EASY CASES AND SOCIAL SOURCES: AGAINST MECHANICAL JURISPRUDENCE

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0. Introduction

I aim to provide an analysis of easy cases. Easy cases are cases where the law on a matter is determinate. There is scant discussion of easy cases in philosophy of law. Philosophers of law are primarily concerned with hard cases in the hopes that they will reveal something about the nature of law. Hard cases allow philosophers to isolate independent factors of law or legal reasoning and hold them up for closer scrutiny. Easy cases might be thought to be unilluminating because all the relevant elements of law are aligned in order to produce a determinate result. It is perhaps for this reason that people often belief that easy cases are decided "automatically" or "mechanically." I believe that this is a mistake. I will argue that though easy, easy cases require an exercise of legal judgment.

This, I will argue, is theoretically significant. This is because all three central attacks on legal positivism characterize source-based reasoning – judgment in easy cases, as I will argue – as mechanical or automatic. All suppose that social sources, or source-based law, play a trivial role in law and legal reasoning, and for this reason need to be supplemented with normative or merits-based considerations in order to fully

explain law. Positivists, I believe, have largely left this assumption intact, focusing instead on the validity of merits-based considerations in law.

I aim to question this assumption. Specifically, I aim to develop an analysis of easy cases in the hopes of deepening our understanding of the role of source-based considerations in law, and bolstering positivist accounts as against their critics. By so doing, I aim to provide positivists with more resources than they ordinarily make use of in the hopes of bolstering their case against their critics.

I will begin by distinguishing between hard and easy cases, and providing an intuitive explanation of what counts as an easy case. I will then turn to an analysis of an easy case, and argue that, though easy, there is nothing about its resolution or decision that can properly be described as "automatic" or "mechanical." This conclusion is theoretically significant. This is because all three central attacks on legal positivism begin with the assumption that source-based reasoning is, or is supposed by positivists, to be "automatic" or "mechanical." I then turn to a harder example of an easy case, or a *hard* easy case, and I suggest that easy cases, as I understand them, can even involve limited appeal to morality in their resolution. This is not sufficient to settle the dispute between positivists and non-positivists. But, as I suggest, it might help to loosen the grip that the problem of merits-based considerations has on debates about the nature of law.

I. Easy Cases

There is an intuitive distinction in law between easy and hard cases. Easy cases are cases in which the law on a matter is clear. They put a clear question before the law (the facts are clear); it is clear which rule or set of rules apply; the relevant rules themselves are clear – there is no vagueness or ambiguity in their formulation, – and they clearly dictate a (clear) result. When all of these facts hold, we have an *easy* case. The law is wholly determinate in such cases, and nothing more than what's written in the posited law is needed in order to render a determinate outcome. So, for example, when a judge decides that a person driving at 75 miles per hour in 60mph a zone is speeding, or that a will that is signed by only two witnesses is invalid (when the law clearly states that three signatures are needed), she is deciding easy cases.[1] These examples are perhaps canonical examples of easy cases. Similarly, e.g., holding that a statute prohibiting the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement"[2] in the United States Supreme Court building is unconstitutional, on the grounds that it violates people's freedom of speech is an easy case.[3] This case is *doctrinally* easy: existing doctrine compels the outcome, even if it does not follow directly from the text of the Constitution itself.[4] To take another well-known

[1] These examples are taken from Dworkin's examples of legal rules (as distinct from principles), in "Model of Rules I," ch.2, *Taking Rights Seriously,* (Harvard University Press: Cambridge, MA, 1977), 24.
[2] Title 40 U.S.C. § 13k.
[3] *United States v. Grace*, 461 U.S. 171 (1983). See Frederick Schauer, "Easy Cases," 58 *S. Cal. L. Rev.* 399 (1985), 409 discussing this example.
[4] Frederick Schauer, "Easy Cases," 58 *S. Cal. L. Rev.* 399 (1985), 409. Schauer also cites *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) in this connection. In this case, the Court held

example, H. L. A. Hart famously argued that a hypothetical rule stating "no vehicles in the park" clearly prohibited driving cars and trucks through the park (making these easy cases). This is so even though its dictates with respect to bicycles, roller skates, toy cars and airplanes are less clear.[5]

Hard cases, on the other hand, are cases in which one or more of the factors that make a case easy does not hold. There are many ways that a case can be hard: it may be unclear what happened (factual uncertainty); the law on the matter might be unclear, due to e.g., vagueness, or an error or uncertainty in its formulation; it may be unclear what rule or rules apply to the case, or whether or not the case falls under a rule(s); the rule might be clear, but point to a morally questionable result; the case might be a borderline case, or fall in the margins (or penumbra) of the rule, or it might be one that is not anticipated by the underlying purpose or justification for the governing rule, and so on. In all of these circumstances, the law on a matter cannot be decided by the straightforward application of the posited legal rules to the

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that a Louisiana statute (Art. 2404) giving husbands the unilateral right to dispose of jointly owned community property without their spouse's consent violated the Equal Protection Clause of the U.S. Constitution. In both cases, he argued, the "existing doctrine makes the resolution of the dispute relatively noncontroversial." *ibid*.

Schauer also argues that cases can be *morally* easy when they present a morally compelling set of facts, even though decisions are "by no means unlittered with doctrinal difficulty." ("Easy Cases," 409) So, e.g., he argues that a statute prohibiting the production and distribution of child pornography for commercial purposes ought clearly not to be protected by the First Amendment of the U.S. Constitution morally speaking, even if child pornography might well be considered a form of speech. This is an interesting suggestion. I'm not sure it fits into the understanding of easy cases I am offering, though.

[5] H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harv. L. Rev.* 593, 607 (1958). And Lon Fuller famously responded that the rule's requirements even with respect to cars in the park are not as clear as Hart supposed. See "Positivism and Fidelity to Law – A Reply to Professor Hart," 71 *Harv. L. Rev.* 630, 661-69 (1958).

facts of the case alone. Instead, something more (judgment, discretion, choice, personal opinion, etc.) must be exercised in order to decide the case.

Easy cases are decided on the basis of the posited law alone. They are *settled* or dictated by the posited law; they are decided on the basis of *applying* the law rather than creating new law; through the exercise of judges' legal skills and not her moral character or judgment, etc.[6] If we flesh out this intuitive distinction between easy and hard cases, it is often understood as a distinction between applying and interpreting the law, upholding the law as written or making new law, cases in which the law is determinate or indeterminate, or where judges must exercise discretion or draw on considerations or principles not contained in the posited rule alone. John Gardner distinguishes between interpretation as identifying and applying the posited law, and interpretation as looking *beyond* the posited law to further, independent considerations, and deciding the law on the basis of these, arguing that

> to the extent that a judge can determine what the First Amendment means by relying exclusively on the relevant source-based norms (i.e., by relying on the text of the First Amendment together with judicial interpretations of it and judicial interpretations of those interpretations and applicable laws of precedent and interpretation), that judge is merely identifying the First Amendment in interpreting it. But to the extent that the judge is left with

[6] See Joseph Raz, "The Sources of Law," *The Authority of Law* (Oxford: Clarendon Press, 1979), 46ff for a discussion of these distinctions as platitudes about law.

> conflicts among or indeterminacies in the applicable source-based norms – including those of precedent and interpretation – the process of legal interpretation necessarily takes him beyond the law.[7]

Easy cases are those cases where judges apply the posited law as written rather than make new law; in which the law is determinate; in which there is no exercise of discretion, or independent or personal judgment; in which the posited law contains all the relevant material for dictating the result and judges need look no further than the posited law to settle a question, and so on. The determination of the outcome need not itself be easy in order for a case to be an easy case. A person might need a calculator (or a good tax lawyer) to determine what she owes in taxes, or some advanced scientific knowledge to determine a matter of patent law, etc. But, these determinations can be easy from the perspective of the law so far as, in such cases, the posited law clearly dictates a clear outcome. This is so even if the outcome is difficult to discern. Easy cases are thus, in this respect, *legally* easy. In contrast, then, hard cases are those in which the posited law is not, on its own, sufficient to settle a question. In such cases, judges must exercise a degree of discretion or judgment (or choice, arbitrary will, etc.) in order to decide what the law on a matter requires.

