of informed consent, it is sufficiently general for this not to be the case.

<sup>38</sup> *ibid* 121. This is despite B&C noting '[t]he basic paradigm of the exercise of autonomy in health care and in research is *express* or *explicit* consent (or refusal), usually informed consent (or refusal)' (*ibid* 110) (footnote omitted) (emphasis in original). See further, chapter 5, point 3.2., "Respect for autonomy".

<sup>39</sup> Onora O'Neill, 'Some Limits of Informed Consent' (2003) 29 (1) *J Med Ethics* 4, 4. See also Neil C Manson and Onora O'Neil, *Rethinking Informed Consent In Bioethics* (CUP 2007).

<sup>40</sup> B&C, *PBE* (n9) 104; 131.

<sup>41</sup> *ibid* 121.

this way, both principles are brought together in manner consistent with one another and mutually explanatory through the presence of an inferential connection (one ought not to deceive another, as doing so prevents that person from expressing her value-systems as fully as she could). Therefore, in the system of our substantive moral theory, seeing informed consent practices through the value of respect for autonomy provides a more coherent fit and justification than seeing those practices through the point of the prevention of deception and coercion could do.<sup>42</sup>

Given the foregoing, and as Ms Chester's legal claim is premised upon her ethical one, it is vital to further examine informed consent practices in light of the meaning imposed on these practices.<sup>43</sup> This analysis will provide the specific grounds for Ms Chester's ethical claim that only by Mr Afshar disclosing the small but inherent risk of injury to her would her autonomy have been properly respected, and not infringed. This analysis thus again highlights the

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<sup>42</sup> Jonathan Montgomery also highlights a number of important observations with regards to informed consent, which, although is perhaps not best described as a "cynical" analysis, does highlight the moral dangers with regards to informed consent in practice. For example, he states that '[c]onsent forms, particularly for pharmaceutical research, can become so long and detailed that they are as likely to confuse people as to assist them in making choices. The purpose of these forms is not so much to enhance the quality of decision making as to transfer the risks involved in trials to the research subjects' (Jonathan Montgomery, 'Law and the Demoralisation of Medicine' (2006) 26 (2) Legal Studies 185, 188). In addition he also states '[c]onsent in the hands of [some] legal advisers is not about promoting the moral value of autonomy but about removing the need for health professionals to take responsibility for treatment being in the interests of their patients by transferring that responsibility to them. The moral value of autonomy is not, in fact, promoted and the moral purpose of healthcare is obscured (*ibid* 189). See further Kenyon Mason and Graeme Laurie, *Mason and McCall Smith's Law and Medical Ethics* (9<sup>th</sup> edn, OUP 2013) 119, para 4.107. What these quotes do show, however, is that Montgomery also adheres to the idea (for the purposes of these examples) that informed consent is best understood through the value of respect for autonomy. For he then goes on to note how it is not the case that this value is actually promoted in practice, and that in some circumstances, considerations of self-interest may take precedence. However, this is not to say that the practices of informed consent should be best understood through the idea that risks should be transferred to patients. Briefly put, it is difficult to see how this principle could ground an ethical argument that could coherently determine (as well as the value of respect for autonomy) whether a doctor is morally culpable on if something was to go wrong in surgery, on the basis of the incorrect application of the principles of risk transfer (Stephen Guest, 'The Role of Moral Equality in Legal Argument' in Du Bois (ed) *The Practice of Integrity: Reflections on Ronald Dworkin and South African Law* (Juta & Co) <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the\\_role\\_of\\_moral\\_equality\\_in\\_legal\\_argument.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/the_role_of_moral_equality_in_legal_argument.pdf)> 18 (21 online) (accessed 15<sup>th</sup> September 2013). Indeed, it seems like these arguments for informed consent relate to what B&C call their 'second sense' of informed consent, whereby 'informed consent refers to *conformity to the social rules of consent* that require professionals to obtain legally or institutionally valid consent from patients or subject before proceeding with diagnostic, therapeutic or research procedures' (B&C, *PBE* (n9) 122) (emphasis in original).

<sup>43</sup> Dworkin, *Law's Empire* (n31) 47.

importance of these ethical grounds, both in general and as applied to Ms Chester's ethical and legal claim.

As the point of informed consent practices is to protect the capacity to express one's character-values and belief systems, it is clear:

a person must do more than express agreement or comply with a proposal. He or she must *authorise* something through an act of informed and voluntary consent...An informed consent in this [ ] sense occurs if and only if a patient or subject, with substantial understanding and in absence of substantial control by others, intentionally authorises a professional to do something quite specific.<sup>44</sup>

Further, because of these fundamental principles behind the concept of informed consent, a number of additional elements need to be involved. These include the fact a patient must *understand* what they are consenting to in order to act autonomously in this circumstance.<sup>45</sup>

The *terms* of the authorisation should be understood; there should be agreement with the doctor regarding the essential features of what has been authorised.<sup>46</sup> The consent must also be *voluntary*, whereby 'he or she wills the action without being under the control of another person or condition',<sup>47</sup> including external *and* internal controlling influences.<sup>48</sup> Most important here is there needs to be *disclosure* of material information from doctor to patient.

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<sup>44</sup> B&C, *PBE* (n9) 122 (emphasis in original).

<sup>45</sup> *ibid* 102. See also B&C's discussion of the nature of the concept of understanding, factors that may inhibit understanding, and differing levels of understanding in *PBE* 131-137. Indeed, see, in a legal context, how Morland J notes in *Smith v Tunbridge Wells Health Authority* [1994] 5 Med Law Reports 334 that '[w]hen recommending a particular type of surgery or treatment, the doctor, when warning of the risks, must take reasonable care to ensure that his explanation of the risks is intelligible to the particular patient. The doctor should use language, simple but not misleading, which the doctor perceives from what knowledge and acquaintanceship that he may have of the patient...will be understood by the patient so that the patient can make an informed decision whether or not to consent to the recommended surgery or treatment' (at 339).

<sup>46</sup> B&C, *PBE* (n9) 132. In addition, B&C also note that even in difficult situations, including patients with a limited knowledge base, adequate understanding can be achieved through a varieties of means and measures, such as drawing analogies between the information needed to be understood, and other events more ordinary to the patient (*ibid* 132-133).

<sup>47</sup> *ibid* 138.

<sup>48</sup> *ibid* 105. See B&C's discussion of different forms of influence in *ibid* 138-139.

B&C highlight three standards of disclosure: the reasonable doctor (or professional practice) standard, the reasonable person standard, and the subjective (or particular patient) standard.<sup>49</sup> In light of the point of informed consent practices, the reasonable doctor standard is not adequate ethically. It not only does not fit with many of the demands the value of respect for autonomy makes, but is not a ‘satisfactory elaboration’<sup>50</sup> of the value of respecting autonomy. If standards of disclosure are set by custom or the profession, there is the possibility of information communication being inadequate across the profession and yet still being legally and ethically permissible. Furthermore, as the nature of the test is to place the judgement of standards of disclosure in the hands of doctors, this has the potential to be at least inconsistent with the principle the patient ought to be able to decide according to her value-systems and beliefs. Finally, the disclosure of material information *does not involve technical medical skills*; it involves communication skills not exclusive to medical professionals. The professional practice standard may serve to endorse poor communication between patient and doctor, and again may deprive patients of the capacity to express their character-values by making meaningful choices about their treatment.<sup>51</sup> Though the reasonable person standard may be preferable to the professional practice standard, there may still be problems with this standard (particularly surrounding the concepts of a “reasonable person”, “material information”, and employment of these concepts). In order to best realise the value of respect for autonomy, the particular patient test initially seems morally preferable.<sup>52</sup> However, this standard cannot be *exclusively* relied upon. This standard may be problematic as patients may

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<sup>49</sup> ibid 125.

<sup>50</sup> Dworkin, *TRS* (n3) 107.

<sup>51</sup> Karen Tickner, ‘Rogers v Whitaker—Giving Patients a Meaningful Choice’ (1995) 15 (1) OJLS 109, 114 (hereafter *A Meaningful Choice*). See further (in an Australian legal context) how this point made explicitly in the seminal case of *Rogers v Whitaker* [1993] 4 Medical Law Review 79, at 83, 84.

<sup>52</sup> B&C, *PBE* (n9) 126-127.

not know what information is relevant to their particular decision. Nor can it be expected a doctor should perform an extensive character-analysis for each patient.<sup>53</sup>

Seemingly what is morally preferable, all things considered, is using the reasonable patient test primarily and supplementing it where necessary with investigating what information particular patients may need in certain circumstances.<sup>54</sup> Whilst initially the particular patient test may seem the most obvious way of implementing the principle of equality of respect, overall the position immediately above best flows from principles of the common morality and the value of respect for autonomy that provide the best interpretation of other substantive ethical propositions taken as true.

It has been highlighted why it is so important ethically to respect a person's autonomy, and what respecting a person's autonomy means regarding informed consent practices. Looking directly at Ms Chester's situation, the grounds for the conceptions of respect for autonomy and informed consent (specifically the interpretive proposition it is right a patient should be able to authorise a surgical procedure upon her person if the authorisation is given voluntarily, on the basis of sufficient understanding and material information has been disclosed compatible with the standard above<sup>55</sup>) outlaw an exceptive clause in this case to the effect it was morally permissible for Mr Afshar not to disclose the small but inherent risk of

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<sup>53</sup> ibid 127. Similarly, see how Lord Scarman notes in *Sidaway* that '[i]deally, the court should ask itself whether in the particular circumstances the risk was such that this particular patient would think it significant if he was told it existed. I would think that, as a matter of ethics, this is the test of the doctor's duty. The law, however, operates not in Utopia but in the world as it is: *and such an inquiry would prove in practice to be frustrated by the subjectivity of its aim and purpose*' (n5) at 888 (emphasis added).

<sup>54</sup> B&C, *PBE* (n9) 126-127. Indeed, note how *legally*, this is the approach taken by the High Court of Australia in the case of *Rogers v Whitaker* (n51). See specifically ibid at 83. See also Sara Fovargue and José Miola, 'How Much Information is Enough?' (2010) 5 (3) Clinical Ethics 13, 15. It is also clear that this standard of disclosure requires the disclosure of alternatives to (for example) surgery, as highlighted in a legal context in *Birch v University College Hospitals NHS Trust* [2008] EWHC 2237. See also *Nicholas v Imperial College Healthcare NHS Trust* [2012] EWHC 591.

<sup>55</sup> Stavropoulos, *Interpretivist* (n14) (accessed 16th September 2013); as distinct from the descriptive fact that a patient may have authorised a particular procedure in certain circumstances, or the purely evaluative fact that it is good patients need to provide their consent before surgery can be performed on them/patients ought to provide their consent before surgery can be performed on them.

the operation.<sup>56</sup> In refining our moral concepts and propositions into a coherent whole, given the nature of the risk, it is necessary for there to be specific informed consent in this scenario. This includes the disclosure of the small but inherent risk of surgery. Though the surgery is therapeutic,<sup>57</sup> this course of action avoids potential unjustified medical paternalism.

To conclude, the ethical proposition Ms Chester ought to be informed of a small but inherent risk of surgery involved in her spinal operation before she consents to this operation is true, and is subject to no exceptive clauses. It now needs to be examined whether this proposition is consistent with the guidance provided by the formal sector of ethical discourse. ‘Ethical guidance should provide the standard for the medical profession to follow’.<sup>58</sup> Further, ‘the [General Medical Council], as the formal sector of discourse, should set the tone by emphasising and explaining the importance of the ethical issues under consideration’.<sup>59</sup>

This proposition is consistent with the GMC’s guidance, *Consent: Patients and Doctors Making Decisions Together*.<sup>60</sup> The guidance states doctors ‘should tailor [their] approach to discussions with patients according to: (a) their wishes, needs and priorities... (c) the nature of their condition (d) the complexity of the treatment, and (e) the nature and level of risk associated with the investigation or treatment’.<sup>61</sup> Additionally, doctors ‘should not make assumptions about (a) the information a patient might want or need [and] (b) the clinical or

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<sup>56</sup> This is not to say that exceptive clauses are not appropriate in some circumstances, on the basis of the value of beneficence, and more specifically on the practices and concept of paternalism. For example, see B&C’s discussion of the ‘therapeutic privilege’ in *PBE* (n9) 127-128, and of the practices and justification of paternalism more specifically at 214-226.

<sup>57</sup> Though this is the case, this is not to detract from the pertinence of needing to discuss and disclose possible alternative courses of action, risks and benefits with those procedures that are non-therapeutic in nature.

<sup>58</sup> Miola, *Symbiotic* (n2) 79.

<sup>59</sup> ibid 79-80.

<sup>60</sup> GMC, *Consent: Patients and Doctors Making Decisions Together* (ethical guidance, 2008).

<sup>61</sup> ibid para 7. Indeed, it might be said that this approach is partly based on the value of veracity in health care. That is the ‘thesis [ ] that adherence to the rules of veracity is essential to the development and maintenance of trust in these relationships’ (B&C, *PBE* (n9) 303). It can be seen that in the GMC’s previous guidance on consent, *Seeking Patients Consent: The Ethical Considerations* (ethical guidance, 1998) the fundamental importance of trust is set out explicitly at the beginning of the document (at para 1). This is repeated in the current guidance, where it is stated ‘[f]or a relationship between doctor and patient to be effective, it should be a partnership based on openness, trust and good communication’ (GMC, *Consent: Patients and Doctors Making Decisions Together* (n61) para 3).

other factors a patient might consider significant'.<sup>62</sup> Moreover, doctors 'must give patients the information they want or need about' a number of medical issues,<sup>63</sup> and 'should explore these matters with patients, listen to their concerns, ask for and respect their views and encourage them to ask questions'.<sup>64</sup> Finally:

If after discussion, a patient still does not want to know in detail about their condition of their treatment, you should respect their wishes, as far as possible. But you must still give them the information they need in order to give their consent to a proposed investigation or treatment...If a patient insists that they do not want even this basic information, you must explain the potential consequences of them not having it, particularly if it might mean their consent is not valid.<sup>65</sup>

Therefore, despite the implications the language used here may have in contrast to previous GMC guidance on consent, in explicitly stating discussions should be tailored with the patient in mind, their perception of risk, and the nature of that risk, the proposition Ms Chester ought to have been informed of a small but inherent risk of surgery by Mr Afshar is not only consistent with the GMC guidance, but is explained by such guidance.<sup>66</sup> Given the guidance

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<sup>62</sup> GMC, *Consent: Patients and Doctors Making Decisions Together* (n61) para 8. It is also noted that doctors 'should not make assumptions about...(c) a patient's level of knowledge or understanding of what is proposed' (*ibid*).