This distinction might seem forced or artificial, and one might think that there are no easy cases on this distinction. But there is some intuition behind it, and it forms the basis of much popular and scholarly debate about law. This includes debates

[7] John Gardner, "Legal Positivism: 5 ½ Myths," in *Law as a Leap of Faith*, (Oxford: Oxford University Press, 2012), 46.

about judicial reform and the accountability of judges to the electorate, judicial activism and the advantages and disadvantages of strict adherence to the written law, the legitimacy of judicial review in a democracy, the role of demographics or political ideology of judges in judicial decision-making, and so on. These questions rest on the assumption that many important questions of law are decided on the basis of a judge's moral or political judgment, rather than being compelled by the posited law. It is because the posited law does not, on its own, always settle a question, that questions about the exercise of political judgment by judges arise. But, these raise controversy only against the background assumption that legal judgment consists (or ought to consist), at least in part, in the application and not creation of legal rules. And this just is to suppose the intelligibility of the notion of easy cases, or the intelligibility of the idea the posited law, not judges, can, at the very least, decide some cases. This is so even if one denies that any such cases exist, or if one concludes that this supposition is ultimately false.

This distinction also underlies scholarly debates about the nature of law. It underlies debates between legal realists and formalists. Most importantly for my purposes, this distinction lies at the centre of debates between positivists and non-positivists. As we have seen, positivists and non-positivists disagree about the role of morality, or merits-based considerations in law. Non-positivists argue that these can be found everywhere in law. As I shall argue, however, this is in part because they adopt an overly-narrow view of the role of source-based considerations and the nature of easy cases in law.

III. Mechanical Jurisprudence

Easy cases are typically described as ones whose outcomes follow "automatically," or "mechanically" from the posited rules of the system. Fred Schauer defines them as ones whose "result flows *inexorably* from a relatively straightforward application of plainly applicable and identifiable legal rules contained in easily located preexisting legal materials."[8] Alternately, David Lyons writes,

> Let us define an *easy case* as one in which the law is clear enough so that it can be decided in a more or less "mechanical" way, by applying relevant rules in a logically rigorous argument. A proposition of law that decides the case is then derivable by logically deductive methods from a combination of rules of law and statements of facts about the case. The simplest model for such an argument may be termed a *legal syllogism,* which includes as its major premise a single rule of law, as its minor premise a statement of relevant facts, and as its conclusion the dispositive proposition of law. In actual practice, arguments or derivations may be much more complex, consisting of several steps, involving several rules of law. But this is, for our purposes, a matter of detail. The important point is that such arguments be logically watertight. And this requires, in turn, that the relevant legal considerations be unambiguous-that it not be necessary to weigh or balance conflicting legal considerations, some favoring a decision one way, some favoring a decision another way. Thus, for example, the relevant rules must not conflict when they apply to the case, unless appeal can be made to an existing, decisive rule

[8] Frederick Schauer, "Easy Cases," 58 S. Cal. L. Rev., 399 (1985), 410 (emphasis added).

> of priority that determines conclusively which of the conflicting rules is to be followed. In a similar way, the rules must not require problematic or controversial interpretation for application to the case, as that would introduce a consideration of the relative merits of alternative interpretations, the determination of which would by no means be "mechanical."[9]

Mechanical jurisprudence, or mechanical judgment – usually terms of derision – are convenient foils for a range of philosophical views on legal judgment. Initially introduced by Legal Realists as a way of registering their objection to the scientific worldview of Legal Formalism, these have become general terms deriding the absence of judgment in legal reasoning.

As against the idea that law must satisfy the "scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice,"[10] Pound argued that

> law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end,

[9] David Lyons, "Justification and Judicial Responsibility," 72 *Cal. L. Rev.* 178 (1984), 180. (emphasis in original) Lyons relies on this definition in order to reject the correlate understanding of hard cases as legally undecidable.

[10] Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, 3rd ed. (MacMillan and Co.: London) 1911, 56, cited in Roscoe Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review*, 8 (Dec. 1908), 605.

> not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation.[11]

Realists thus railed that mechanical jurisprudence consists in "legal magic and word-jugglery," purporting to derive determinate legal outcomes from "magical legal concepts" [12] and "supernatural terms;" [13] a "consistent, gapless and unambiguous system, mechanically operated;"[14] "a condition of juristic thought and judicial action in which deduction from conceptions has produced a cloud of rules that obscures the principles from which they were drawn, in which conceptions are developed logically at the expense of practical results and in which the artificiality characteristic of legal reasoning is exaggerated." [15] It reduces judges to "slot machines, the facts being inserted at one end of the machine, and the decision, through the use of mechanical logic, coming out at the other end."[16]

In a more contemporary context, Ronald Dworkin charged Robert Bork with applying the law mechanically or unreflectively, rather than "judgmentally"[17] in his criticism of Bork's Supreme Court nomination, arguing that

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[11] Roscoe Pound, "Mechanical Jurisprudence," 8 *Columbia Law Review*, 8 (Dec. 1908), 605.
[12] Felix Cohen, "Transcendental Nonsense and the Functional Approach," 35 *Columbia Law Review*, 809 (1935), 821 arguing that mechanical jurisprudence is "legal magic and word-jugglery" consisting of a "classical theological jurisprudence of concepts." (footnote omitted)
[13] Felix Cohen, "Transcendental Nonsense," 35 *Columbia Law Review*, 809 (1935), 822.
[14] Duncan Kennedy, "Legal Formality," 2 *Journal of Legal Studies*, 2 (1973), 351-98, 376.
[15] Roscoe Pound, "Liberty of Contract," 18 *Yale Law Journal*, 7 (May, 1909), 454-487, 457.
[16] Jerome Frank, *Law and the Modern Mind*, (Transaction Publishers, NJ) 2009, 223 (describing Pound's approach to commercial law).
[17] *Freedom's Law* (Harvard University Press: Cambridge, MA, 1996), 289. See also Dworkin, "The Bork Nomination," 9 *Cardozo Law Review,* 101 (1987); "Bork's Jurisprudence," reviewing, *The Tempting of America: The Political Seduction of the Law,* by Robert H. Bork, 57 *University of Chicago Law Review*, vol. 2, 657 (Spring, 1990); and Ronald Dworkin, "Law's

> Bork always has available a mechanical, unreflective way to choke off arguments of principle; he claims that these arguments are preempted by purportedly historical claims about what the framers had in mind.[18]

He contrasts Bork's approach with exercising a "more judgmental and less mechanical role in interpreting the Constitution."[19] Dworkin compares mechanical jurisprudence to the idea that law can or should proceed as if by the operation of a machine, without any exercise of human judgment. He writes that "there may be nations where people think it doesn't matter who the judges are, that the law is a mechanical system like a calculator that anyone with the proper training can and will manipulate to the same result."[20] Hart sums up mechanical jurisprudence as follows:

> If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified

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Ambitions for Itself," 71 *Virginia Law Review,* 173-87 (1985). In "Law's Ambitions for Itself," Dworkin (mistakenly, I believe) takes Bork's approach to be positivistic, and motivated by conservative principles and concerns for economic efficiency.

[18] *Freedom's Law*, 286.

[19] *Freedom's Law,* 289.

[20] *Freedom's Law*, 263.