<sup>63</sup> *ibid* para 9. There are 12 issues that patients may want to know about, including diagnosis, prognosis, uncertainties involved in these, options for treatment or managing the condition, the potential benefits and burdens of such treatments, and potential costs incurred and the patient's right to seek a second opinion (*ibid*).

<sup>64</sup> *ibid* para 10.

<sup>65</sup> *ibid* para's 14-15.

<sup>66</sup> That is, some implications of the new guidance are problematic. In stating that the doctor *must* give the patient medical information wanted or needed by the patient, as opposed to the doctor merely *should* not make assumptions about a particular patient, or *should* tailor their discussions towards the particular patient, the conversational, shared decision-making aspect of the guidance becomes separated and distinguished from the medical aspect of the guidance. The effect of this change, even if merely superficial, is one which means that in using *should*, there is scope for these duties or principles *not* applying in certain circumstances. This is because the guidance specifies that 'the terms "you must" and "you should" are used in the following ways: "you must" is used for an overriding duty or principle... "you should" is also used where the duty or principle will not apply in all circumstances' (*ibid*, page 5). This change in wording may therefore potentially undercut all the benefits of the previous guidance (GMC, *Seeking Patients' Consent: The Ethical Considerations* (ethical guidance, 1998) that meant a doctor's ethical duty in terms of treating the *individual* autonomous patient was greater than that of the law. This is in clear contrast to the previous guidance, where it was stated that 'you *must* do your best to find out about patients' individual needs and priorities' (*ibid*, para 6) (emphasis added). Therefore, there is a

rests upon the basic explanatory principle ‘[w]hatever the context in which medical decisions are made, [doctors] must work in partnership with our patients to ensure good care. In doing so [doctors] *must...maximise* patients’ opportunities, and their ability, to make decisions for themselves’,<sup>67</sup> it can be further asserted this proposition is *coherent* with the guidance, as outlined above. This conclusion is also important as it has also highlighted (despite some of the implications of language used in the guidance) the overall suitability of the GMC’s guidance as a regulatory tool for the medical profession. This is due to the sustained focus upon the patient’s circumstances in question, relative to the treatment to be undertaken. Thus, confidence can be placed in the GMC’s guidance by courts, and as it is the formal sector of discourse, this ethical guidance should be the courts’ first point of contact when dealing with medical professional regulation in ethical matters of informed consent. Attention must now be turned Ms Chester’s *legal* claim, and the importance of Ms Chester’s *ethical* claim to this.

### **2.2.2. Legal application**

It was noted earlier the legal question is whether Ms Chester has a concrete legal right on the basis of a true proposition of law. ‘Legal rights are those that people are entitled to enforce on demand, without further legislative intervention, in adjudicative institutions that direct the executive power of the sheriff or police’.<sup>68</sup> A concrete right is a political aim specifically defined (relative to an abstract right) to express with a greater degree of certainty the weight against other political aims they have on certain occasions.<sup>69</sup> A proposition of law is justified if it coheres with principles of personal and political morality that provide the best interpretation of other justified propositions of law in contemporary legal practice.<sup>70</sup>

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regression from a less onerous duty on behalf of doctors, towards the legal situation (F&M, *One Step Forward* (n54) 496).

<sup>67</sup> GMC, *Consent: Patients and Doctors Making Decisions Together* (n61) para 2 (d) (emphasis added).

<sup>68</sup> Dworkin, *JFH* (n1) 406.

<sup>69</sup> Dworkin, *TRS* (n3) 101; 93.

<sup>70</sup> Dworkin, *JIR* (n7) 13-14.

All of the foregoing links into the ‘weak and commonsensical legal claim’ in hard cases ‘the law, properly interpreted is for the plaintiff (or the defendant)’.<sup>71</sup> It is our task to work out what that right answer is. However, we must make a case for which proposition is true. This requires we bring to bear on the case a general theory of the point of legal practice that shows it in its best light, why the rules and principles in question create rights at all, and the consequences of this general theory for this particular case. The legal argument here is based upon abstract jurisprudential foundations.<sup>72</sup>

Those foundations are as follows. The concept of law is best seen as an interpretive concept. Importantly, because the concept of law is an interpretive concept, it is best to see that concept through a particular value.<sup>73</sup> The value that best justifies the practices of law is integrity. Integrity best explains the value of the rule of law as a political ideal by making fundamental demands of principle.<sup>74</sup> One key fundamental principle already featured prominently is equality of respect, of which integrity is a key component.<sup>75</sup> Integrity is best understood through the idea of coherence. However, this is not to *conflate* coherence with integrity. Integrity requires two conditions to be fulfilled: coherence and authenticity.<sup>76</sup> Nonetheless, in stating integrity is best understood through coherence, this shows the best way to view the claims integrity makes. The coherentism of integrity is best understood through the same characteristics as those applicable to B&C’s bioethical framework. Further, the best way to construct an account of the truth conditions of propositions of law in light of

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<sup>71</sup> ibid 41.

<sup>72</sup> Dworkin, *Law’s Empire* (n31) 90; *JFH* (n1) 116; *TRS* (n3) 104.

<sup>73</sup> Guest, *How to Criticise* (n11) 4 (online).

<sup>74</sup> Dworkin, *JIR* (n7) 13.

<sup>75</sup> Ronald Dworkin, ‘Réponse aux articles de Ronald Dworkin’ (2005) 3 (233) *Revue Internationale De Philosophie* 435, 436 (hereafter *Response Guest*); Dworkin, *JFH* (n1) 107. This point is more explicitly discussed in Chapter three, point 3.3 “Integrity, justice and the snail darter”, and chapter 5, point 2.1., “Further characteristics of Dworkin’s moral epistemology & why Dworkin endorses these characteristics”.

<sup>76</sup> Authenticity means that we must embrace the coherent network of values and principles that justify a particular proposition of law not just for the sake of elegance or convenience, but sincerely so as to eliminate arbitrary distinctions and differences, and to permit principled distinctions and extensions where necessary (Dworkin, *JFH* (n1) 101; 108).

integrity is to ‘make the question of what the law is on an issue itself an interpretive question’.<sup>77</sup> The process of constructive interpretation is also best understood as based on coherentism. Therefore, integrity and the process of constructive interpretation fit together. Last, as is the case with the ethical framework, there are two dimensions by which we can measure the success of an interpretation: (1) the interpretation must fit past political practice, and (2) must possess a substantive justificatory power to show the proposed interpretation is the best, all things considered.<sup>78</sup> As these questions are themselves interpretive, coherence considerations are pervasive throughout both dimensions. The foregoing considerations are to be borne in mind when looking to find a coherent interpretation about legal rights to compensation for a negligent failure to warn of a slight but intrinsic risk of surgery where the principles of causation have not been satisfied in the traditional manner, ‘such that a single political official with that theory could have reached most of the results the precedents report’.<sup>79</sup>

Moreover, it is possible to situate B&C’s framework and Dworkin’s theory of law in in the same network of value, relative to each other. In seeing the concepts of law and morality as interpretive concepts, it becomes apparent the concept of law *cannot* be fully analysed except by seeing it located within an integrated web of political morality and other values like bioethics. Law is a specification of political morality, as political morality is of a more general personal morality.<sup>80</sup> In comparison, the four interpretive values analysed above

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<sup>77</sup> Dworkin, *JIR* (n7) 14.

<sup>78</sup> Dworkin, *JIR* (n7) 15; *Law’s Empire* (n31) 231.

<sup>79</sup> Dworkin, *Law’s Empire* (n31) 230. For Dworkin’s discussion of the chain novel, see, *Law’s Empire* 228-238. It is also clear that elements of coherence (in the technical sense above) play a prominent role in Dworkin’s discussion of that thought experiment. As Gerald Postema notes, ‘integrity calls on officials and citizens to view their practice as the expression of a coherent set of principles ... requiring them to fit together into an intelligible, practically and morally meaningful whole under the concept of justice’ (Gerald J. Postema ‘Integrity: Justice in Workclothes’ in Justine Burley (ed), *Dworkin and his Critics: With replies by Dworkin* (Blackwell 2004) 295) (footnote omitted) (emphasis omitted). Postema also notes that ‘integrity is essentially historical ... The search for principles of justice undertaken in the name of integrity is historically situated; integrity takes past decisions and actions as its point of departure and normative compass’ (*ibid*) (emphasis omitted).

<sup>80</sup> Dworkin, *JFH* (n1) 404-405.

branch out from the common morality, which in turn is a specification of the interpretive concept of morality. Both theories interlink in a single continuous system, forming a tree structure. Interpretive concepts and values must be integrated with one another. Both frameworks are interpretive through and through.<sup>81</sup>

Further important consequences follow from the nature of these two frameworks. As law and morality should be seen as one continuous system, it also follows Dworkin's theory of law adheres to an interpretive moral epistemology. However, this epistemology is applied specifically with the concept of law in mind. This is shown through the similar fundamental demands of principle both frameworks characteristically make. There is an extension of a 'community of principle'<sup>82</sup> across law and bioethics, whereby there is a responsibility on behalf of individuals and a community to treat others in a principled manner. Judges must also show a disposition towards realising this responsibility. They must do this by engaging with the legal and ethical issues in particular cases on the basis of both the frameworks set out above.

Finally, as both frameworks are thoroughly integrated with one another, this provides another reason why Ms Chester's ethical case is so important to her legal claim. *Only* by looking at Ms Chester's ethical case can we highlight and understand the specific grounds for her argument the rules of causation should be relaxed. A true proposition of law is one that the better interpretive case can be made for it. *Only* by looking at her ethical case can a better interpretive case be possibly be made for the proposition of law she argues for. The best way to see Ms Chester's legal claim is for recovery because her ethical right to have her autonomy respected was injured.

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<sup>81</sup> ibid 7.

<sup>82</sup> Dworkin, *Law's Empire* (n31) 214.

### **2.2.2.1. Standards of disclosure**

Legally, strictly speaking however, the cases most relevant to *Chester* do not deal directly with issues of causation. Many of the relevant cases concern whether there has been a breach of duty on behalf of the doctor to the patient.<sup>83</sup> These cases are still important to analyse. The ethical analysis has shown *why, substantively*, the rationale behind relaxing the rules of causation is so important. Analysis of these cases will show this rationale to be important in a different, complementary way; it will show the principles of respect for autonomy and equality of respect amenable to Ms Chester's case to be 'embedded in the law'.<sup>84</sup>

The principles that best explain past political decisions regarding standards of disclosure, though not directly on point regarding whether Ms Chester has a right to recover damages despite not satisfying the "but for test", still have 'a gravitational force'.<sup>85</sup> Though there may be disagreement about the extent of the gravitational force of earlier decisions, fairness and integrity require a consideration of relevantly similar cases, to the extent of the arguments of principle required to justify those cases. These arguments of principle will also become important when looking at cases that *do not* deal with the standards of consent, as these principles must also be consistent with, mutually explain, and not render anomalous, all the

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<sup>83</sup> It was stated in *Chester* the warning of a slight but inherent risk of surgery *should* have been given to Ms Chester, and it was found it had not been given ((n4) at [5]). Furthermore, in cases such as *Sidaway*, the traditional principles of causation were held to have been satisfied (or would have been satisfied).

<sup>84</sup> *JIR* (n7) 104. Indeed, in *Chester*, Lord Hope notes '[t]he issue which is in dispute is now confined to the issue of causation. But the duty which, as is now accepted, was breached forms an essential part of the background to a discussion of that issue ... damages can only be awarded if the loss which the claimant has sustained was within the scope of the duty to take care ... So, it is appropriate to reflect for a moment, before addressing the issue of causation, on the scope of that duty that was found to have been breached in this case and on the rationale for it' ((n4) at [51]).

<sup>85</sup> Dworkin, *TRS* (n3) 111.

other decisions pertinent to Ms Chester's case. This is the implication of treating the law as if it were a seamless web.<sup>86</sup>

In showing why Ms Chester has not just an ethical, but legal right to be informed as well, the transition is made from the personal to the political in the large network of value which includes B&C's and Dworkin's theories. As the focus is on why Ms Chester has a right enforceable on demand within an adjudicative political institution, the discussion is situated within the broader context of what citizens must do to acquit their political obligations through the artificial collective entity of the political community. This also means in providing the best moral justification for this legal right, the principles under discussion here will be principles of *political morality*, in that we are looking at the separable department of principles that provide the best justification of the political practices of a community. However, the concept of law and its departments are pervasively interpretive. There is an extension of a community of principle across the domains of law and bioethics. Bioethical practices and collective political arrangements must show a disposition towards realising the fundamental principles of equality of respect. The principles under discussion here are still principles of political *morality*. This means their substantive force is largely constituted by the *ethical* analysis undertaken above. The pertinent injury Ms Chester seeks recovery for is Mr Afshar's lack of respecting her *ethical* right to autonomy. But to ask "what duties does a doctor have in respecting a patient's autonomy, and why is it so important to do so?" is to engage in ethical analysis. Her legal claim *cannot* be fully understood *without* engaging in and relying on the ethical analysis above.<sup>87</sup>

It is important to show why Ms Chester's ethical right to be informed can be vindicated through those principles of political morality that provide the best justification of past

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<sup>86</sup> ibid 113-116. See further, Dworkin's discussions of local priority in *Law's Empire* (n31) 250-254 and justificatory ascent in *JIR* (n7) 51- 53, which have important elements of coherence bound up in these processes.

<sup>87</sup> Stavropoulos, *Interpretivist* (n14); Dworkin, *JFH* (n1) 7; 110; 327-8; 404-405.

political decisions and other true propositions of law in contemporary legal practice for further reasons.<sup>88</sup> It can be shown how the ethically preferable conception of respect for autonomy is supported within our law. This conception's implications can also be explained, so as to eliminate as much as possible the potential for future courts to use inconsistent, potentially ethically unsophisticated conceptions of respect for autonomy. The ethical analysis has also looked at whether the GMC's ethical guidance on consent explains and coheres with the ethically true proposition Ms Chester ought to have been informed about the risk in question. It also highlighted how this guidance *can* perform an effective regulatory function for the medical professional. This legal analysis will look specifically at the role different categories of ethical discourse play in relation to legal standards of disclosure. Again, both analyses are complementary and cannot be fully understood without one another. Put together, this will structure courts' future engagement with medical ethics, and send a message to medical practitioners regarding which sources of discourse to prioritise.

The ethical discussion showed informed consent practices are best understood through the principle of respect for autonomy. The ethically preferable conception of autonomy to be respected is best understood as protecting the capacity to express one's own character-values through the views and actions that a person takes. The best justification of cases involving standards of consent, and why the proposition Ms Chester legally ought to have been informed about the slight but inherent damage in the operation is true, is because past political decisions show the principle "people have a moral right to have their autonomy respected by being told of all those significant risks that are material to the informational needs and would affect the judgment of a reasonable patient" is a principle of our law. There is also an issue regarding the meaning of "significant risks". The concept of significance operates as an entryway to the question of whether the information is material. The ethical

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<sup>88</sup> Dworkin, *Law's Empire* (n41) 225; Dworkin, *JIR* (n7) 14.

discussion showed how respecting a patient's autonomy is one way in which we treat others in a genuinely principled, respectful manner. Thus, *using this ethical analysis*, the best way to understand the concept of significance, and to lend coherence to the standard of disclosure as a whole, both in its application and underlying rationale, is again through those *ethically substantive* principles of political morality apparent from past political decisions that require a patient's autonomy to be respected. This means recognising a patient's perception of risk may differ from a medical professional's. It also means that the question of significance is *not* to be decided by clinical judgment, though clinical judgment may help in determining the probability and magnitude of relevant harm.<sup>89</sup> Our law *can* vindicate Ms Chester's *ethical* right.

The case for this interpretation needs to be substantiated. This interpretation is arguably superficially inconsistent with previous case law that has applied differing standards of disclosure. It is also arguable it is inconsistent with the application/understanding of the concept of "significant risks" in previous case law, and on one reading of pertinent case law, the currently applicable standard of disclosure in medical negligence claims. However, this justification is coherent with pertinent case law. Both the demands of integrity on the dimension of fit, and the coherentist process of constructive interpretation must be borne in mind. It will also be shown how such an interpretation best secures those fundamental principles of equality of respect, and respect for autonomy, highlighted to be of special importance in the ethical analysis.<sup>90</sup>

Any competent interpretation must first look at *Sidaway*. What is important here is even in the most conservative judgment of the house, Lord Diplock was to note:

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<sup>89</sup> Alasdair Maclean, 'From Sidaway to Pearce and Beyond: Is the Legal Regulation of Consent Any Better Following a Quarter of a Century of Judicial Scrutiny?' (2012) 20 Medical Law Review 108, 117-126 (hereafter *Sidaway to Pearce*); B&C, *PBE* (n9) 233; Shaun D Pattinson, *Medical Law and Ethics* (3<sup>rd</sup> edn, Sweet & Maxwell 2011) 128-129.

<sup>90</sup> Dworkin, *JIR* (n7) 14.

when it comes to warning about risks, the kind of training and experience that a judge will have undergone...makes it natural for him to say (correctly) it is my right to decide whether any particular thing is done to my body, and I want to be fully informed of any risks...No doubt if the patient in fact manifested this attitude by means of questioning, the doctor would tell him whatever it was the patient wanted to know.<sup>91</sup>

Though Diplock here limits his analysis to principles of autonomy underpinning the duty to disclose when asked questions by the patient, Lords Bridge and Templeman are also explicit in recognising the principle of respect for autonomy underpins the duty to disclose information when asked questions by a patient.<sup>92</sup> However, they both go on to recognise a more general right for the patient's autonomy to be respected,<sup>93</sup> with Lord Scarman prioritising the principle of respect for autonomy in his judgment.<sup>94</sup>

Therefore, though *Sidaway* is sensitive to personal and political principles of respect for autonomy which all legal standards of disclosure serve, in isolation *Sidaway* can be read as authority for the following proposition. What counts as a material risk is determined primarily by reference to professional practice. Though respect for autonomy operates subject to the *professionally defined* best interests of the patient, there are some circumstances which in order to truly respect a patient's autonomy, the court is able to define a risk as material

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<sup>91</sup> (n5) at 895.

<sup>92</sup> For Lord Bridge, see (n5) 898; for Lord Templeman see (n5) 902.

<sup>93</sup> For Lord Bridge, see (n5) at 897; 897-898, in recognising the “logical” force of the transatlantic concept of informed consent at 899 (see also footnote 76 in chapter 1 as to why Lord bridge is actually interpretively disagreeing with this doctrine), and 900. For Lord Templeman, see (n5) 903.

<sup>94</sup> See chapter 1, point 3.1.4., “Recognition (*and prioritisation*) of respect for autonomy”.

even if medical professionals would not, if that ‘particular risk is so obviously necessary to an informed choice on the part of the patient’.<sup>95</sup>

Since *Sidaway*, the law has developed to become more sensitive to the *ethical* rationale behind standards of disclosure. Those with special powers and roles that allow them to act on behalf of the whole of those individuals making up the political community have begun to recognise how substantively important those *ethical* principles of respect for autonomy and equality of respect are. Those ethically substantive principles provide the best justification for the way the state wishes to act in the name of law, inasmuch *ethically*, this is the best way to act (respecting a patient’s autonomy) in the individual scenario.<sup>96</sup> This is exemplified in *Smith v Tunbridge Wells Health Authority*<sup>97</sup> and *Pearce v United Bristol Healthcare NHS Trust*.<sup>98</sup>

In *Smith*, it was held Mr Smith had a right to recover damages resulting from his consultant surgeon’s negligent failure to provide a sufficiently clear warning of the risk of impotence from the operation, given he was under such a duty to warn and that risk did eventuate.<sup>99</sup>

*Smith* is important because the best interpretation of the grounds for this legal proposition are those principles of political morality which stipulate that the political community ought to treat its citizens as equals by respecting the autonomy of patients. This is done by them being warned of material risks in a sufficiently clear manner, if the reasonable standard of care requires such a warning. Yet, as noted above, these principles’ justificatory force is substantially constituted by the *ethical* case made in the individual scenario. Moreover, though Morland J held ‘it is the decision in *Sidaway* and the test in *Bolam* which I must [use],

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<sup>95</sup> (n5) at 900 Miola, *Symbiotic* (n2) 62; F&M, *How Much Information is Enough?* (n54) 14. For further analysis of these principles underpinning the case, see chapter 1, point 3.1.2., “Protection from paternalism” and 3.1.3., “Relation of doctor and patient”.

<sup>96</sup> Dworkin, *Law’s Empire* (n31); *JFH* (n1) 327

<sup>97</sup> [1994] 5 Med LR 334.

<sup>98</sup> [1999] PIQR 53.

<sup>99</sup> (n45) at 334. It was also established that had the risk of impotence been explained to Mr Smith, he would not have gone ahead with the surgery (*ibid*).

and do apply',<sup>100</sup> he was much more ready to infer 'in my [his] judgment...although some surgeons may still not have been warning patients similar in situation to the plaintiff of the risk of impotence, *that omission was neither reasonable nor responsible*'.<sup>101</sup> There was far stronger assertion by Morland J of the *court's* responsibility for deciding what standards of disclosure should be.<sup>102</sup> The principles identified above serving as the grounds for the specific and general proposition are seen in the extensive passages to *Rogers v Whitaker*<sup>103</sup> which emphasised the inadequacy of respecting patients' autonomy by applying the professional practice standard to information disclosure cases, and sets out a modified version of the "reasonable patient" test, to focus even more on the *particular* patient themselves.<sup>104</sup> Further, *every single passage* Morland J quotes from *Sidaway* makes some reference, in one form or another, to principles of respect for autonomy underpinning legal standards of disclosure.<sup>105</sup>

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<sup>100</sup> ibid at 335.

<sup>101</sup> ibid at 339 (emphasis added). Morland J went on to further comment '[i]n my judgment Mr Cook, in stating that he considered that he owed a duty to warn, was reflecting not only the generally accepted proper practice, but also the only reasonably and responsible standard of care to be expected from a consultant in Mr Cook's position faced with the plaintiffs situation' (ibid). These quotes go on to show, given Morland J's identification of the principles underpinning standards of information disclosure, the judge's reliance upon the soundness of his own convictions regarding how these justificatory principles fix the legal rights of the parties (Dworkin, *TRS* (n3) 124).

<sup>102</sup> Margaret Puxon QC, 'Comment on *Smith v Tunbridge Wells HA*' (1994) 5 Medical Law Reports 342, 342.

<sup>103</sup> [1993] 4 Medical Law Reports 79.

<sup>104</sup> (n45) at 335. That test is as follows: '[t]he law should recognise that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it, or if the medical practitioner is or should be reasonably aware that the particular patient, if warned of the risk, would be likely to attach significance to it' ((n51) at 83). However, as Miola correctly notes, *Rogers* 'was, seemingly, summarily dismissed by Morland J' (José Miola, 'On the Materiality of Risk – Paper Tigers and Panaceas' (2009) 17 Medical Law Review 76, 97 (hereafter *Paper Tigers*)). See (n45) at 335. Nonetheless, as Miola also notes '[g]iven the support for a less restrictive view of *Bolam* [the professional practice standard], however, and the assertions of the patient's right to choose and the court's to decide on materiality, such substantial quotes from Australia may perhaps be seen as more of a nod and a wink, suggesting to higher courts a change in the law might be appropriate' (Miola, *Paper Tigers* (n104) 97).

<sup>105</sup> See (n45) at 336-337. See also *McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Medical Law Reports 343, in which again the court was not reluctant to decide which practice of disclosure was the responsible practice to adopt, despite expert evidence being adduced on behalf of the defendants, and despite purporting to rely on Lord Bridge and Lord Templeman's interpretation of *Bolam* (the professional practice standard) in *Sidaway* (Miola, *Paper Tigers* (n104) 96). Rougier J was also to note the underlying rationale for the court being able to adopt such a stance was that 'a patient is entitled to be given enough information on the risks of an operation to allow him or her to exercise a balanced judgment; after all, it is their life that is going to be affected' ((n105) at 351).

*Pearce* is also important because although the claimant lost in that case,<sup>106</sup> it is authority for the following proposition of law:

if there is a significant risk which would affect the judgment of the reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.<sup>107</sup>

This proposition has been treated as true by past political decisions, both pre- and post-*Chester*, as the standard of disclosure regarding medical negligence claims in English law. Therefore a coherent interpretation of this proposition and its grounds in light of the grounds of the other true propositions of law above needs to be provided. This interpretation will further show two matters: those local decisions which have a greater force in fixing a medical professional's legal standards of disclosure<sup>108</sup> are underpinned by political-moral principles of equality of respect and respect for autonomy. Second, these political-moral principles' justificatory force substantially depends upon the *ethical* case made for them above.

There are two important, related issues regarding this proposition of law. The first is whether to read the proposition as simply an attempt to refine Lord Bridge's approach to the standard of disclosure in medical negligence claims (one based on professional practice subject to the caveat highlighted above); or, alternatively, whether the proposition is best read as shifting the emphasis of the standard of disclosure to one which a risk is material and must be

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<sup>106</sup> It was held Mrs Pearce's consultant, Mr Niven, was not negligent in failing to disclose the 0.1 to 0.2 per cent increased risk of stillbirth resulting from further non-intervention in the delivery of Mrs Pearce's sixth child, which was two weeks beyond term. Mr Niven had discussed the risks of inducing the birth and also the disadvantage of a caesarean section, both with regards to Mrs Pearce and the baby ((n98) at 54-55).

<sup>107</sup> (n98) at 59. See Lord Steyn's reliance on this proposition in originally in *Chester* (n4) at [15].

<sup>108</sup> Dworkin, *JFH* (n1) 171, in contrast to their force in fixing what is ethically just or unjust generally (*ibid*).

disclosed if a *reasonable patient* would wish to be told of it.<sup>109</sup> The second issue is how to read the claim those “significant risks” must be disclosed:

On the one hand, it may be interpreted as stating that the reasonable doctor will disclose everything that the reasonable patient would want to be told of. On the other hand, it may be suggested that the use of the word “significant” means that the reasonable doctor must disclose only risks that are *both* “significant” and “material” (information the patient needs to make an autonomous choice).<sup>110</sup>

Further, if the latter interpretation is the correct interpretation to take, the question of how to best understand whether a risk is “significant” needs also to be determined.

In looking at the first question, it is important to highlight the following passages from Lord Woolf’s statement that ‘[t]he first speech [in *Sidaway*] was given by Lord Scarman...The views he expresses *are a minority view and do not in this jurisdiction represent the law*.<sup>111</sup> Lord Woolf then went on to explicitly highlight Lord Bridge’s caveat<sup>112</sup> regarding obviously necessary risks that must be disclosed. All of the foregoing has been invoked of the proposition ‘Lord Woolf’s test is a significant refinement of Lord Bridge’s approach’.<sup>113</sup>

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<sup>109</sup> Maclean, *Sidaway to Pearce* (n89) 119-129; F&M, *How Much Information is Enough?* (n54) 15.

<sup>110</sup> Miola, *Paper Tigers* (n104) 98.

<sup>111</sup> (n98) at 57 (emphasis added).

<sup>112</sup> *ibid* at 57-58.

<sup>113</sup> Maclean, *Sidaway to Pearce* (n89) 118. I would, however, question the assertion by Kenyon Mason and Graeme Laurie that ‘Lord Woolf MR felt that Lord Templeman’s views in *Sidaway* best summed up the position, whereby the patient was entitled to such information as was needed to make a balanced judgment in the circumstances’ (Mason & Laurie, *Mason & McCall Smith* (n42) 126). This is because, in context, two passages from Lord Woolf are instructive. He notes ‘Lord Templeman did not adopt quite the same approach as either Lord Scarman or the majority, but his speech is particularly relied upon by Mr Richardson. I bear that in mind, but I would *merely refer to one short passage*’ ((n98) at 58) (emphasis added). Lord Woolf then goes on to look at Templeman’s promotion of the principle of respect for autonomy. Lord Woolf then notes ‘[w]hile recognising that Lord Templeman’s approach is not precisely that of the majority, it seems to me that that statement of Lord Templeman does reflect the law and *does not involve taking a different view from the majority*’ (*ibid*) (emphasis added). These two passages where Lord Woolf does refer to Lord Templeman are hardly a ringing endorsement that his approach *best* summed up the position, as highlighted by the italicised portions of the quotes.

Despite this argument holding weight and being consistent with previous case law, the best interpretation of this proposition of law is, although still framed in terms of the reasonable doctor, one where they must disclose that material information which the reasonable patient needs to make an informed choice about their care.<sup>114</sup> The political community acts in the best way when it gives effect to those *ethical* principles of respect for autonomy and equality of respect that support Ms Chester's individual claim above.