> in advance by a rule. This would be a world fit for 'mechanical jurisprudence.[21]

IV. Anti-Positivist Attacks

This characterization of easy cases is important because, as mentioned in the introduction, all three major attacks on legal positivism begin with the idea that reasoning from social sources, or posited considerations, either is, or is supposed by positivists to be automatic or mechanical.

Non-positivists argue that positivists cannot account for the full scope and force of law just by appeal to social sources. They conclude that law must also include moral considerations. There are three main arguments for this conclusion. In his early work, Ronald Dworkin argues that positivists cannot account for the role of moral principles in deciding hard cases.[22] In later works he argues that positivists trivialize substantive disputes about the grounds of law, ignoring the important role that they can play in legal reasoning.[23] More recently, Mark Greenberg has argued that source-based considerations (or "law practices," as he calls them) alone cannot determine legal outcomes; they must be underwritten by moral considerations in

[21] H. L. A. Hart, *The Concept of Law*, 2nd. ed., (Clarendon Press: Oxford, 1994), 128.
[22] Ronald Dworkin*Taking Rights Seriously*, (Harvard University Press: Cambridge, MA, 1977).
[23] Ronald Dworkin, *Law's Empire*, (Harvard University Press: Cambridge, MA, 1986).

order to bear any legal weight in legal reasoning.[24] All represent deep challenges to legal positivism and have forced positivists to broaden their account to accommodate the full range of ways that morality can enter law. However, I believe, in setting out these challenges, positivists' detractors trivialize the role of source-based considerations in legal reasoning. This has allowed them to overstate the role of morality in law, and exaggerate the challenge that it poses to legal positivism. Moreover, the emphasis on hard cases has forced positivists to ignore some of the resources that are available to them in defending their position.

In "Model of Rules I," Dworkin distinguishes between source-based rules and moral principles.[25] Rules, unlike principles, apply in an "all-or-nothing fashion;"[26] they either decide a case or contribute nothing to the decision. Exceptions to rules can be enumerated;[27] they lack "weight;"[28] they cannot conflict;[29] they dictate their consequences "automatically."[30] These cannot be all there is to law, however, because as Dworkin argues at length, law also incudes principles and other

[24] Mark Greenberg, "How Facts Make Law," in *Exploring Law's Empire*, Scott Hershcovitz, ed. (Oxford University Press: Oxford, UK, 2005). Greenberg also develops these arguments in "Hartian Positivism and Normative Facts: How Facts Make Law II," in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, Scott Hershovitz, ed. (Oxford University Press, Oxford, UK 2005), 265-290, respectively (hereinafter *HFML I* and *II*), "The Standard Picture and Its Discontents," *Oxford Studies in Philosophy of Law*, vol. 1, Leslie Green and Brian Leiter, ed.s, (Oxford: Oxford University Press, 2011), 39-106, and "The Moral Impact of Law," 123 *Yale Law Journal*, 5 (2014), 1288-1343.
[25] Ronald Dworkin, *Taking Rights Seriously*, (Harvard University Press: Cambridge, MA, 1977), 14-45.
[26] *Taking Rights Seriously*, 24.
[27] *Taking Rights Seriously*, 25f.
[28] *Taking Rights Seriously*, 26.
[29] *Taking Rights Seriously*, 27.
[30] *Taking Rights Seriously*, 25.

standards that are binding because of their appropriateness to the circumstances. Principles have a dimension of weight; judges can evaluate their significance against each other and other competing considerations; they can admit of exceptions, and their exceptions are not enumerable. Positivists trivialize law and legal reasoning by taking law to consist only in source-based rules.

In *Law's Empire*, Dworkin takes a different tack. There he argues that positivists subscribe to a plain fact view of law, on which law is an empirical matter of what legal institutions and legal officials say and do and every question of law "has a flat historical answer."[31] Consider Dworkin's discussion of legal disagreement in *Riggs v. Palmer* which he uses to illustrate his dispute with positivists.[32] The judges in this case agreed on what counted as the relevant law on the matter and what the law dictated; they agreed that the case was governed by the New York Statute of Wills, and that, under the statute, Elmer was set to inherit.[33] They agreed it was their duty to execute the law. Nonetheless, he argues, they disagreed about "what the law actually was, about what the statute required when properly read."[34] Dworkin then continues to distinguish two senses of the word "statute."

> It can describe a physical entity of a certain type, a document with words printed on it, the very words congressmen or members of Parliament had in

[31] *Law's Empire*, 9.
[32] *Law's Empire*, 15-23.
[33] "None denied that if the statute of wills, properly interpreted, gave the inheritance to Elmer, they must order the administrator to give it to him. None said that in that case the law must be reformed in the interests of justice." *Law's Empire*, 16.
[34] *Law's Empire*, 16.

> front of them when they voted to enact that document. But it can also be used to describe the law created by enacting that document, which may *be* a much more complex matter.[35]

Positivists, he argues, can explain a statute as a "physical entity of a certain type, a document with words printed on it." But they cannot explain the "law created by enacting the document," or the "real" statute behind the statute; they cannot explain the "difference the statute makes to the legal rights of various people."[36] The judgment in *Riggs* split because though the judges agreed on the relevant law and the words of the statute in front of them, they "disagreed about the impact of these words on the legal rights of Elmer, Goneril, and Regan because they disagreed about how to construct the real statute in the special circumstances of that case."[37] Dworkin contrasts adherents to the plain fact view (who are mostly academics) with "thoughtful working" [38] lawyers and judges, who, though they might accept positivism as a piece of "formal jurisprudence,"[39] prefer to describe law as an art, involving instinct, analogy, craft, political wisdom, and mystery in their unguarded moments.[40] He concludes that positivism is therefore "an evasion rather than a theory."[41]

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[35] Dworkin compares this to the difference between "a poem conceived as a series of words that can be spoken or written and a poem conceived as the expression of a particular metaphysical theory or point of view." *Law's Empire*, 16f.
[36] *Law's Empire*, 17.
[37] *Law's Empire,* 17.
[38] *Law's Empire*, 10.
[39] *Law's Empire*, 10.
[40] *Law's Empire*, 10.
[41] *Law's Empire*, 11.

Unlike Dworkin, Greenberg denies that positivists can even identify or explain the *posited* law. Greenberg argues that the social facts, or "law practices" as he calls them, that form the basis of legal positivism, cannot on their own determine legal content. So, he argues that the ordinary mental and linguistic content of participants in legal practices "does not *automatically* endow the law with legal content;"[42] "there can be *no mechanical derivation* of the content of the law"[43] from the ordinary content of the relevant sentences and mental states that contribute to it; non-legal content does "not automatically yield"[44] legal content; "law practices do not determine the content of the law by contributing propositions, which then get *amalgamated*;"[45] "the problem of determining the content of the law is *not simply a problem of adding or amalgamating* the various relevant aspects of practices;"[46] "the content of the law is not determined by any kind of *summing procedure*, however complicated… It is not that those practices contribute propositions that are *conjoined* to a proposition contributed by the statute;"[47]

Greenberg sums up his argument by noting,

> it is safe to conclude that the law *does not automatically* acquire content when actions, utterances, and sentences involved in law practices are attributed content… *once we root out any idea of a mechanical conversion of non—legal content to legal content*, it is clear that something must determine

[42] *HFML I*, 232, my emphasis.
[43] *HFML I*, 235, my emphasis.
[44] *HFML I*, 235, my emphasis.
[45] *HFML I*, 235, my emphasis.
[46] *HFML I*, 236, my emphasis.
[47] *HFML I*, 236, my emphasis.