Initially it may seem precisely because of the way Lord Woolf provides context for his proposition, the former interpretation is superficially more consistent with previous case law. However, properly understood on this interpretive framework, the dimension of fit is an interpretive judgement bound up with questions of substance. Thus, the constraint of fit must be sensitive to the demands of coherence with equality integrity is best understood through. Thus, whilst the former interpretation can be inferentially justified by that dimension of equality of respect requiring legitimate expectations encouraged by past political decisions be protected (here regarding medical professionals and primarily professional practice-oriented standards of disclosure so as not to be legally negligent), the latter interpretation *also fits with* and is inferentially justified by this dimension of equality of respect.<sup>115</sup> Given the prominence attached to principles of autonomy in *Smith* and *McAllister*, the highlighting by Lord Woolf

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<sup>114</sup> Margaret Brazier & José Miola, 'Bye Bye Bolam: A Medical Litigation Revolution?' (2000) 8 Medical Law Review 85, 110 (hereafter *Bye Bye*); Pattinson, *Medical Law and Ethics* (n89) 128. Though 'Maclean has argued that requiring disclosure of the information that a reasonable patient would want to be disclosed is very different from requiring disclosure of "those risks that the reasonable doctor believes the reasonable patient ought to find significant to a decision"' (Pattinson, *Medical Law and Ethics* (n89) 129-130) (footnote omitted), I am in agreement with Pattinson that it is doubtful this distinction has any real practical significance. Much the same is said by Fovargue and Miola, who simply note 'Lord Woolf moved the definition beyond judicial supervision ... A risk is thus material and should be disclosed to a patient if a *reasonable patient* would want to be told of it' (F&M, *How Much Information is Enough?* (n54) 15) (emphasis in original).

<sup>115</sup> Dworkin, *Response Guest* (n75) 435. For further discussion, see Dworkin, *TRS* (n3) 85-86. That inferential connection may be put as follows: equality of respect requires legitimate expectations from past political decisions to be protected. Past political decisions have created the legitimate expectation that standards of disclosure regarding material risks will be governed primarily by the professional practice standard. Therefore, this legitimate expectation must be protected.

of many of the same quotes from *Sidaway* as *Smith*,<sup>116</sup> and all of the judges in *Sidaway* identifying a patient's autonomy is to be respected, it is arguable past judicial pronouncements have also created the more *general* expectation patients' autonomy will be respected with regards to standards of disclosure. However, the inferential connection can be argued to be weaker, given the specification of principles of respect for autonomy and professionally-defined best interests of the patient in *Sidaway*.

But the dimension of fit is an interpretive question. Thus, whilst convictions of fit are sufficiently distinct to ensure this interpretation *is* an interpretation of legal practice and not a normative assertion, the dimensions of fit and substance are to be delicately balanced with one another in an overall opinion. But, this interpretive conclusion allows us to trade off that interpretation's success on one standard against its shortcomings on another. The overall opinion is about which interpretation makes the community's legal practice the best it can be from the standpoint of political morality. As the latter interpretation has passed the threshold of fit, and has the potential to show the community's legal practice in the best light, the defects of fit noticed above are able to be compensated in the final overall judgment, because those political-moral principles underpinning this interpretation are markedly more attractive. Whilst those principles of respect for autonomy have not always been observed in current legal practice, there is more merit in adhering to them and their implications.<sup>117</sup> The former interpretation of Lord Woolf's proposition is therefore a less coherent elaboration of those fundamental principles of respect for autonomy, equality and integrity the department of medical negligence law and law in general, serves.

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<sup>116</sup> Miola, *Symbiotic* (n2) 71-72. See, for example (n98) at 57-58. See also how Lord Woolf was to rely on Lord Browne-Wilkinson's speech in *Bolitho v City & Hackney Health Authority* [1997] 3 WLR 1151, at 1160B, at (n98) 58-89.

<sup>117</sup> Dworkin, *Law's Empire* (n31) 239; 257; 410-411.

The pertinent injury that has occurred to Ms Chester is the affront to have her autonomy respected. The ethical analysis showed equality of respect justifies Ms Chester being told of the inherent risk. It also showed in order to protect the capacity to express one's character-values, informed consent procedures must give patients control, in terms of information provision and unwanted influence elimination, to ensure understanding and voluntary action. It also showed it is ethically preferable to initially use the reasonable patient test and supplement it where necessary with particular patient investigation. This *ethical* analysis shows the principles of equality of respect and respect for autonomy are *especially important* to translate into what a political community of principle owes to its citizens, as part of the state's endeavour to treat all people with equal concern.<sup>118</sup> The department of medical negligence law relating to standards of disclosure relies upon *no special medical skill*. As such, a test based primarily upon professional practice misidentifies the nature of the matter. The principles behind this test are incoherent with the system of principles the department of medical negligence law and law itself serves. The primary justification for the *Bolam* test of professional practice is 'that expert matters can only be judged by expert opinion. This rationale cannot be used to justify *Bolam* in determining standards of disclosure'.<sup>119</sup>

Moreover, as seen with *Sidaway* in chapter one, to interpret Lord Woolf's proposition of law as stating the professional practice standard is the determinative standard of disclosure, the test takes on an unjustifiably paternalistic tone. The test also implicitly relies on the premise that the law views the relationship of doctor and patient as unilateral in nature; the patient is passive, allowing the medical practitioner to dictate their medical care. However, simply focussing on the actions and disclosures of the doctor is a too simplistic view to take of the doctor-patient relationship. Generally, '[t]he informed patient is better equipped to participate

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<sup>118</sup> Stephen Guest, *Ronald Dworkin (Jurists: Profiles in Legal Theory)* (2<sup>nd</sup> edn, Edinburgh University Press 1997) 46 (hereafter RD); Dworkin, JFH (n1) 327-328.

<sup>119</sup> Tickner, *A Meaningful Choice* (n51) 114. See also the Supreme Court of Canada in *Reibl v Hughes* (1980) 114 DLR (3d) 1 at 13. On this point further, see *Rogers v Whitaker* (n51) at 82, 83, 84.

in treatment',<sup>120</sup> if the patient has understood the information provided to them. Further, 'greater judicial concerns with the process of disclosure would at least be symbolically more important'.<sup>121</sup> As such, the specification that those principles of respect for autonomy operate subject to the professionally defined best interests of the patient (and thus the interpretation that Lord Woolf's proposition of law simply attempts to refine Lord Bridge's approach) cannot be inferentially connected with those political-moral principles of respect for autonomy justified by the *ethical* case made for them, and that dimension of equality of respect requiring 'equal respect in the substantive treatment of individuals by the state'.<sup>122</sup>

Again, it has been highlighted how *ethically* the practices of informed consent are best understood through the interpretive value of respecting patients' autonomy. Such principles are *justifying premises* for the political-moral principles applicable in interpreting Lord Woolf's proposition, given the community's adherence to the same principle of equality of respect as bioethical practices. As the reasonable person standard of disclosure is justified by B&C's theory, because of the coherence between Dworkin's theory of law and B&C's bioethical theory, we also *do well* to embrace the legal proposition embodying that coherent moral principle (in the *ethical* scenario). Therefore, the best interpretation of a community's legal practice, regarding Lord Woolf's proposition and previous case law is one which though it still speaks of the reasonable doctor, a medical practitioner must disclose the information

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<sup>120</sup> Margaret Brazier 'Patient Autonomy and Consent to Treatment: The Role of the Law?' (1987) 7 Legal Studies 169, 176 (hereafter *Autonomy and Consent*).

<sup>121</sup> Maclean, *Sidaway to Pearce* (n89) 127.

<sup>122</sup> Dworkin, *Response Guest* (n75) 435. See further, chapter 1, point 3.1.2., '(Protection from) paternalism' and 3.1.3., 'Relation of doctor and patient'. See also Brazier's nuanced discussion surrounding how '[t]he debate on "informed consent" is not simply about the philosophical concept of autonomy but offers an opportunity to develop co-operative health care' (Brazier, *Autonomy and Consent* (n120) 176). Finally, see the importance of the concept of understanding above in the ethical analysis of *Chester*, in particular footnotes 44 and 45, and also Mason & Laurie, *Mason & McCall Smith* (n) 119-120. The principles here also call into question the decision in *Gold v Haringey Health Authority* ([1988] QB 481 at 489) with regards to how the professional practice standard applies to both therapeutic and non-therapeutic procedures. See *ibid* at 489-490 per Lloyd LJ and *ibid* 492 per Stephen Brown LJ.

that is material for a reasonable patient to make an informed choice about their medical care.

People have a moral right to have their autonomy respected.<sup>123</sup>

The highlighting of those principles of respect for autonomy leads to the second contestable issue of Lord Woolf's proposition; the relationship of the significance question to the materiality of information issue, and how to best understand how to determine what a "significant" risk is. That interpretation is one which the question of significance is determined by reference to clinical judgment. This may yet further argue for the proposition Lord Woolf intended to refine Lord Bridge's professional practice-based standard of disclosure in *Sidaway*.<sup>124</sup> However, the relationship between the significance and materiality questions needs to be considered first. It is only on one interpretation of the relationship between the significance and materiality questions the issue of how to determine what a "significant" risk is arises.

Lord Woolf's statement 'if there is a significant risk that would affect the judgment of a reasonable patient'<sup>125</sup> is ambiguous. It can be read as either tying the question of significance to whether the information is material to the decision of a reasonable patient. Alternatively,

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<sup>123</sup> Brazier & Miola, *Bye Bye* (n114) 110; Pattinson, *Medical Law and Ethics* (n89) 128. However, given that constraints of fit still do operate, whilst these principles of political morality are considered in every case highlighted so far, they do not permit (at this point) the conclusion that the best interpretation of a community's legal practices is one in which people have a moral right to have their autonomy respected, by being told of all those significant risks that would affect the judgment of a reasonable patient, with the theoretical reasonable patient also being invested with those relevant special characteristics of the *individual claimant* (Mason & Laurie, *Mason & McCall Smith* (n42) 118), much like the ethically preferable standard of disclosure above, and the standard of disclosure put forward in *Rogers v Whitaker*.

<sup>124</sup> Though Maclean has argued in another article that, regarding the separation of the question of whether a risk is significant, and relying on clinical judgment to determine the issue, 'asking the "expert"', the test ceases to be what the reasonable person ought to think significant, *and becomes what the "expert" thinks the reasonable person ought to think significant*' (Alasdair Maclean, 'Giving the Reasonable Patient a Voice: Information Disclosure and the Relevance of Empirical Evidence (2005) 7 Medical Law International 1, 7) (emphasis added). However, much like Maclean's assertions of two apparently different propositions collapsing into one another at footnote 114, it does not seem that Lord Woolf was to use clinical judgment in *Pearce* to decide simply whether a risk was significant in and of itself, *not* whether the medical practitioner thinks that the reasonable person ought to think that this risk is significant. However, Maclean is correct to assert that if the issue of whether a risk is significant is to be determined by professional practice, then it seems 'Lord Woolf's test lies somewhere between *Bolam* simpliciter and the prudent patient standard' (Maclean, *Giving the Reasonable Patient a Voice* (n124) 7) (emphasis in original).

<sup>125</sup> (n98) at 59.

the question of significance is separable from the question of whether certain information is material, and thus must be disclosed. If this latter interpretation is best, this implies the concept of significance acts as the entry point to the question of whether the information is material. The doctor must only disclose those risks that are both significant, and then material.<sup>126</sup>

Initially, it seems most logical to read the passage through this latter interpretation:<sup>127</sup> ‘[t]he way Lord Woolf phrased his test the significance of the risk appeared to be linguistically prior to whether the risk was material to the patients decision’.<sup>128</sup> Though Lord Woolf further states ‘where there is what can realistically be called a “significant risk”, then, in the ordinary event...the patient is entitled to be informed of that risk’,<sup>129</sup> making no reference to a distinct question of materiality,<sup>130</sup> he was to determine the question of significance largely by reference to professional practice.<sup>131</sup> There is thus the potential for ‘the informational needs of the reasonable patient [to] be readily disconnected from the doctor’s duty to disclose’.<sup>132</sup>

Though the question of which interpretation regarding the relationship between the questions of whether a risk is significant and whether it is material has not been conclusively answered (although the interpretation that renders such questions separable seems weightier), this

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<sup>126</sup> Miola, *Paper Tigers* (n104) 98; Maclean, *Sidaway to Pearce* (n89) 120. The former interpretation has been expressed by the District of Columbia Circuit of the United States Court of Appeals in *Canterbury v Spence* (1972) 464 F 2d 772.

<sup>127</sup> Miola, *Paper Tigers* (n104) 98.

<sup>128</sup> Maclean, *Given the Reasonable Patient a Voice* (n124) 7.

<sup>129</sup> (n98) at 59.

<sup>130</sup> Miola, *Paper Tigers* (n104) 98. Miola also notes that this view, that the questions of “significance” and materiality are not separate is shared by the English Court of Appeal in *Wyatt v Curtis* [2003] EWCA Civ 1779, and the Supreme Court of Ireland in *Fitzpatrick v White* [2007] IESC 51, which viewed both terms as interchangeable, and in which medical evidence is helpful but not conclusive (Miola, *Paper Tigers* (n) 98). However, it shall be shown that the scheme of principle that best justifies the statements regarding the relationship of the significance and materiality questions and how best to determine whether a risk is significant in *Wyatt v Curtis*, argues for the better interpretation of Lord Woolf’s proposition as one that separates out the issues of significance and materiality, yet are still linked together by that system of principles of equality of respect and respect for autonomy. Further, *Fitzpatrick* is a case that arises post-*Chester*. Thus, whilst it does have some influence, it cannot be counted in the interpretive process here.

<sup>131</sup> Maclean, *Sidaway to Pearce* (n89) 120. Lord Woolf in *Pearce* noted that, regarding the risk of stillbirth that the defendant had not warned the claimant of ‘[t]he doctors called on behalf of the defendants did not regard that risk as significant, nor do I’ ((n98) at 59).

<sup>132</sup> Maclean, *Sidaway to Pearce* (n89) 120.

interpretation can be shown to be best by considering why we do well to read Lord Woolf's proposition this way. That is, by determining how to best determine what a significant risk is (in acting as an entryway to the question of 'whether the information would be material to the reasonable patient'<sup>133</sup>). Rendering the questions separable may seem counterintuitive. However, these legal questions are still linked by that common scheme of political-moral principles of equality of respect and respect for autonomy (based on the *ethical* case made for them). Interpreting the questions as separable does not decrease the coherence of this standard of disclosure, relative to interpreting the concepts of "significant" and "material" are interchangeable. In fact, the separable interpretation *better* coheres with the ethical analysis and those political-moral principles justifying the community's legal practice relating to standards of disclosure.<sup>134</sup> In not treating the two concepts as interchangeable this enables us to focus on the concept of significance, the principles the concept serves, and the implications of this. In doing so, the legal standard of disclosure can be brought closer to the preferred ethical standard of disclosure. The ethical analysis highlighted why it was especially important to respect a person's autonomy. A community of principle discharges its duty to treat people with equal concern *only* when it justifiably<sup>135</sup> gives effect to this ethical rationale the best way it can through political-moral principles latent in law.