> which aspects of law practices are relevant to the content of the law and what role those relevant aspects play in contributing to the content of the law.[48]

All three thinkers rely on these characterizations of social sources to argue for the ubiquity of morality in law. Positivists have typically left this assumption intact. They focus instead on the validity of merits-based considerations, arguing that where they are legally binding, this is so in virtue of the posited law, but dividing on whether or not, in recognizing the validity of moral, or merits-based considerations, the law thereby incorporates them.[49]

I do not aim to debate the validity of merits-based considerations. I aim instead to examine whether reasoning from source-based considerations is really automatic or mechanical in the relevant sense, and whether it is best understood as

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[48] *HFML I*, 237, my emphasis.

[49] Positivists also often accept the sharp distinction between source- and merits-based reasoning that follows from the picture above. Witness, e.g., Joseph Raz's characterization of the sources thesis as strictly excluding appeal to moral judgment, arguing

> According to it [the sources thesis], the law on a question is settled when legally binding sources provide its solution. In such cases judges are typically said to apply the law, and since it is source-based, its application involves technical, legal skills in reasoning from those sources and does not call for moral acumen. If a legal question is not answered by standards deriving from legal sources then it lacks a legal answer--the law on the question is unsettled. In deciding such cases courts inevitably break new (legal) ground and their decision develops the law (at least in precedent-based legal systems). Naturally, their decisions in such cases rely at least partly on moral and other extra-legal considerations.

Joseph Raz, *The Authority of* Law, (Oxford University Press, Oxford UK, 1979) p. 49f. Cf. also John Gardner, "Legal Positivism: 5 ½ Myths," 46 *American Journal of Jurisprudence* (2001), 199, sharply distinguishing between source- and merits-based considerations. I will return to this supposition below.

excluding all appeal to morality. Specifically, I will argue that, though easy, legal judgment in easy cases is not properly described as "automatic" or "mechanical." Even easy cases require an exercise of judgment. Indeed, as I shall argue at the end, they might even involve a limited exercise of moral judgment. Nothing in my argument aims to address the role of *merits*-based considerations in law or legal reasoning in hard cases however. But, by expanding the role of source-based reasoning in law and showing that it is not trivial or "automatic," I hope to loosen the grip that this characterization of reasoning from posited rules, and, by extension, the problem of hard cases and conclusions of the role of morality in law have on debates about the nature of law. Let us begin by considering what I take to be a clear example of an easy case, Neil MacCormick's example of *Daniels and Daniels* v. *R. White & Sons and Tarbard*.[50] MacCormick takes this case to be a case of "pure deductive justification"[51] at law. In the hopes of picking an uncontroversial starting point, and because I believe he is correct about this, I will follow MacCormick in taking this to be an easy case.

V. Easy Easy Cases: Daniels and Daniels v. *R. White & Sons and Tarbard*

On July 23, 1938, as was his habit, Mr. Daniels when to his local pub and bought a jug of beer and a bottle of R. White's lemonade to share with his wife. On this

[50] [1938] 4 All E. R. 258. MacCormick puts this case forward as a clear example of pure deductive reasoning at law. He discusses this case in *Legal Reasoning and Legal Theory*, (Clarendon Press: Oxford, 1978), 19ff.

[51] Neil MacCormick, *Legal Reasoning and Legal Theory*, (Clarendon Press: Oxford, 1978), 19ff.

occasion, however, they both became ill when they drank from it. It turned out that the bottle of lemonade had been contaminated with carbolic acid. Mr. and Mrs. Daniels sued R. White & Sons, the manufacturer of the lemonade, and Mrs. Tarbard, the manager of the pub (the "publican") who had sold it to them, for the losses they suffered due to their consumption of the contaminated lemonade.

The relevant law on the matter was s.14 of the *Sale of Goods Act 1893*, holding that

> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purposes, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.
>
> (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.

The Court applied the law governing the sale of defective goods to the case, and held the licensee of the pub, Mrs. Tarbard, liable for the damages suffered by Mr. Daniels. It argued that under s.14(2) of the *Sale of Goods Act of 1893*, there was an implied condition on the part of the manufacturer and the person who sold it to them that the lemonade was of merchantable quality and reasonably fit to drink. The Court thus ordered Mrs. Tarbard to pay damages to Mr. Daniels in the sum of £21 15s, in compensation for the losses he suffered as a result of his consumption of the contaminated lemonade.

This case does indeed, as MacCormick suggests, seem to be a case of "pure deductive justification." The Court arrives at its conclusion by means of purely deductive argument, and the argument that it provides has conclusive force.[52] The law on the matter was clear; was clearly in force; the case clearly fell under the rule; there is no uncertainty with regards to the facts; and the law (clearly) dictated a clear result. There were no conflicting or countervailing considerations telling against applying the law at the time that the case was decided, and the Court was clearly authorized to render a judgment in this case. This case is thus indeed a natural and intuitive example of an easy case.

Closer inspection of the law on the matter, however, reveals that, though easy, the application of the legal rule to the case is by no means "automatic" or "mechanical." There are a number of reasons for this. First, there are a number of collateral issues

[52] MacCormick, 21.

that the Court also had to settle in rendering its decision.[53] Legally-speaking, these issues were likewise straightforward or relatively "easy." But their inclusion in the case can make the conclusion above slightly less immediate than might first appear. Moreover, the conclusion that the Court reached does not follow as a matter of logic alone. There are a number of respects in which the application of the rule to the facts requires at least some exercise of judgment.[54] Most importantly, however, the

[53] The Court was also asked to determine the liability of Mrs. Tarbard, the owner of the pub, to Mrs. Daniels, and of the manufacturer of the lemonade, R. White and Sons, to both plaintiffs. In making these determinations, the Court had to engage in similar processes of legal reasoning to the one described above: it had to discern the relevant law on the matter (and its accordant legal specification), and it then had to apply these to the facts of the case as well. On these issues, the Court ruled that, Mrs. Tarbard was not liable towards Mrs. Daniels, and that R. White and Sons was not liable for the damage suffered by either plaintiff.

[54] We can see this if we consider again some of the steps in the Court's reasoning. So, for example, the Court also rejected the argument that Mr. Daniels relied on Mrs. Tarbard's "skill and judgment" in the completion of the sale, for the purposes of s.14(1) of the *Act*. As we have seen, s.14(1) holds that where a buyer makes her purpose known and relies on a seller's skill and judgment in the delivery of goods, then there is an implied condition on the contract of sale that the goods are reasonably fit for the buyer's purpose, so long as their patent or trade name does not itself imply a particular purpose. In *Daniels and Daniels*, Mr. Daniels also argued that he relied on Mrs. Tarbard's skill and judgment in her delivery of the lemonade, under s.14(1).

As the licensee of the pub, Mrs. Tarbard had some skills and judgment that Mr. Daniels could have relied on – she could likely have made some recommendations about lemonade or described the lemonade if he'd asked, or recommended another drink to him. She also exercises a kind of "skill and judgment" in selecting the bottle of lemonade and selling it to him, in the sense that the actions are hers, she is not a robot or a vending machine. But it would be absurd to Mr. Daniels as relying on Mrs. Tarbard's skill and judgment for the purposes of the statute. This would truly be a merely technical or "mechanical" understanding of the provision.

The same can be said about the Court's determination that Mr. Daniels did not have an opportunity to examine the goods, for the purposes of excluding Mrs. Tarbard from liability under the proviso listed in s.14(2) of the *Act*. (Under s.14(2), the implied condition is negated when the buyer had an opportunity to inspect the goods in a way that would have revealed the defect.) Again, one might say that Mr. Daniels had *some* opportunity to examine the goods when he was, say, pouring the lemonade for himself and his wife. But logically availability of the conclusion does not mean that he had sufficient opportunity in the sense required by the statute in order to negate the implied condition.

relevant law on the matter was more subtle than was initially presented by the Court.