Focussing on the concept of "significance" allows us to explicitly recognise that perceptions of what constitutes a significant risk may differ between patients and practitioners, in relation to both the magnitude and type of harm. Differing perceptions may reflect the 'psychological makeup' of patients<sup>136</sup> and more generally might mirror different approximate assessments of certain risks. This may include factors such as 'whether the risks in question are voluntary,

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<sup>133</sup> ibid.

<sup>134</sup> Dworkin, *Law's Empire* (n31) 225.

<sup>135</sup> That is, with due regard to the greater force local decisions have in fixing what law requires than in morality/ethics in general (Dworkin, *JFH* (n1) 171) and any other especially important countervailing considerations.

<sup>136</sup> Maclean, *Giving the Reasonable Patient a Voice* (n124) 5.

controllable, highly salient, novel, or dreaded'.<sup>137</sup> The meaning of that type of harm risked by a particular action and whether it is "significant" can only be fully determined by the affected person.<sup>138</sup>

Though these arguments are 'based purely on the concept of risk',<sup>139</sup> they interlink with *ethical* analysis underpinning the best interpretation of the legal standard of disclosure. Recognising the question of risk significance is only fully determinable by the affected person, and altering the legal standard to reflect this, gives *control* to the patient over information provision. This will further ensure patients' *understanding*. Patients' capacity for autonomous choice is maintained,<sup>140</sup> by ensuring they have had 'both the likelihood and nature of the harm being risked'<sup>141</sup> brought home to them in a meaningful way.<sup>142</sup> Focussing on the question of significance allows us to further promote these fundamental principles of equality and respect for autonomy in a way that conflating the two questions does not. It brings the legal standard closer to the ethical position outlined above. The proposition that the concepts of significance and materiality are separable is the better interpretation of the community's political practice, all things considered. More detailed guidance on what constitutes a significant risk can also be supplied to the courts, meaning the potential for future inconsistencies regarding this issue is less likely to occur. In determining what a "significant" risk is, whilst the court is able to rely on experts in helping to 'define the nature

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<sup>137</sup> B&C, *PBE* (n9) 235 (footnote omitted).

<sup>138</sup> Maclean, *Giving the Reasonable Patient a Voice* (n124) 5.

<sup>139</sup> *ibid.*

<sup>140</sup> B&C, *PBE* (n9) 107.

<sup>141</sup> Maclean, *Sidaway to Pearce* (n89) 120. See, in contrast to this, the discussion of *Al Hamwi v Johnston and Another* [2005] EWHC 206, and *Atwell v McPartlin* [2004] EWHC 829 in chapter 1, point 4.1., discussing developments in case law since Miola's analysis in *Symbiotic*. For further discussion of the concept of understanding, see footnote 45 above.

<sup>142</sup> Such arguments are also important because they link with one specification of the interpretive concept of beneficence; medical practitioners ought to act for the benefit of others in providing healthcare based on and appropriate analysis of benefits relative to risks (B&C, *PBE* (n9) 203; 230). Further, this specification is explained by the concept of respect for autonomy. The "appropriate" analysis of benefits relative to risks is again one in which the patients capacity for autonomous choice is maintained (*ibid* 107).

and to quantify the likelihood of the risks,<sup>143</sup> relevant to the issue at hand, it should not rely on them for ‘the judgment of significance itself’.<sup>144</sup> This judgment serves those principles just spoken of, and is sensitive to these and the nature of the concept of risk.<sup>145</sup>

In conclusion, the system of principles best explaining past political decisions supports the subsequent theory about legal rights to damages as a result of negligent disclosure by a medical professional of significant and material risks regarding a proposed medical procedure.<sup>146</sup> To best give expression to those political-moral principles of equality of respect and respect for autonomy (*premised on the ethical analysis* which showed informed consent practices are sensitive to a particular conception of respect for autonomy), people have a moral right to be told of those significant risks material to the reasonable patient in determining what course of treatment to take. The concept of significance operates as an entryway to the question of whether the information is material. In determining which risks are to be properly classified as significant, the court is to have regard to a number of issues.

First, the court is able to rely on experts to help define the nature of risks, and to quantify

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<sup>143</sup> Maclean, *Sidaway to Pearce* (n89) 123-124.

<sup>144</sup> *ibid* 123. See how in *Rogers v Whitaker*, it was accepted that ‘the amount of information or advice which a careful and responsible doctor would disclose depended upon a complex of factors: the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances’ ((n51) at 82). See how all these factors were then applied (*ibid* at 83-84) to find that a risk of 1 in 14,000 procedures was significant and should be disclosed.

<sup>145</sup> Indeed, though Lord Woolf did seem to decide the question of significance in *Pearce* by largely relying on clinical judgment, he was to note ‘[w]hen one refers to a “significant risk” it is not possible to talk in precise percentages’ ((n98) at 59). He was also to say ‘the doctor, in determining what to tell a patient, has to take into account all the relevant considerations, which include the ability of the patient to comprehend what he has to say to him or her, and the state of the patient at the particular time, both from the physical point of view and an emotional point of view (*ibid*). See also, though *obiter*, a similar nuanced interpretation of the concept of significance in *Wyatt v Curtis* ([2003] EWCA Civ 1779) at [16]. The foregoing passages show this interpretation does have a further degree of fit with past political decisions. Indeed, see the discussion of *Birch v University College London Hospital NHS Foundation Trust* [2008] EWHC 2237, in chapter 1, point 4.1., ‘Developments since *Symbiotic*—Case law’. See also *Nicholls v Imperial College Healthcare NHS Trust* (n), where ‘it was held to be a breach of duty of care to fail to discuss all options surrounding carotid artery surgery’ (Mason & Laurie, *Mason & McCall Smith* (n42) 128). Further, see *Jones v North West Strategic Health Authority* [2010] EWHC 178, in which it was found that there was a breach of duty in failing to warn the mother of the risk of cerebral palsy and shoulder dystocia to the child as a result of prolonged delivery (*ibid* at [1]-[3]; [53]). In that case, Nicol J was to note ‘[w]hether or not a risk is “significant” is ultimately for the Court to decide’ (*ibid* at [24]). Though such cases were decided post-*Chester*, they are influential as they show the interpretation above is on that does fit with the subsequent practices of the courts. Finally, in contrast, see the Scottish case of *M’s Guardian v Lanarkshire Health Board* [2010] CSOH 104, and Maclean’s discussion of the case in *Sidaway to Pearce* (n89) at 124-125.

<sup>146</sup> Dworkin, *Law’s Empire* (n31) 240.

their likelihood. They should *not* rely on experts for the final judgment of significance; issues concerning standards of disclosure are *ethical* in nature.<sup>147</sup> Of primary importance is recognising the main purpose in determining the question of what constitutes a “significant risk” is to promote the system of principles of equality of respect and respect for autonomy that underpin this department of law and the practice of law itself. The court must always be aware a patient’s perception of risk may differ from a medical professional’s. This may stem from various factors (including but not limited to) the patients level of understanding, disposition, the nature of the treatment, and pertinent cultural or environmental factors. This suggests though a risk may be statistically small, it might still be significant to the patient.

This interpretation applied in the instant case means Ms Chester’s *ethical* right to have her autonomy respected can be vindicated. Ms Chester ‘had a general aversion to surgery’,<sup>148</sup> ‘was anxious to avoid surgery if possible’,<sup>149</sup> and ‘would have wanted at least two further opinions as to whether an operation was necessary’.<sup>150</sup> Finally, it was accepted at trial Ms Chester had ‘told Mr Afshar that she had heard a lot of horror stories about surgery and that she wanted to know about the risks’.<sup>151</sup> The risk was inherent to this type of surgery. It is both a significant and material one that should have been disclosed. Ms Chester legally ought to have been informed about the slight but inherent damage in the operation.

#### **2.2.2.2. The relationship between the legal standard and medical ethics**

The best interpretation of the legal standard of disclosure has been provided. However, this standard seemingly differs from the ethical standard. The ethical standard is one whereby the reasonable patient standard is used initially, and *then* supplemented by further investigation where necessary into what information the particular patient may need in particular

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<sup>147</sup> Maclean, *Sidaway to Pearce* (n89) 123-124.

<sup>148</sup> (n4) at [41].

<sup>149</sup> *ibid* at [42].

<sup>150</sup> *ibid* at [44].

<sup>151</sup> *ibid*.

circumstances.<sup>152</sup> Contrastingly, the legal standard looks at the separable issues of significance and materiality. The materiality of a risk is determined by reference to the reasonable patient standard, with the very concept of a “significant risk” meaning courts can take into account more individual factors. Though this legal standard deals with some objections levelled against the reasonable patient standard,<sup>153</sup> it may be contended such a test is unattainable,<sup>154</sup> and may lead to counterintuitive results.

However, by analysing the way different categories of ethical discourse interact with legal standards of disclosure for medical professionals and courts, the ethical discourse and legal standard work together to ensure patients’ autonomy is fully respected. Further, the interaction between the legal and ethical standards means patients’ autonomy is respected in an ethically sophisticated way. Finally, in showing how the legal and ethical standards interact, this will also go towards ‘defragmenting medical ethics through categorisation’.<sup>155</sup> This will remedy the problems outlined in chapter one. There is recognition medical ethics *is* currently fragmented, but that certain discourses of ethics *can* be prioritised as they can perform a suitable regulatory function.

Initially, it may seem the thin (or liberal) view of autonomy highlighted above gives little direction regarding how it is to be prioritised and implemented. However, this is not the case, given the adherence on this legal and bioethical framework to fundamental principles of equality of respect. This adherence means it is valuable there is a private space in which

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<sup>152</sup> B&C, *PBE* (n9) 126-127.

<sup>153</sup> This includes ‘as with all objective tests … the disadvantage of being potentially unfair to the claimant. There may be specific circumstances that are unique to the individual and it may well be that he or she would genuinely wish to know the potential effect on them’ (Mason & Laurie, *Mason & McCall Smith* (n42) 117). See how Professor Brazier similarly states [t]he basic problem with a “reasonable patient” standard lies in ascertaining the nature and reactions of the mythical reasonable patient … The trouble perhaps is that there is no standard patient, only particular patients’ (Brazier, *Autonomy and Consent* (n120) 189). See also Lord Bridge’s interpretive disagreement in *Sidaway* regarding the doctrine of informed consent as propounded by *Canterbury v Spence* (n126), at (n5) 899, and footnote 76 in chapter 1.

<sup>154</sup> F&M, *How Much Information is Enough?* (n54) 15.

<sup>155</sup> Miola, *Symbiotic* (n2) 79.

individuals can act autonomously.<sup>156</sup> But, the freedom to express one's own character-values is parametered by the fundamental principle to 'respect the moral rights, properly understood, of others'.<sup>157</sup> At a state level there is therefore a *duty* to create and protect that space where people may act autonomously, since this is one of the main means by which the state adheres to the fundamental principle of equality of respect.<sup>158</sup>

At an individual level, this conception of autonomy has implications for the informed consent scenario. Legally, this conception is to be prioritised and implemented by recognising, as far as can be done within the community's current legal practice, informed consent is a *process*, with decisions being made by medical professionals and patients in a co-operative partnership. As those principles of respect for autonomy are part of the fundamental principles of equality of respect, the state has a strong moral duty to respect an individual's *ethical* right to autonomy.<sup>159</sup> The problem is the very nature of the community's legal practices means there is a greater emphasis on the *consequences* of that partnership, rather than the partnership itself. However, on the current legal standard, given the factors the court can have regard to in determining whether a risk is "significant", the court is able to direct its attention to whether the medical professional conducts a bilateral discussion with the patient to bring home in a meaningful way the risks associated with certain procedures. Whilst the nature of the community's legal practices surrounding standards of disclosure may mean the

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<sup>156</sup> That is, '[p]eople have a right to ethical independence that follows from the principle of personal responsibility' (Dworkin, *JFH* (n1) 4). This principle means there is a 'responsibility and right of each person to decide for himself how to make something valuable of his life' (*ibid* 2).

<sup>157</sup> Dworkin, *JIR* (n7) 14.

<sup>158</sup> Guest, *RD* (n118) 193; Stephen Guest, 'Ronald Dworkin and the Question of Political Stability and Legitimacy in Stephen Gough and Andrew Stables (ed) *Sustainability and Security within Liberal Societies: Learning to Live with the Future*' (Routledge 2008) <[http://www.homepages.ucl.ac.uk/~uctlsfd/papers/ronald\\_dworkin\\_and\\_the\\_question\\_of\\_political\\_stability\\_and\\_legitimacy.pdf](http://www.homepages.ucl.ac.uk/~uctlsfd/papers/ronald_dworkin_and_the_question_of_political_stability_and_legitimacy.pdf)> 1-2 (online) accessed 27<sup>th</sup> June 2014 (hereafter *Question*).

<sup>159</sup> These principles are therefore compatible with a further communal duty to integrate the autonomous individual into that community, whilst at the same time encouraging them to make responsible decisions within their own private space (Guest, *Question* (n158) 1) (online). Guest further notes that therefore, 'certain failure's in an individual's life may be attributable to a failed communal duty towards them' (*ibid*).

legal standard does not go as far as the ethical one, these greater concerns are at least (again) symbolically important.<sup>160</sup>

However, because of this legal standard and conception of autonomy, a counterintuitive, potentially dangerous situation for the medical professional regarding risk disclosure may occur. For example: a woman comes in to discuss cosmetic breast surgery with her medical practitioner. Around 1 in 20 women can be left with more severe scarring, resulting from surgery.<sup>161</sup> But, as a result of discussions, the medical practitioner has learned this patient places an extremely high ‘premium on having the perfect bust’.<sup>162</sup> The patient is calm, willing to take all the risks occurring resulting from surgery, and readily comprehends the procedure will involve some sort of scarring. In this situation, the medical practitioner might reasonably conclude, if such factors overwhelmingly point in one direction, more severe scarring, to this patient, is not a significant risk. Nonetheless, as there is approximately a 5% risk of severe scarring, such a risk would be (at least on initial reflection) classed as a material one a reasonable patient would wish to know. But, this seems to lead to the counterintuitive result that if the medical practitioner was *not* to disclose this risk, as only those risks that are ‘*both* “significant” and “material”’<sup>163</sup> must be disclosed, it may be the medical practitioner, if such a result did occur as a result of the breast surgery and the patient was *not* warned, would not be legally negligent.<sup>164</sup> The question arises whether the doctor should still inform the patient of these risks.

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<sup>160</sup> Maclean, *Sidaway to Pearce* (n89) 127. In addition, as it is those risks that would be material to a reasonable patient that must be disclosed, this means ‘the onus is placed on the doctor to consider at least what in general a patient in the plaintiffs circumstances would want to know. The onus is placed on the doctor to initiate an exploration of the extent to which his patient wishes to actively participate in treatment decisions’ (Brazier, *Autonomy and Consent* (n120) 188).

<sup>161</sup> NHS Choices, ‘Breast Implants – Complications’ (3 June 2012) <<http://www.nhs.uk/Conditions/Breast-implants/Pages/Complications.aspx>> accessed 18<sup>th</sup> June 2014.

<sup>162</sup> Brazier, *Autonomy and Consent* (n120) 187, footnote 66.

<sup>163</sup> Miola, *Paper Tigers* (n104) 98 (emphasis in original).

<sup>164</sup> This example is adapted from Professor Brazier’s discussion of *White v Turner* (1981) 120 DLR (3d) 269, in *Autonomy and Consent* (n120) at 187, footnote 66. To put the problem the other way, there might be a situation

It is here the importance of ethics informing the law comes to the fore. As shown in the ethical analysis, the GMC guidance on consent is ‘authoritative and influential in this area’.<sup>165</sup> The formal (and less so) semi-formal sectors of discourse are not only the primary standards the medical profession should follow but the primary reference point for the court regarding the standards the medical profession should follow. Turning to our problem, the GMC guidance outlined above would *require* as an overriding duty disclosing the risk of more severe scarring. Failure to do so would put the doctor’s registration at risk.<sup>166</sup> Further, where a risk *could* be classed as significant to the patient in the circumstances, the GMC guidance states medical professionals *should* be tailoring their discussions with patients to take into account a number of personal factors. Indeed, at one point the guidance goes further, stating ‘[i]n assessing the risk to an individual patient, you *must* consider the nature of the patient’s condition, their general health and other circumstances’.<sup>167</sup>

Thus, it is clear *on reflection* the formal sector’s ethical guidance regarding consent provides a higher standard than law. *Legally* therefore ‘doctors will be required to do no more than the

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in which a risk is classed as significant to the patient in the circumstances, but would not be held to be a material one according to the reasonable person.

<sup>165</sup> Miola, *Symbiotic* (n2) 79.

<sup>166</sup> Indeed, as stated above, ‘[i]f after discussion, a patient still does not want to know in detail about their condition of their treatment, you should respect their wishes, as far as possible. But you must still give them the information they need in order to give their consent to a proposed investigation or treatment...If a patient insists that they do not want even this basic information, you must explain the potential consequences of them not having it, particularly if it might mean their consent is not valid’ (GMC, *Consent: Patients and Doctors Making Decisions Together* (n61) para’s 14-15).

<sup>167</sup> ibid para 30 (emphasis added). See also ibid para 3, 7, 8, 10, 11, 12, 29. See also the discussion above of the GMC guidance on consent in the ethical analysis above. See also how the GMC, in *Good Medical Practice* notes that ‘[y]ou *must* give patients the information they want or need to know in a way they can understand. You should make sure that arrangements are made, wherever possible, to meet patients’ language and communication needs’ (GMC, *Good Medical Practice* (ethical guidance, 2013) para 32) (emphasis added). See also para 31 and para’s 46-49. Regarding the semi-formal sector of discourse, see how the BMA notes ‘[t]he quality and clarity of information given is the paramount consideration’ (BMA, *Consent Tool Kit* (ethical guidance, 2009) card 2, para 3). The BMA guidance also refers to the GMC guidance on consent (see, in particular card 3). Finally, the Department of Health notes ‘[t]he GMC ... recommends that doctors should do their best to find out about patients’ individual needs and priorities when providing information about treatment options. It advises that discussions should focus on the patient’s “individual situation and risk to them” and sets out the importance of providing the information about the procedure and associated risks in a balanced way and checking that the patients have understood the information given’ (DH, *Reference guide to consent for examination or treatment* (ethical guidance, 2009) para 19 (footnote omitted).

GMC already requires'.<sup>168</sup> This guidance does perform an effective regulatory function. It also means the counterintuitive scenarios considered should not occur in practice, if the guidance and legal standards are followed.

So, as the legal and ethical standards work together well in this scenario on reflection, a clear categorisation of which sources of medical ethics should be considered by the medical profession and the court can be articulated, to begin the process of defragmenting medical ethics. Again, both the court and the medical profession should consult first the GMC's guidance on consent as the *ethical* standard. Insofar as semi-formal sectors of discourse refer to the GMC's guidance, they are also to be considered. They further emphasise how important the GMC's guidance on consent is. The unofficial sector of discourse should *not* be used insofar as to ascertain what specific standards the medical profession should follow.

Having set out the relationship between the law and ethics regarding standards of disclosure, the legal question on point must now be discussed; whether Ms Chester has a right to recover damages following a negligent failure to warn, despite her being unable to prove on the balance of probabilities “but for” this negligence, she would not have consented to the surgery.

#### **2.2.2.3. Causation**

In dealing with the proposition of law immediately above, important cases which deal with principles of causation must be examined. This is to set out in the best way possible the principles underlying Mr Afshar's claim. This case law will also show how Ms Chester's *ethical* right to make an informed choice regarding the procedure (this principle linking the issues surrounding standards of disclosure and causation in medical negligence claims) can be fully vindicated. All elements of the legal case flow from the *ethical* analysis above. There

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<sup>168</sup> F&M, *How Much Information is Enough?* (n54) 15.

it was shown *why* the rationale behind relaxing the rules of causation was so important. The law can vindicate this right that has been violated,<sup>169</sup> ‘consistent[ly] with principle and also with authority’.<sup>170</sup> Moreover, it shall be shown how the gravitational force of the arguments of principle (both political-moral *and* ethical) justifying standard of disclosure cases lead to the following conclusion: in order to see legal practice in the best light possible, Ms Chester has a right for the rules of causation to be relaxed, so that our legal system is less divided into relatively unconnected subsystems of principles.

Though space precludes a detailed discussion, two cases on causation are appropriate. First, *Fairchild v Glenhaven Funeral Services*,<sup>171</sup> where it was held ‘[o]n occasions the threshold “but for” test of causal connection may be over exclusionary’.<sup>172</sup> More specifically in that case ‘by proving that the defendants individually materially increased the risk that the men would develop mesothelioma due to inhaling asbestos fibres, the claimants [were] taken in law to have proved that the defendants materially contributed to their illness’.<sup>173</sup> It was sufficient, for causation purposes, the breach of the duty of care substantially contributed to the risk that eventually occurred.<sup>174</sup> Second, though it is an Australian case, *Chappel v Hart*<sup>175</sup> is also influential as the facts are very similar to those in question here. It was held in *Chappel* the patient was entitled to recover damages for the injury she suffered, of which she was not warned. This was despite it not being shown the patient would not have had surgery at all, but that she would not have had it when she did, and would have sought out the most experienced surgeon to perform the operation.<sup>176</sup>

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<sup>169</sup> Tony Honoré, Medical Non-Disclosure: Causation and Risk: Chappel v Hart’ (1999) 7 Torts LJ 1, 8 (hereafter *Causation and Risk*).

<sup>170</sup> *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22, [34].

<sup>171</sup> *ibid*.

<sup>172</sup> *ibid* at [40]. See also *ibid* [10]-[12].

<sup>173</sup> *ibid* at [168].

<sup>174</sup> *ibid* at [47].

<sup>175</sup> [1999] 2 LRC 341.

<sup>176</sup> *ibid* at 341-342.

Indeed, these help to frame the principles underlying Mr Afshar's claim. To vindicate Ms Chester's ethical right to respect for autonomy, Mr Afshar was under a duty to warn her, as the risk was inherent in the surgery, and thus was foreseeable. But, generally, '[t]he purpose of a duty to warn someone against the risk involved in what he proposes to do, or allow to be done to him, is to give him the opportunity to avoid or reduce that risk'. However, here, Ms Chester was both 'unable and unwilling to take that opportunity'.<sup>177</sup> There was no way of minimising the inherent risk in the surgery. It was 'liable to occur at random irrespective of the degree of care and skill with which the operation was conducted by the surgeon. This means that the risk would have been the same whenever and at whoever's hands she had the operation'.<sup>178</sup> Thus although Ms Chester contended she would have not gone ahead with the operation at the particular time she did, it is irrelevant at what time she would have undergone surgery and who performed it. Mr Afshar's mistake in not warning Ms Chester, though serious enough in itself, had no untoward results which can be properly attributed to it.<sup>179</sup>

Mr Afshar's case is supported by the principle highlighted in *Chappel* that:

To burden a surgeon, in whose actual performance no fault could be found, with civil liability for randomised chance events that followed the surgery would not be reasonable. It would penalise him for chance alone. It would do nothing to establish a superior standard in the performance of the work of surgeons generally.<sup>180</sup>

Further, Mr Afshar's case gains some support from the analogous situation whereby there is more than one person is liable for injury to a person. It is clear the extension of the scope of a

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<sup>177</sup> (n4) at [28]. See also *Chappel* (n) at [27].

<sup>178</sup> (n4) at [61].

<sup>179</sup> (n175) at [93] (3). More generally, '[i]n principle, therefore, if the act or omission of the defendant has done no more than expose the plaintiff to a class of risk which the plaintiff would have been exposed irrespective of the defendant's act or omission, the law or torts should not require the defendant to pay damages' (*ibid* at [28]). See also *ibid* [118], and Lord Hoffman in *Chester* (n4), at [30].

<sup>180</sup> (n175) at [94].

defendant's liability must be exceptional in the latter circumstance 'because of the adverse consequences which the lowering of the threshold will have for the defendant. He will be held responsible for a loss the plaintiff might have suffered even if the defendant had not been involved in at all. To impose liability on a defendant in such circumstances normally runs counter to ordinary perceptions of responsibility'.<sup>181</sup> It may be argued by analogy this causal connection falling outside the scope of the principle is materially the same as the causal connection in Mr Afshar's case. It was also stated by every Law Lord in *Fairchild* that such principles should be limited.<sup>182</sup> Finally, and even more explicitly, Lord Hoffman states:

It is true that actions for clinical negligence notoriously give rise to difficult questions of causation. But it cannot possibly be said that the duty to take reasonable care in treating patients would be virtually drained of content unless the creation of a material risk of injury were accepted as sufficient to satisfy the causal requirements for liability.<sup>183</sup>

Mr Afshar's case therefore weighs very heavily. But these arguments are an attempt to show the best justification of medical negligence law contains a moral principle meaning Mr Afshar is not liable to pay damages in this case.<sup>184</sup> As such, the best interpretation of past political decisions regarding standards of disclosure, and the *ethical* analysis and principles serving as justifying premises for this interpretation cannot be discounted.

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<sup>181</sup> (n170) at [40]. See also *ibid* [74] per Lord Hoffman, and *ibid* [29] per Lord Hope.

<sup>182</sup> Indeed, Lord Nicholls specifically stated: 'I need hardly add that considerable restraint is called for in any relaxation of the threshold "but for" test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof on him' (*ibid* at [43]). See also Lord Hope at [34], Lord Hoffman at [73], Lord Hutton at [118] and Lord Roger at [169].

<sup>183</sup> *ibid* at [69].

<sup>184</sup> Dworkin, *JIR* (n7) 14.

An alternative view of the facts can be taken, which complements the *ethical* rationale behind the legal standard of disclosure in medical negligence claims. Much like in *Chappel*,<sup>185</sup> Ms Chester was anxious to avoid surgery if at all possible.<sup>186</sup> It was clear this risk was a significant one to Ms Chester, and ‘the obtaining of adequate advice as to the risks involved was a central concern of [Ms Chester] in seeking and agreeing to undergo the surgical procedure in question’.<sup>187</sup> In addition, without Mr Afshar’s negligent failure to warn, ‘the injury would not have occurred when it did and, statistically, the chance of it occurring during an operation on another occasion was very small. Moreover, that failure was the very breach of duty which the plaintiff alleges caused her injury’.<sup>188</sup> Mr Afshar’s argument that ‘as surgery was inevitable and the risk which eventuated was inherent in that surgery, [Ms Chester therefore] didn’t in fact suffer any damage’<sup>189</sup> is also questionable. This argument misses that the pertinent injury is the lack of respect shown to Ms Chester’s autonomy. It was shown in the ethical analysis *why* it is especially important to respect a person’s autonomy.<sup>190</sup> Ms Chester’s case is thus supported by the gravitational force of those ethical and political-moral principles of equality of respect and respect for autonomy. It is also supported by the more general principle that ‘[i]t would...be unjust to absolve the medical practitioner from legal responsibility for her injuries by allowing decisive weight to hypothetical and problematic considerations of what could have happened’<sup>191</sup> to Ms Chester had she undertaken surgery at a later date, in conditions of yet further unpredictability.

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<sup>185</sup> (n175) at [67].

<sup>186</sup> (n4) at [41]-[42].

<sup>187</sup> (n175) [81].

<sup>188</sup> *ibid* at [25]. For further argument specific to the facts of *Chappel*, see *ibid* at [99].

<sup>189</sup> *ibid* at [11].

<sup>190</sup> Moreover, this argument is also premised on the mistaken basis that the damage incurred by Ms Chester was not the harm that eventuated, but the expose to risk. However, to say that Ms Chester would unavoidably been exposed to that risk of harm suffered is not the same as saying Ms Chester would have unavoidably suffered that harm (*ibid* [12]).

<sup>191</sup> *ibid* [81].