At the time of the decision, it was settled law that goods that are sold by patent or trade name are bought and sold by description for the purposes of s.14(2) of the *Sale of Goods Act of 1893*. However, the fact that a contract for sale uses the patent or trade name to identify the goods sold does not *automatically* make a sale one *by* (or, to use the terminology of the statute, goods sold *under*) patent or trade name.

In *Bristol Tramways, Etc, Carriage Co, Ltd* v *Fiat Motors*,[55] the plaintiff contracted with Fiat Motors for the sale of a "24 to 40 hp Fiat motor omnibus complete" and "six 24 to 40 hp Fiat motor omnibus chassis." He expressly specified that the omnibuses and chassis were to be used for heavy passenger traffic in and near Bristol. The goods that he received were suitable for touring purposes, but unfit for heavy traffic, and they eventually broke down and became useless. He sued Fiat Motor Co. for breach of both contracts, arguing that the goods delivered were not fit for his specified purpose under s.14(1), and not of merchantable quality, under s.14(2).

All three judges sitting on the Court upheld his claim under s.14(1). All argued that although the contract specified the goods by reference to their trade name, the sale was not one *by* trade name, and the goods were not sold *under* this name, for the purposes of absolving Fiat Co. of liability for supplying defective goods. As they argued, at the time of the contract, the industry was still in a tentative

[55] (2) [1910] 1 KB 840.

stage, and there was no such specified things as a "Fiat omnibus" or "Fiat chassis" to which the buyer could have been referring.[56] Instead, and the Court repeatedly noted, Fiat was continually updating its design of the omnibus even after the contract was completed, and up to, and after, its scheduled date of delivery. Nonetheless, two of the three judges held that the plaintiff could also recover under s.14(2) of the *Act*, on the grounds that the contract also implied that the goods would be of merchantable quality.[57] As they argued, the buyer was contracting for an omnibus and chassis made for a particular purpose, to be manufactured by a company with the reputation of Fiat Motor Co., even though he was not buying goods known as a "Fiat omnibus" or "Fiat chassis."[58] So, here we have a case in

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[56] As Farwell LJ. argued,

> at the time when the omnibus and the chassis were ordered in this case there was nothing that could properly be called a Fiat omnibus or a Fiat chassis: the industry was in the tentative stage, and the order was really for the particular omnibus and the chassis to be completed and made respectively by the Fiat Co on such lines and patterns as that company should find expedient for the purpose. It is one thing to order an article known as a "Fiat omnibus," an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an omnibus to be made by the Fiat Co, although in the latter case that company might adopt patterns and devices which were its own exclusive property the former is within the proviso, the latter is not. An omnibus made by the Fiat Co may well be described as a Fiat omnibus, but such nomenclature does not necessarily constitute a trade name within the Act; if it did, a manufacturer could always get the benefit of the proviso by labeling all the goods made by him with his own name, a trade name not acquired by user, and whether it has or has not been so acquired is a question of fact in each case.

Sir Cozens-Hardy and Kennedy LJ reached similar conclusions. [1910] 1 KB 840

[57] The third judge, Kennedy LJ, dissented on the grounds that the goods were of merchantable quality, even if they were not fit for purposes for which they were ordered. [1910] 1 KB 840

[58] Sir Cozens-Hardy wrote that

> I also think that the case may be brought within s 14(2) - namely, that there was an implied condition that the goods should be of merchantable quality. In the face of the report of 25 October 1907, which comes from the defendants' custody, I cannot doubt that the goods sold were not of merchantable quality within the fair meaning of those words, and I see no reason to doubt the finding of the learned judge that the

which the goods are sold by reference to their trade name, even though they are not sold *by* or *under* their trade name for the purposes of the provision.

This case is not an outlier or mistake in law. The Court drew a similar conclusion in *Gillespie Bros & Co v Cheney, Eggar & Co*,[59] holding that that the sale of "Cyfartha Merthyr or Hills Plymouth" coal is not a sale by trade name for the purposes of exclusion from warranty under s.14(1) of the *Act*. Similarly, in *Baldry v. Marshall,*[60] the Court held that the sale of an "eight cylinder Bugatti car" was not a sale by trade name when the buyer specified the specific purpose for which he intended its use (to be fast, flexible, and easily managed, and comfortable and suitable for ordinary touring use).

The reason for these subtleties in the law of sales by description has to do with the justification for the implied warranties on these sales. Implied warranties on sales by descriptions are an exception to the general common law maxim of *caveat emptor*. Where a buyer is reliant on the judgment of the seller in the selection

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> slight inspection by the representatives of the plaintiffs of one of the complete omnibuses was not of such a nature as sufficed to disclose the defects. In my opinion there is no ground for interfering with the judgment of the learned judge, and the appeal must be dismissed with costs.

Similarly, Farwell LJ argued

> in the present case the materials used, especially as regards the size and strength of material fittings, were not of merchantable quality. It is as though a man bought the patent shaving machine to which I have already referred by way of illustration and found that the blades would not fit the frame, or that the frame broke from the brittleness of the metal used. The purchaser would in such a case be entitled either to return the article or, if he had accepted it within s 35, to bring his action for breach of warranty under s 11, not because he had not got a shaving machine at all, although it would not shave, but because the machine that was delivered was not of merchantable quality.

[1910] 1 KB 840

[59] [1896] 2 QB 59.

[60] *Baldry v. Marshall*, *[1925] 1 KB 260*.

of the goods, and where the buyer does not have an opportunity to inspect the goods for herself before the contract is concluded, the law implies a warranty on the contract of sale guaranteeing that the goods are either of merchantable quality, when the buyer does not specify the purpose for which they are intended, or that they are fit for a particular purpose, when the buyer does specify the intended purpose.[61] In both cases, it is unfair to put the risk of defect or unfitness on the buyer.

Goods sold by trade name are a kind of sale by description for the purposes of s.14(2) in the sense that they are not the sale of specific or ascertained goods, or goods that are "identified and agreed upon at the time a contract of sale is made."[62] In such cases, the trade name operates as a kind of short-hand for a more elaborate or illustrative description of the goods. These very reasons, however, exclude an implied warranty of fitness for a particular purpose on sales of goods by trade name. So far as a trade name is meant to serve as a kind of short-hand for a description of goods, it is presumed that the buyer knows what she is getting even though she has not inspected the goods, and is not relying on the skill and judgment of the seller to provide her with something fit for a particular purpose.

Overall, then, the doctrine governing implied warranties on the sale of goods by trade name depends on the trade name signifying "known, described and definite" articles, but not goods that are uniquely identified in the sense of being

[61] Walter C. A. Ker and Arthur B. Pearson-Gee*, A Commentary on the Sale of Goods Act of 1883* (Sweet and Maxwell: London, 1894), 93. Cf. also Frank L. Mechem, "Implied Warranties in the Sale of Goods Act By Trade Name," 11 *Minnesota Law Review*, 6 (May, 1927), 485-503, 487.
[62] *Sale of Goods Act 1893*, s.62(1).

specific and ascertained.[63] This justifies including sales by trade name under the general doctrine of sales by description for the purposes of the implied condition of merchantability, but excluding them from the implied condition of fitness for a particular purpose. The two provisions (ss. 14(1) and (2) of the *Act*) ought therefore to be read together.[64] These justifications only hold, however, where a product is well-known under its name, (and the manufacturers know that it is known). When there is no such thing that the trade name refers to (as when, as in *Bristol Tramways*, the industry is in its early stages), or when the seller recommends or affirms the fitness of the article under its brand name as specially fit for the buyer's purpose as Bugatti did in *Baldry v. Marshall*, then the use of the trade name to identify the goods does not serve as a descriptive short-hand. Nonetheless, the trade name might form part of the general description under which the goods are identified for the purposes of determining whether or not there is an implied condition of merchantability on the contract of sale.

It thus seems that although, *in general* sales made by reference to a trade name are sales *by* trade name, and that they are, for this reason, subject to the

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[63] cf. *Jones v. Just*, (1868) L.R. 3 Q.B. 197. Cf. also Mechem, "Implied Warranties in the Sale of Goods Act By Trade Name," 11 *Minnesota Law Review*, 6 (May, 1927), 485-503, 488f, discussing the common law origins of the doctrine.

[64] Diplock J. notes,

> subsection (1) and (2) are really two sides of the same coin. If a buyer makes known a particular purpose—those, of course, are the words of the subsection—to the seller so as to show that he relies on the seller's skill and judgment, then the suitability for that particular purpose is a warranty and implied condition of the contract. If he does not make known any particular purpose, then, the assumption being that he requires them for the ordinary purposes for which such goods are intended to be used, the implied condition is one that they are fit for those ordinary purposes, that is to say, that they are merchantable, and I venture to think there is no other between subsection (1) and subsection (2)

Mash & Murrell Ltd v Joseph I Emanuel Ltd, [1961] 1 All ER 485, [1961] 1 WLR 862, 866

provisions in ss. 14(1) and (2) of the *Sales of Goods Act of 1893*, they are not *always* sales by trade name for this purpose, and they are certainly not *automatically* sales by trade name, and therefore subject to the rules governing implied warranties. Rather, whether or not a contract for sale is a sale by trade name for the purposes of the *Act* will depend on whether or not the trade name specifies a particular object of a particular quality that is generally known to the public, and whether or not the parties to the contract relied on this fact in their use of the trade name when striking their bargain.

In *Daniels and Daniels*, the trade name did refer to such a known and specified article, and the parties did indeed rely on this fact in making their contract for sale. The sale therefore was indeed a sale by trade name for the purposes of s.14(2) of the *Act*. More importantly, in this case, the sale was *clearly* a sale by trade name in this sense, and it clearly fell under the rules governing sales by description as they are understood in this context. In all these respects, *Daniels and Daniels* is a clear example of an easy case; it is an *easy* easy case. But, these cases were binding precedent at the time that *Daniels and Daniels* was decided, making the law governing the use of trade names in the sale of goods somewhat more subtle and complex than the foregoing analysis suggested. Legally speaking, the ruling in *Daniels and Daniels* required, at the very least, a judgment that the use of the trade name in this case made the sale one *by* trade name, rather than as part of a general description. It is true that this would likely not have made any difference to the finding that the sale was one by description, or to the outcome of the case. My point

is not that *Daniels* is a hard case, or that it is not decided by the straightforward application of the posited law. My point is just that it does not *automatically* follow from the fact that the sale occurs by reference to the trade name that the sale is one *by* trade name for the purposes of the provision. Judges cannot reach this conclusion by "mechanical" application of the law, arriving at their conclusion as if by a machine. This, I believe, is sufficient to deny that the outcome is one that follows "automatically" or from the "mechanical" application of the rules to the facts. This is so even though the case clearly remains an example of an easy case.

VI. Hard Easy Cases: A Bold Conjecture

Once we dislodge the idea that social sources are inferentially inert or of trivial significance in legal reasoning, we can begin to inquire into the kind, and extent of the contribution that they do make to the determination of particular legal outcomes. So far, we have made some headway on this question. We can see that even in very clear cases the application of determinate legal rules to particular cases can require an exercise of legal judgment. It is not "mechanical" or "automatic" in the manner suggested by positivists' opponents.

If judgment in easy cases is not "automatic" or "mechanical," then what might it include? We have already seen it can involve mathematical and scientific reasoning. Why not moral reasoning or judgment? As we have seen, *hard* cases involve appeal to merits-based considerations and attempts to evaluate substantive moral controversies. These involve looking beyond the source-based norms to further, moral considerations to settle conflicts or indeterminacies in the posited

law. But can the application of source-based considerations to particular cases itself require an exercise of moral judgment? Can there be easy cases that involve the exercise of easy moral judgment? Cases that are nonetheless decided on the basis of the posited law alone? I will argue that once we abandon the idea that easy cases are decided "automatically" or "mechanically" and involve the exercise of some legal judgment, we can allow that legal judgment in easy cases might include the limited exercise of moral judgment as well. I will call such cases *hard* easy cases. Consider an example.

Imagine a law prohibiting murder. A law against murder prohibits intentionally causing the death of another human being, or intentionally harming another human being in a way that one knows is likely to cause his death and being reckless as to whether or not death ensues. It is not hard to imagine cases that fall under this rule. A person who intentionally stabs another and causes his death is clearly guilty of murder. (Let's assume) the facts are clear, the case clearly falls under the posited rule against murder, and the application of this rule to this case is a clear instance of source-based reasoning. This is a clear example of an easy case, much like *Daniels* above. It raises no questions of legal judgment, and no difficulties for the positivism/anti-positivism dispute.

Imagine instead that the accused beats his victim, intending to cause his death and then, under the mistaken belief that his victim is dead, throws the victim

over a cliff, leaving him to die of exposure.[65] This case is slightly more difficult than the case above. The accused caused the death of his victim, and he did so intentionally, but the death was not caused in the precise manner in which the accused intended it. Is the accused guilty of murder under the provision? The answer, I believe, has to be yes. Moreover, I will argue, it is *clearly* yes. This is so even if death did not ensue due to the precise mechanism intended by the aggressor. This follows, I suggest, just by considering the nature of murder. This makes this case an easy case as well. Recall that easy cases are those that are settled by the posited law alone. The posited rule against murder prohibits all and only acts of murder. Cases like the first are clearly forbidden under this rule. To the extent that it prohibits the first type of killing, I suggest that the rule must also prohibit cases like the second.

Murder is distinguished by the degree of malice or wickedness involved in its commission. Indeed, it is this moral evil more than any other factor that distinguishes it from other killings.[66] Blackstone distinguishes murder from other killings by its attendant "wickedness of the heart."[67] Lord Coke defines murder as killing with "malice aforethought,"[68] a definition later reproduced in the common law. It is alternately defined as killing with "an abandoned and malignant heart,"[69]

[65] *R. v. Meli* [1954] 1 W.L.R. 228 (P.C.).
[66] See George Fletcher discussing the distinctive moral aspect of murder, *Rethinking The Criminal Law* (Oxford University Press: Oxford, UK, 2000), 235ff.
[67] Blackstone *Commentaries on the Laws of England*, bk. IV, ch. 14, p. 190.
[68] *Coke's Institutes* (1628, Part III, Chapter 7).
[69] Cal. Penal Code §188, cited in Fletcher, *Rethinking*, 265, fn. 21.

or "for a base, anti-social motive and with wanton disregard of human life."[70] Both killings described above satisfy this distinctive moral standard.

Meli is normally understood as raising questions of simultaneity: the victim's death did not ensue in the precise way that his killer intended. It would be a stretch however to say that the case raises questions of proximate cause. This is not a case of a complex series of events involving multiple agents with varying mental states with regards to the victim's injury and death that normally arise in cases of proximate cause. Here, Meli clearly intended to kill his victim, he acted murderously towards him, and his murderous actions resulted in the death of his victim.