Therefore, there are two competing interpretations of the case, each of which fits and is justified by different political-moral principles, neither of which are directly on point. Which proposition is justified is therefore to be determined by answering which interpretation flows from the system of principles showing medical negligence law in its best light. To this end, it is vital to include the ethical analysis showing the point and importance of respect for autonomy, what this entails, and its applicability to Ms Chester's scenario. Whilst dimensions of fit are still pertinent in answering this question, they do not help any further in deciding which interpretation is best, all things considered. The system of principles underlying issues surrounding standards of disclosure captures both an important and wide ranging issue. Alternatively, *Fairchild* deals with principles fundamental to negligence law as a whole. Both interpretations, if therefore accepted, would show a degree of damage to integrity, making them (at least initially) a less than completely satisfactory interpretation. Further, the principle justifying Ms Chester's proposition of law has not been explicitly recognised in English law. Whilst integrity demands the initial best interpretation of past political decisions is one which shows judges clearly stating which path later judges should follow, this has to be balanced against the more substantive ethical and political-moral principles arguing for this interpretation. Whilst more procedural values may be specified so as to take on a less prominent role, it is more important the interpretation fits what judges did as opposed to what they said.<sup>192</sup>

Thus, the more evidently normative dimensions of the legal framework's moral epistemology must be emphasised. The argument it would be unjust or unfair to hold Mr Afshar liable is premised on the following principled specification: a medical practitioner ought to take reasonable care in treating patients, in particular their ethical right to have their autonomy respected by being told of all those significant risks material to the informational needs of a

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<sup>192</sup> Dworkin, *Law's Empire* (n31) 246-248. See also Lord Hope in *Fairchild* (n170) at [32].

reasonable patient. Yet it would be unfair to be penalised for a random event inherent in surgery, despite not warning the patient of this event. This specification directs us to the conclusion there is no causal connection between Mr Afshar's negligence and Ms Chester's injury. However, this principled specification is not as coherent a specification with those fundamental principles of equality the legal and bioethical frameworks' serve as the one that supports Ms Chester's case. Ethically, autonomy is worthy of respect as it protects the capacity to lead our lives according to our own value-systems. This means a person must be in control as a result of information provision concerning surgery. There must be an effort by the medical practitioner to promote appropriate comprehension. A patient can only authorise something on the basis of this control. As this ethical right of respecting a patient's autonomy is especially important, if it is infringed by a medical practitioner negligently failing to warn a patient about risks in surgery to the required legal standard, and those risks eventuate, they should be held liable for the eventuation of those very risks. This specification signals causation principles must be relaxed in this instance, as Mr Afshar *did* cause the harm Ms Chester suffered. He did not cause harm by the advice he failed to give her, but by operating on her with adverse outcomes. Mr Afshar is responsible for the consequences of his actions.<sup>193</sup>

This is a more coherent interpretation as it correctly recognises the issues are *ethical* in nature. It therefore gives due regard to the ethical analysis above, as it is only once this analysis has been undertaken can the real issues at stake be really understood. More legally, this interpretation allows the gravitational force of the principles of respect for autonomy to

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<sup>193</sup> Honoré, *Causation and Risk* (n169) 8. See also how Lord Nicholls notes in *Fairchild* 'I have no hesitation in agreeing with all your Lordships that these appeals should be allowed ... The real difficulty lies in elucidating in sufficiently specific terms the principle being applied in reaching this conclusion. To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another must be transparent and capable of identification' ((n170) at [36]). See also how Lord Hoffman states '[c]learly the rule must be based upon principle. However deserving the claimants may be, your Lordships are not exercising a discretion to adapt causal requirements to the individual case. That does not mean, however, that it must be a principle so broad that it takes no account of the significant differences which affect whether it is fair and just to impose liability' (*ibid* at [60]).

inferentially connect both compartments of law concerning risk disclosure and causation. Inconsistency in the law hidden in compartmentalisation potentially allows unprincipled distinctions to decisively define and distinguish departments. Such potential arbitrary inconsistency shows little genuine equality of respect and concern for others.<sup>194</sup> To endorse the principle supporting Mr Afshar's case would give too little weight to the importance of those principles of respect for autonomy that are inferentially connected to the fundamental principles of equality of respect. These principles link and are applicable across the domains of bioethics and law. This means the ethical principles constitute and serve as justifying premises for those political-moral principles that are so important in justifying case law concerning standards of disclosure. To limit the principles in this way *would, pace* Lord Hoffman, empty the content of a medical practitioner's duty of care to respect the autonomy of patients to such a significant degree that the community's legal practices would not be seen in their best light. Legal sanction must be given to the 'underlying moral responsibility for causing injury of the very sort against the risk of which the defendant should have warned her';<sup>195</sup> 'the duty is one intended to create a civil right to compensation for injury relevantly connected with its breach'.<sup>196</sup>

More positively, Lord Hoffman's comments in *Fairchild* can be used to show why the principle supporting Ms Chester's case is a better interpretation. He states 'what amounts to a relevant causal connection...depends upon the purpose of the inquiry'.<sup>197</sup> Further, he notes causation is a question of fact: 'whether the causal requirements which the law lays down for that particular liability have been satisfied'. Importantly though, 'those requirements exist by virtue of rule of law. Before one can answer the question of fact, one must formulate the

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<sup>194</sup> Dworkin, *JFH* (n1) 108.

<sup>195</sup> Honoré, *Causation and Risk* (n169) 8

<sup>196</sup> (n170) at [61]. See analogously, how Lord Hoffman and Lord Roger both believed that if they were not to relax the rules of causation, then the duty to protect persons from inhaling asbestos dust by all practicable means (*ibid* at [1]) would be empty of content, at [61]-[63] and [155] respectively.

<sup>197</sup> *ibid* at [48]-[49].

question. This involves deciding what, in the circumstances of the particular case, the law's requirements are'.<sup>198</sup> From this, the key point Lord Hoffman makes is 'the causal requirements are as much part of the legal conditions for liability as the rules which prescribe the kind of conduct which attracts liability or the rules which limit the scope of that liability...one is never simply liable, *one is always liable for something*'.<sup>199</sup>

Thus, in this scenario, the departments concerning standards of disclosure and causation are best seen as inextricably linked:

The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of the liability in a way which relates to the reason why liability for the conduct in question exists in the first place.<sup>200</sup>

Therefore, as the requirements of causation are sensitive to the point underlying and justifying the legal standards surrounding risk disclosure, emphasis must be given to these principles of equality of respect and respect for autonomy. One significant feature of this case is the duty to disclose specifically flows from the *ethical* analysis conducted above. Moreover, because the system of principles of respect for autonomy and equality of respect is pervasive across the domains of bioethics and law, a state that wishes to treat all people with equal concern requires disclosure in this case, due to the legal standard of disclosure, constituted by the ethical case that has been made. The *value* of respect for autonomy has

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<sup>198</sup> ibid at [52].

<sup>199</sup> ibid at [54] (emphasis added).

<sup>200</sup> ibid at [56]. See also similarly Gaudron J in *Chappel* (n175) at [7].

been shown in this chapter and the previous one. Therefore the development of these standards is for the best reasons. When these standards are breached, it should cause little shock there will be legal consequences. Whilst a patient must accept the inherent risk of injury in every surgical procedure, such a risk was inherent to this operation. When these risks did occur, given the appropriate emphasis on those principles of respect for autonomy, this supports the conclusion more than an irrelevant cause has occurred. This conclusion is reinforced by the very fact Ms Chester would not have undergone the operation at that specific time if duly warned. It is more in accordance with protecting and respecting the capacity to express one's own character-values for Mr Afshar to be made an insurer against the risks he failed to warn of.<sup>201</sup>

Further, it *is* within our law to be able to relax the principles of causation in this way, if done on a sufficiently principled basis. Though all the law lords in *Fairchild* were unanimous in limiting the instances in which the causation principles could be relaxed and in stating the rule's scope (at least as it relates to materially similar cases to *Fairchild*) should be clear,<sup>202</sup> it was also explicitly recognised '[i]t would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development'.<sup>203</sup> Nonetheless, the principles justifying parting from the "but for" test 'must be sufficiently

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<sup>201</sup> (n170) [61]-[63]; [155]; (n175) [96]; (n4) [32]. Compare how Hayne J notes in *Chappel* that '[n]or is it enough to say that a purpose of this area of the law is to promote reasonable conduct by medical practitioners and, particularly, the giving of advice necessary to enable people to make decisions about their own lives' ((n175) at [126]). See also *ibid* at [121].

<sup>202</sup> See (n170) at [62] per Lord Hoffman. See also *ibid* at [169]-[170] per Lord Roger. Finally, see footnote 193 per Lord Nicholls.

<sup>203</sup> (n170) at [34] Per Lord Bingham. Further, see how Lord Hoffman notes that 'I would suggest that the rule laid now laid down by the House should be limited to cases which have the five features I have described ... That does not mean that the principle is not capable of development and application in new situations' (*ibid* at [73]-[74]). Third, see Lord Hutton at *ibid* [118]. See also how Lord Bingham was to state 'I prefer to recognise that the ordinary approach to proof of causation is varied than to resort to the drawing of legal inferences inconsistent with the proven facts' (*ibid* at [35]) explicitly affirming the rules of causation *had* been relaxed. See also *ibid* at [45] per Lord Nicholls; *ibid* at [47] per Lord Hoffman, and in a similar context [129] per Lord Roger. Indeed, see how it was also affirmed that the principle in *McGhee v v National Coal Board* [1972] 3 ALL ER 1008; [1973] 1 WLR 1, was based on a relaxing of the rules of causation, as opposed to a legal inference, at [21]-[22] and [35] per Lord Hope; [65]-[70] per Lord Hoffman; [144] and [150] per Lord Roger. In contrast, see Lord Hutton, at [94]-[97].

weighty to justify depriving the defendant of the protection this test normally and rightly affords him, and it must be plain and obvious this is so'.<sup>204</sup>

As has been highlighted above, the principles underpinning Ms Chester's claim are sufficiently weighty to be able to justify departing from this test, analogous to the situation in *Fairchild*. Thus, the proposition of law justified in this case is Ms Chester has a right to recover damages following Mr Afshar's negligent failure to warn her of a small but inherent risk of surgery, despite it cannot be asserted conclusively that "but for" Mr Afshar's negligence, Ms Chester would not have consented to the surgery at all. It is sufficient for causation purposes here Ms Chester would not have consented to the operation at the time she did.<sup>205</sup>

### **3. Comparative evaluation**

It has been shown the system of principles providing the best interpretation of our political community's legal practices is one which justifies the proposition that Mr Afshar's negligent failure to warn of the inherent risk in Ms Chester's surgery caused the injury for which she claimed.<sup>206</sup> This is coherent with the ethical analysis that Ms Chester ought to be informed of a small but inherent risk of surgery involved in the spinal operation before she consents to the operation. A brief comparative analysis shall now be undertaken with the original judgments in *Chester*. This analysis will highlight not only the differences in approach with the integrated framework set out here, but more importantly, why the approach taken under this framework is better, all things considered. This is because of the ethical sophistication of this decision-making framework.

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<sup>204</sup> (n170) at [43] per Lord Nicholls.

<sup>205</sup> See how this conclusion deals largely with Professor Brazier's concern that 'the rules applied relating to causation have diminished the utility of the "reasonable patient" test in upholding individual autonomy' (Brazier, *Autonomy and Consent* (n120) 187).

<sup>206</sup> (n175) at [109].

First, it is clear the judgment here, in considering explicitly the *ethical* issues surrounding Ms Chester's case, how such ethical issues interlink and can be integrated into the legal decision, is much more ethically aware and engaged than Lord Hoffman's conservative judgment in *Chester*.<sup>207</sup> Indeed, given the simple assertion of autonomy by Lord Walker, and Lord Bingham's non-identification of the right to be appropriately warned as an *ethical* right,<sup>208</sup> the judgment here is much more ethically sophisticated than these judgments as well. Additionally, it was analysed (in this chapter and the previous one) what conception of respect for autonomy the bioethical framework was committed to, and why this conception is preferable. The implications of this conception for the ethically appropriate standards of disclosure were then also analysed. It was then shown how this ethical conception of respect for autonomy was to be prioritised within the legal scenario. This analysis therefore laid down, as far as possible, future guidance regarding how the principle of respect for autonomy is to be prioritised and implemented. This shows again an understanding of, and sensitivity to, the ethical nature of judicial decision-making. Whilst not forgetting the problematic development of case law surrounding standards of disclosure since *Chester*,<sup>209</sup> even in comparison to Lord Steyn's judgment in *Chester*, such an analysis here is more ethically proactive and structured, and provides clearer guidance for future courts.

This leads on to the related point that the integrated framework here correctly identifies the issues discussed as ones of *principle*. This is in contrast to the misidentification of both Lord Steyn and Lord Hope in *Chester* that the issues to be discussed are ones of *policy*.<sup>210</sup> In turn, these misidentifications mean, in not recognising the true nature of the arguments, both Lords Hope and Steyn have reached the correct conclusion, but through the wrong reasoning. The

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<sup>207</sup> See Lord Hoffman's approach in chapter 1, point 3.2.1., "Recognition (*and prioritisation*) of respect for autonomy".

<sup>208</sup> See *ibid*.

<sup>209</sup> See chapter 1, point 4., "Developments since *Symbiotic*".

<sup>210</sup> See chapter 1, point 3.2.2., "Misidentification of the nature of arguments".

decision-making framework here corrects this flaw, providing a more ethically and legally sophisticated judgment, consistent with the principles underpinning the judicial role.<sup>211</sup>

Third, this decision-making framework has explicitly considered whether the formal sector of ethical discourse relating to standards of disclosure performs an effective regulatory function. It has also been highlighted *why* the formal sector of discourse should be looked at by the court first, if the court wishes to ascertain the primary standards the medical profession should follow. The framework has also explicitly highlighted the formal sector of discourse provides the primary standards the medical profession should follow. In recognising the effective regulatory function the formal sector of discourse performs, this sector has been prioritised. In this way there has been the beginnings of an attempt to defragment medical ethics through categorisation. Finally, there has been an explicit consideration of how the formal sector of discourse interlinks and integrates with the law, to provide comprehensive guidance regarding the doctor's legal and ethical duty. This is in comparison to those judges who actually engaged with medical ethics, those who did so in a less structured, sophisticated way than outlined here.<sup>212</sup>

Thus, in concluding this section, the judgment here no longer means the relationship between medical law and medical ethics in the informed consent/risk disclosure scenario has to be seen as fortuitous. Principles of autonomy in all their manifestations (be they ethical or political-moral) pervasive throughout the entire discussion in this chapter are given due weight and priority. It has also been comprehensively analysed in each scenario (ethical, in dealing with different sources of ethical discourse, legal and the interaction of all three) how and why such principles should be promoted, and what such principles mean. Thus, whilst the outcome of the decision here is the same as the majority in *Chester*, the decision-making

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<sup>211</sup> See Dworkin, *TRS* (n3) 84-86.

<sup>212</sup> See Lord Hope and Lord Steyn's engagement with different sources of medical ethics discourse in chapter 1, point 3.2.1., "Recognition (*and prioritisation*) of respect for autonomy".

framework has been used here to come to a far greater legally and ethically responsible decision.

#### **4. Chapter conclusion**

This chapter has sought to conclude and definitively answer the central research question set, by providing an example of how, under the decision-making framework constructed, a judgment can be given that recognises the inherent ethical issues at stake and tackles them in a proactive, responsible manner. Moreover, the judgment has shown how the integration of the legal and ethical frameworks operates in practice. Finally, there has been an explicit consideration of the various, multi-faceted roles that medical ethics as a concept does, and ought to, play. Thus, it is clear that the decision-making framework constructed in this thesis can be provided to judges as it recognises and shows how to analyse the ethical nature of judicial decision-making. The decision-making framework also shows judges how to rely on their convictions in applying moral principles and medical ethics to come to a legally and ethically responsible decision. The theoretical justification for courts to take a more proactive approach to both legal and ethical issues involving informed consent and risk disclosure has been fully provided. The subsequent chapter shall now conclude and summarise the findings of this thesis.