They are *hard* cases of murders. Murder can be extended to include holding co-conspirators guilty for murders committed by one group member in the course of an armed robbery on the grounds that they are vicariously liable for the wrongs of their co-conspirators,[71] or that the murderous actions of their co-conspirators can be imputed onto them. This can include cases where robbers turn on each other and kill a co-conspirator (negating the assumption that they are working in concert),[72] or where the gun discharges accidentally.[73] Indeed, the felony-murder rule might even be extended to include cases in which the victim of a robbery kills someone in

[70] Caljic §8.31, cited in Fletcher, *Rethinking*, 265, fn. 22.
[71] See Fletcher, *Rethinking*, 307, citing *People v. Gilbert*, 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), reversed on other grounds, 388 U.S. 263 (1965); *People v. Miller*, 37 Cal. 2d 801, 236 P.2d 137 (1951) (fn. 130).
[72] *People v. Cabaltero*, 31 Cal. App. 2d 52, 87 P.2d 364.
[73] *Rex v. Jarmain*, [1946) 1 K.B. 74 (1945); *State v. Thorne*, 39 Utah 208, 117 P. 58 (1911); *Regina v. Elnick*, 33 Can. Crim. Cas. 174 (1920), *People v. Morlock*, 46 Cal. 2d 141, 292 P .2d 897 (1956)

an attempt to defend himself,[74] or if a police officer accidentally kills a bystander in an attempt to prevent an assault.[75]

These defendants are also murderers. This might be because they are legally speaking murderers,[76] or perhaps one thinks the law is justified in holding these defendants guilty of murder, or that they deserve to be found guilty of (and punished for) murder. The law of murder should perhaps be extended to include cases like these, or that the underlying purpose or justification for the law prohibiting murder also holds for cases like the ones described above. One might think that their actions are tantamount to murder or as bad as murder. It is a stretch to say that the defendants in these cases are guilty of murder in the narrow sense of intentionally causing the death of another person, or that they do fall under the strict definition of the term. But there might be sound reason to hold these defendants guilty of murder nonetheless, notwithstanding the fact that they do not fall under the strict interpretation of the rule.

R. v. Meli is not like these cases. What he did is not *as bad as* murder, tantamount to murder or morally akin to murder. Meli is not merely legally-speaking a murderer; his liability for murder is not some artifact of legal doctrine (even sound legal

[74] Commonwealth v. Moyer, 357 Pa. 181, 53 A.2d 736 (1947).
[75] Commonwealth v. Almeida, 362 Pa. 596, 68 A.2d 595 (1949), *cert, denied,* 339 U.S. 924 (1950).
[76] Some argue that the legal notion of murder is the primary one, and that the moral notion follows this one. See e.g., Joel Feinberg, "On Being 'Morally Speaking a Murderer,'" *Journal of Philosophy*, 61:5 (1964), 158-171), and Elizabeth Anscombe , "The Two Kinds of Error in Action," *The Journal of Philosophy*, Vol. 60, No. 14, (Jul. 4, 1963), pp . 393-401, 400, arguing that imputability is built into the meaning of murder.

doctrine). Meli is literally speaking a murderer.Thabo Meli intended to kill his victim in carrying out the assault, he intended to kill the victim whose death he caused, he was the direct cause of the victim's death, and the victim died as a result of the murderous actions that Meli intentionally took against him. In prohibiting murder, I suggest, the law prohibits actions just like Meli's. This is so even if this takes a bit of moral reasoning to see. My suggestion then is that *Thabo Meli* is an easy case just like *Daniels and Daniels* so far as it is decided on the basis of the posited law alone. This is so even if it requires a bit of moral reasoning in order to arrive at this conclusion.

True, unlike the first case, Meli's victim did not die by the precise mechanism by which Meli intended his death. It is hard to see what moral difference this makes though. It is unlikely that murderer in the first example had a precise mechanism of his victim's death in mind either, or that he intended to inflict specific injuries (hemorrhaging to the victim's left atrium or lung, e.g.) and that his victim die from these. Nor would it make any moral difference if he did, or whether the victim's actual injuries were the precise ones that the attacker intended. The precise mechanism of the victim's death and its correspondence with the killer's intentions are morally, and legally, inconsequential. What matters is that in both cases, the attackers killed their victims intentionally, and did so with "wickedness in their hearts" and "for base, anti-social motives" and with "wanton disregard for human life." The events constitute a single transaction for the purposes of moral evaluation, and there is no question of whether the law against murder should include cases

like his, or whether in prohibiting murder, the law also covers cases like *Meli*. Morally speaking, there is no difference at all between the actions of the two defendants. Meli is not (merely) legally speaking a murder, he is literally a murder and the case falls under the strict definition of the rule. Most importantly, in order to see this one need only consider the nature of murder and the posited law prohibiting it. No further appeal to morality or unposited merits-based considerations is needed in order to arrive at this conclusion. It is for this reason, I suggest, a *hard case* of an easy case. Or, to put the point more succinctly, *Meli* is a *hard easy case*. If this is correct, then reasoning from source-based considerations can admit of a (very narrow) range of moral considerations as well.

VII. Legal Positivism

What follows from the foregoing analysis? One might object that my position is no different from inclusive positivism, so far as it allows that posited considerations can require appeal to morality in their application to particular cases. Or else one might argue that my argument proves too much, and simply reaffirms what Dworkin and his followers have been arguing all along, namely that morality is everywhere in law and that the law makes frequent appeal to moral considerations in determining particular cases, even in easy cases. I believe these concerns are overly hasty, however, and they overstate the point of the arguments advanced above. This is so for a number of reasons.

Inclusive positivism is a theory about the role of morality in law. It is a positivist response to Dworkin's challenge about the existence of unposited moral considerations in law. Inclusive positivists counter that far from being unposited, these considerations are validated by superior posited rules. Inclusive positivists aim to explain the legal validity of moral principles like "no person shall profit from her own wrong," or rules including terms like "reasonable," "fair," "just," "equitable," etc. or those directing judges to appeal to moral arguments in order to render a decision. These are rules whose content is determined by substantive moral argument.[77] Posited or source-based considerations are not like this: their existence and content is determined by reference to social facts alone.[78] Inclusive positivists take these appeals to be incorporated into the legal system, whereas exclusive positivists deny that they are so incorporated. For exclusive positivists, posited law's appeals to morality are more like law's appeal to the rules of a foreign country in conflict of law cases: these decisions are governed by law (they are not discretionary), but these rules are not thereby made part of the system.[79]

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[77] Cf. e.g. Wil Waluchow, arguing that "a distinguishing feature of inclusive positivism is its claim that standards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content, and meaning of valid laws." *Inclusive Legal Positivism*, (Oxford: Clarendon Press, 1994), 2. Inclusive positivists also include H.L.A. Hart, *The Concept of Law*, 2nd Ed. (Oxford: Clarendon Press, 1994); Jules Coleman, *The Practice of Principle: A Defense of a Pragmatist Approach to Legal Theory*, (Oxford: Oxford University Press, 2001); David Lyons, "Principles, Positivism, and Legal Theory," 87 *Yale Law Journal* 415 (1977), 423-24; Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute," 75 *Michigan Law Review* 473 (January 1977).

[78] Joseph Raz characterizes the "strong" social thesis as holding that that "a law has a source if its contents and existence can be determined without using moral arguments." *The Authority of Law*, 47.

[79] See Raz, *The Authority of Law*, 46, making this analogy.

My thesis is a thesis about the *posited* law and its operation in easy cases. I am claiming that the application of the posited law to particular cases can require an exercise of moral judgment in a limited sense, even in easy cases. Crucially, I make no reference to merits-based considerations that are binding in virtue of their appropriateness to the circumstances that lie at the heart of the dispute between positivists and non-positivists and that divide inclusive and exclusive positivists.