## **Chapter 7: Conclusions**

Here is what has been learned. This thesis has attempted to answer a central research question:

“Can an appropriate decision-making framework be provided to judges that recognises the ethical nature of judicial decision-making so as to provide confidence to judges in relying on their convictions in applying moral principles and medical ethics to come to a legally and ethically responsible decision?”

It has been shown, through a series of subsidiary research questions, such a framework can be provided, and is practicable in nature. What prompted this central research question, attendant subsidiary research questions, and further investigation, was the findings made and conclusions set out in chapter one.

In that chapter it was shown, using José Miola’s *Medical Ethics and Medical Law: A Symbiotic Relationship*,<sup>1</sup> that medical law and ethics depend on each other to their mutual detriment. This is due to three elements, two of which are of primary importance to this thesis. First, there is so much “medical ethics” discourse today, in the form of official and unofficial guidelines and analysis. Coupled with no coherent mechanism for prioritising one set of guidelines over another, from the medical professional’s point of view and looking at the practices of the courts, these sources of discourse cancel each other out. Second, judges aggravate these matters by medicalising and deferring matters to the medical profession, even in cases with an inherently *ethical*, not technical-medical, content. Moreover, when judges do recognise ethical content in cases, they continue to act as if the various guidelines promulgated by the formal and semi-formal sectors of discourse, the GMC and BMA, *do*

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<sup>1</sup> José Miola, *Medical Ethics and Medical Law: A Symbiotic Relationship* (Hart 2007) (hereafter *Symbiotic*).

effectively regulate the medical profession. This deference is falsely premised. Thus, the courts need to identify and rectify this problem.<sup>2</sup>

These arguments were demonstrated by evaluating two major cases involving informed consent/risk disclosure; *Sidaway v Bethlem Royal Hospital Governors*<sup>3</sup> and *Chester v Afshar*<sup>4</sup>. The analysis of *Sidaway* showed the majority of judges misidentified the ethical matter as medical in nature. This lead to numerous unjustifiably paternalistic judgments, with a resultant lack of focus on the patient in the doctor-patient relationship. Only Lord Scarman recognised *and* prioritised the principle of respect for autonomy. Whilst the majority of judges in *Chester* delivered ethically *aware* judgments, when dealing with different sources of medical ethics, they did not do so in a sufficiently structured way. Further, matters of principle are often misidentified as matters of policy. Thus, whilst there is an effective relationship between medical law and ethics in the risk disclosure scenario, this relationship is accidental. Since *Chester*, courts have used comparably inconsistent, ethically unsophisticated conceptions of respect for autonomy. This has gone unrecognised. These conclusions reinforce the argument the courts do not understand the ethical nature of judicial decision-making. Consequently, chapter one showed how a project complementary to Miola's investigations was possible, by showing theoretically the courts have the ability to realise the possibility of taking the initiative in dealing with the inherent ethical nature of judicial decision-making.

Having mapped out the current state of medical law and ethics concerning risk disclosure, it was determined a legal theory which fits and justifies judicial practices, and could also be used as a critical tool was needed. Further, this legal theory would need to be thoroughly integrated with a bioethical framework to show how judges can deal with the inherent ethical

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<sup>2</sup> ibid 1; 6-8; 212-214; 216-217.

<sup>3</sup> [1985] AC 871.

<sup>4</sup> [2004] UKHL 41.

content in risk disclosure cases responsibly. The starting point in discerning which legal theory was appropriate, given the focus on the role of moral principles in the case analysis in chapter one, was to look specifically at the role moral principles play in the types of cases under consideration.

Chapter two thus went on to answer the more specific research question “What role do moral principles play in hard cases?” Two theories of law were considered: a modern version of positivism defended by Matthew Kramer, and Ronald Dworkin’s theory of law. Both theories provide competing explanations regarding the role of moral principles in hard cases. It was shown Kramer’s positivism, which analysed the use of moral principles by judges in hard cases as existing “externally” to “the law” and then being incorporated, did not accurately capture legal practice. It also did not satisfactorily explain how judges can take a more proactive attitude by using moral principles. Problems that befell Kramer’s positivism included the supposed convention legal officials adhere to, to ascertain the law in hard cases, is so abstract almost *any* legal practice could be counted as conventional. Further, such an abstract convention makes legal reasoning indistinguishable, and eliminates the notion of a “convention” itself.<sup>5</sup> This is not only because of the substance of the disagreements in hard cases, but also the level and scale of these disagreements. Meanwhile, the chapter also provided a comparative analysis of the way Kramer’s theory explains the characteristics of moral principles of hard cases, relative to Dworkin’s theory of law. This highlighted moral principles are able to provide partially exclusionary reasons-for-action in resolving hard cases; and, it is best to understand the provenance of moral principles as subsumed within the larger interpretive question for Dworkin of constructively interpreting the law.

Relative to Kramer’s positivism Dworkin’s theory of law is therefore preferable. Thus, as evaluative considerations necessarily feature in the truth conditions of propositions of law,

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<sup>5</sup> Ronald Dworkin, *Justice in Robes* (Belknap Press of Harvard University Press, 2006) 193.

this strengthens the claim judges have the ability to take a more proactive stance in cases with an inherently ethical content. Further, Dworkin's sound contention there is a right answer in hard cases partially alleviates problems in the three-element analysis above, by providing a method for prioritising and eliminating competing principles (leading to less fragmentation and cancelling out). But, a more positive case for Dworkin's theory of law needed to be given, one that showed why elements central to his interpretive theory, including the value he postulates for law, integrity, is beneficial in explaining how judges can come to a legally and ethically responsible, proactive decision.

As explained in chapter three therefore, integrity is the value law should be seen through, *not* Stephen Guest's theory of 'law as justice'<sup>6</sup>. A greater understanding regarding the underlying justificatory structure of Dworkin's theory was provided, in order to best understand how B&C's and Dworkin's theories could be integrated. This better understanding was gained by answering the question "What role does coherence play in Dworkin's account of law?" It was demonstrated integrity was best understood as having a coherentist structure, as was Dworkin's process of constructive interpretation. Coherence was defined as constituted by the elements of consistency, mutual explanation and anomaly elimination, with coherentism based on a holistic structure of justification. It was argued, looking at Dworkin's discussion of checkerboard solutions and associative obligations, the demands of integrity express an endorsement of the technical conception of coherentism above. Specifically, in looking at Dworkin's discussion of checkerboard solutions, it was argued integrity demands coherence with those fundamental principles of equality underpinning the entire legal system. This highlights their legitimising and regulating function. The best explanation as to why checkerboard solutions are objectionable is because they display incoherence with equality.

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<sup>6</sup> Stephen Guest, 'Integrity, Equality and Justice' (2005) 3 (233) Revue Internationale De Philosophie 335 <[http://www.ucl.ac.uk/~uctlsfd/papers/integrity\\_equality\\_and\\_justice.pdf](http://www.ucl.ac.uk/~uctlsfd/papers/integrity_equality_and_justice.pdf)> 6 (online) accessed 27<sup>th</sup> June 2014 (hereafter *IEJ*).

It was then argued we do well to see integrity through this conception of coherence. This was done in the context of Stephen Guest's arguments against integrity. First though, the chapter demonstrated Guest's problems with constructive interpretation could be solved by recourse to coherentist considerations. By distinguishing between security *within* and *outside* the interpretive process, and the different *levels* of security a conviction can have within the interpretive process, Dworkin's account of constructive interpretation can fix the object to be interpreted, whilst not requiring that object to be *outside* the interpretive process. This led to the larger conclusion that as constructive interpretation and integrity are best understood as structured by coherentism, it is natural the latter flows from the former in Dworkin's theory of law. The case of *Tennessee Valley Authority v Hill*<sup>7</sup> demonstrated that as both Guest and Dworkin endorse the fundamental principle of equality of respect,<sup>8</sup> what is important in securing equality of respect is the coherentist manner of legal argument demanded by integrity. Equality of respect makes demands of integrity and coherence in the long run.

Given it had thus been demonstrated Dworkin's theory of law was the appropriate legal framework to answer the central research question, the next step was to analyse the other side of the integrated framework—the ethical framework. Chapter four therefore began to analyse and re-interpret B&C's bioethical theory, by answering the research question “What is the best interpretation of B&C's framework with regards to moral justification so as to come to an epistemically responsible decision regarding a moral course of action?” After outlining B&C's common morality theory, the initially most plausible interpretation regarding B&C's common morality and moral justification is the theoretically comprehensible position of moderate foundationalism, as B&C maintain the beliefs in the common morality do not depend on any other beliefs for their justification. This is regardless of the prominence they attach to the coherentist process of reflective equilibrium. This was important to establish, as

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<sup>7</sup> (1978) 437 US 153.

<sup>8</sup> Guest, *IEJ* (n6) 8 (online).

it meant foundationalism as a structural account of justification had to be considered on its own merits. It was found there was no way a moral belief could be justified in virtue of itself. Therefore, though B&C's common morality moderate foundationalism is theoretically *comprehensible*, it is inadequate in depicting the justificatory structure of our moral beliefs.

Having made this negative claim, a more positive case for adopting a moral coherentism as the best structural standard for B&C's common morality theory was made. This was done by considering B&C's objection to coherentism, their version of the “isolation problem”. This problem contends coherence does not provide a sufficient justificatory standard, as those coherent beliefs could be morally repugnant. Given the earlier rejection of foundationalism, and as B&C raise this problem, it was noted B&C only had two options available: either embrace *non-moral* basic beliefs, or adopt a pure moral coherentist account. Pure moral coherentism was shown to be able to deal with the isolation problem. This is due to the best conception of moral objectivity being one where moral truth is achieved solely through moral argument. Further, even though it was shown moral beliefs have no causal effects in our forming moral convictions, it was also set out how there are still cogent reasons for thinking moral values objectively true. Thus, it is best B&C adopt a moral coherentist approach when considering in detail the interaction of beliefs in a coherentist system, the nature of interpretive concepts, and moral objectivity as a matter of moral argument.

Having begun to explain how judges should deal with the ethical content in risk disclosure cases, and how B&C's theory is best characterised, chapter five sought to directly integrate B&C's ethical theory and Dworkin's theory of law. It did so by answering the research question “How should B&C's four-principles approach influence cases with an inherently ethical content, when used as an example of Dworkinian principles in law?” The answer to this in fact asserted B&C's principles are *not* best seen as principles. They are best seen as four interpretive concepts and values. These values best justify paradigm features of

bioethical practices. B&C's theory satisfies further characteristics that enable it to be integrated seamlessly with Dworkin's theory of law. Not only is B&C's theory best seen as coherentist and interpretive, it also adheres to an interpretive moral epistemology, and is interpretive in the right way. Morality as a whole, and B&C's common morality, is based upon an interpretive project. This means B&C's four-principles are intrinsically linked to the common morality, and are the best way of implementing the norms of the common morality. This makes the decisions in question the most justifiable and genuine they can be. This adherence to an interpretive moral epistemology, and B&C's four interpretive values securing the norms of the common morality means there are the same fundamental demands of principle/equality across the domains of law and bioethics. The network of value Dworkin's theory of law and B&C's bioethical theory is situated in is the following. Both theories' starting points are in the interpretive concept of morality. Morality then branches out in to separable domains of the common morality, and political morality. Finally, the four values dealing with bioethical practices are part of the common morality, just as law is part of political morality. Dworkin's and B&C's theories are able to be integrated as the justification of those political-moral principles a community committed to equality does best to endorse, particularly in cases with an inherent ethical content, are premised on and constituted by the *ethical* case for them.

These theoretical investigations laid the foundations for the switch of focus in chapter six to actually *applying* the framework constructed. This chapter showed judges, in recognising the ethical nature of judicial decision-making, how to apply moral principles and medical ethics in cases with an inherently ethical content. In reinterpreting *Chester*, the chapter was able to explicitly show the real, *ethical* case behind Ms Chester's claim to relax the rules of causation to allow her to recover despite not satisfying the "but for" test. This ethical analysis identified an ethically preferable conception of respect for autonomy, the point of which is the

protection of the capacity to express one's character-values. This conception was then imposed upon informed consent practices, to restructure those practices in light of the point they serve. Importantly, this analysis showed which standard of disclosure was ethically preferable. All things considered, it is ethically preferable for the "reasonable patient" standard to be used initially, and supplement this where needed with further investigation into the particular patients' requirements and circumstances. This ethical analysis was applied specifically to Ms Chester's case to show it was ethically impermissible for Mr Afshar not to disclose the inherent risk of injury in surgery. It was then analysed in detail how this proposition was coherent with the GMC's guidance on consent, and *why* confidence can be placed in this guidance by the courts to perform an effective regulatory role for the medical profession. Ms Chester's legal claim was then discussed. As Ms Chester's *legal* claim was premised upon her *ethical* one, the importance of her ethical right to have her autonomy respected and the ethical already case made out were shown to be of special significance in resolving the legal issues at stake.

This legal analysis established the best interpretation of past political decisions regarding standards of disclosure is one where persons have their right to autonomy respected by being told of those significant risks material to the informational needs of a reasonable patient. A community discharges its duty to treat people with equal concern when due regard is had to the *ethical* rationale of respecting the ethically preferable conception of respect for autonomy, and effect is given to this rationale through political-moral principles, given the community's adherence to the same fundamental principle of equality of respect as bioethical practices. The way different categories of ethical discourse interact with legal standards of disclosure for medical professionals and courts was then evaluated to show *how* the ethical discourse and legal standard work together to ensure patients' autonomy is fully respected. Because of this, the process of defragmenting medical ethics could begin, by prioritising which sources

of medical ethics should first be considered by the medical profession and courts. Explicit issues of causation were then turned to. It was shown to endorse the principle supporting Mr Afshar's case would give too little weight to the importance of those principles of respect for autonomy that are inferentially connected to the fundamental principles of equality of respect. These principles link and are applicable across the domains of bioethics and law. Finally, a comparative analysis with the original judgments in *Chester* was undertaken to show that though the decision reached in this case was the same as the majority in *Chester*, the decision-making framework has been used to come to a far greater ethically and legally responsible decision.

To finally conclude, it was noted at the very beginning of chapter one Miola describes the symbiosis between medical ethics and law as mutually detrimental. However, it was also suggested that he saw this relationship was salvageable and had the potential for good. It is hoped this thesis has shown, through the integrated legal and ethical framework, just how good that relationship can be. The tools are readily available to generate a positive symbiosis between medical ethics and medical law.

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