A posited rule prohibiting murder is a source-based rule: its content and existence can be determined without resort to moral argument. It is like rules prohibiting assault, theft, negligence or other wrongs that lie at the heart of a legal system. These overlap with moral rules and invoke moral notions, and they can perhaps, as I have argued, involve moral judgment in their application. But their content and existence can be determined without reference to moral argument. Determination of the content of these rules is not like appealing to the laws of a foreign country. More generally, it would be implausible to construe positivists as debating (much less denying!) whether or not the law incorporates these notions when it makes explicit reference to them. To the contrary, prohibiting murder and other criminal wrongs form the core of what many think is the function of a legal system.[80]

[80] Indeed Raz specifies that the strong sources thesis does not require that there be a sharp distinction between value-neutral and value-laden terms. (*Authority of Law*, 40) More generally, rules prohibiting murder and upholding other core social values are precisely the kinds of rules Raz takes to be central to law. (*The Authority of Law*, 169f discussing the primary functions of law). Raz lists a rule saying "do not steal" as possessing the conceptual unity and simplicity needed for a single, unified legal norm in his discussion of the

It is true, as argued above, that there is a moral aspect to the notion of murder. Murder is perhaps a "thick" moral concept like courage or loyalty, which are irreducibly moral as well as descriptive. In this respect it can require more moral judgment in the determination of its content than, say, rules setting a speed limit or governing sales by description. But this is a far cry from rules containing open-ended moral notions like "reasonable," "fair," "just," and other merits-based considerations that require appeal to substantive moral argument to determine their content. These broad moral concepts are so open-ended as to allow disagreement even about core cases and the relevant criteria for settling them.[81] This is what typically characterizes them as requiring appeal to independent questions of morality.[82] It is hard to imagine this sort of disagreement about core cases of murder. Murder is a "thick" moral concept precisely because notwithstanding potential disagreements at the margins, there are clear cases of murder that count as murder just by virtue of the meaning of the term.[83] My claim

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individuation of laws. (*The Concept of a Legal System: An Introduction to the Theory of Legal System*, 2nd ed., (Clarendon Press: Oxford, UK, 1970), 143.)

[81] Consider, e.g., the disagreement surrounding *Brown v. Board of Education* (347 U.S. 483 (1954)) about whether "equal protection" prohibits segregation (Charles Fairman, "Forward: The Attack on the Segregation Cases," 70 *Harvard Law Review*, 83 (1956)), with detractors attacking the lack of "neutrality" in the Court's judgment (Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 *Harvard Law Review*, 1 (1959)), and defenders insisting on the "inherently" discriminatory nature of the separate but equal doctrine. See generally Ronald Dworkin's discussion of *Brown* and theoretical disagreement in *Law's Empire*, ch. 1.

[82] Joseph Raz thus likens such appeals to appeals to the rules of a foreign legal system, that domestic law sometimes makes reference to, but does not necessarily incorporate into the system. *Authority of Law* (Oxford University Press: Oxford, UK, 1979).

[83] One of the ways that Williams distinguishes between "thick" "world-guided" concepts and thin moral concepts is in terms of the degree of overlap or agreement in people's application of them. See Bernard Williams, *Ethics and the Limits of Philosophy*, (Routledge:

then that the law prohibiting murder falls under the strong social thesis and that the outcome in *Meli* is determined by the content of the posited law alone. No further appeal to morality or merits-based considerations is needed.

On the other hand, one might object that my argument proves too much, and that I have simply reaffirmed what anti-positivists have been arguing all along, namely that moral reasoning is everywhere in law and that all cases involve appeals to morality, as well as source-based considerations. Both Dworkin and Greenberg argue that legal reasoning always involves a combination of source-based and moral reasoning, and that social sources must be supplemented with relevant normative considerations in order to arrive at determinate legal conclusions.[84] One might argue that my analysis of easy cases provides another way of proving this point.

London UK 1985), 140FF. But see Samuel Sheffler, "Morality Through Thick and Thin: a Critical Notice of Ethics and the Limits of Philosophy,"
Morality Through Thick and Thin a Critical Notice of Ethics and the Limits of Philosophy," *The Philosophical Review*, vol. 96, no. 3 (Jul., 1987), pp. 411-434 taking issue with this aspect of the distinction.

[84] Consider Dworkin's characterization of easy cases:

> Now this critic trims his sails. "In any case Hercules has too much theory for easy cases. Good judges just know that the plain meaning of a plain statute, or a crisp rule always applied and never doubted in precedent, is law, and that is all there is to it. It would be preposterous, not just time-consuming, to subject these undoubted truths to interpretive tests on each occasion. So law as integrity, with its elaborate and top-heavy structure, is at best a conception for hard cases alone. Something much more like conventionalism is a better interpretation of what judges do in the easy ones." The distinction between easy and hard cases at law is neither so clear nor so important as this critic assumes, as we shall see in Chapter 9, but Hercules does not need that point now. Law as integrity explains and justifies easy cases as well as hard ones; it also shows why they are easy. It is obvious that the speed limit in California is 55 because it is obvious that any competent interpretation of California traffic law must yield that conclusion. So easy cases are, for law as integrity, only special cases of hard ones, and the critic's complaint is then only what Hercules himself would be happy to concede: that we need not ask questions when we already know the answer. *Law's Empire*, 265f.

This conclusion is too quick, however. First, I make no claim about the ubiquity of morality in law. My claim is simply that in some cases, a limited exercise of moral judgment can be needed in order to arrive at a legal conclusion. This is a far narrower claim than those made by Greenberg and Dworkin.

Secondly, my argument only supports anti-positivism on the supposition of the trivial role of source-based considerations in legal reasoning. It is only if one accepts the anti-positivist notion that source-based reasoning must exclude *all* appeal to morality in determination of particular legal outcomes that my argument supports this position. But this is precisely the idea I aim to challenge: I argue that source-based considerations can serve a much more robust role in determining particular legal outcomes than anti-positivists allow, and that so holding poses no threat to positivism. Particularly, it leaves the main positivists theses intact, and the central questions dividing positivists, and distinguishing positivists from non-positivists open.

So, for example, social sources remain paramount on my view. The existence and content of law is a matter of social fact, and whether or not the law makes appeal moral considerations, and which considerations have legal bearing is determined by social sources. There is no further moral test for determining the validity of source-based considerations on my view.

Nor does anything I say settle the question of the role of merits-based considerations in law. Rather, I have upheld the received distinction between

source- and merits-based considerations in law; my argument focuses on source-based reasoning and the role of source-based considerations in easy cases.

Positivists and non-positivists debate the role of morality in law. They aim to explain the broad range and diversity of moral considerations that can bear on law, and the complex moral analysis can be needed for determining particular legal outcomes. This is much broader than the argument I am offering. Nothing in my argument entails such an expansive view about the scope of moral judgment in law, or the legal validity of appeals to morality in law. Indeed, my argument is not about the role of merits-based considerations in law at all. My argument pertains only to the application of the posited law to particular cases, and my conclusion is the narrow one that some cases decision about what the *posited* law dictates can involve appeal to some limited moral judgment, namely, moral judgment about the content of the posited rules and their application to the case. My conclusion is therefore confined to easy cases, where the law is decided by the application of the posited rules alone. My claim is that even in easy cases, legal judgment is not necessarily "mechanical" or "automatic," and that the legal judgment involved in what are canonically considered easy cases – namely, those cases that are decided by reference to the posited law alone – can sometimes involve a limited range of moral judgment. Although inclusive- and non-positivists might accept this, it is far short of the expansive views about the role of morality in law that they defend.

VII. Conclusion

I have thus argued that easy cases, though easy, are not "mechanically" or "automatically," decided. Instead I have attempted to show that even in a clear instance of an easy case, legal judgment is required. This is theoretically significant because easy cases are often characterized as ones that are decided by source-based law alone, and anti-positivists often launch their attacks on positivists on the assumption that source-based reasoning is, or is supposed by positivists to be "automatic" or "mechanical." I have argued that positivists do no, and need not make any such supposition. On the contrary, posited considerations can be inferentially robust. They might even include the exercise of some moral judgment in their application. While this is not sufficient to solve the problem of hard cases and explain the full range of moral considerations in law that anti-positivists emphasize in their challenges to positivism, it does give positivists more resources than they are typically credited with, and than they themselves make use of.