

## **Objectivity and value: legal arguments and the fallibility of judges<sup>1</sup>**

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The force of objectivity lies primarily in the idea that our judgments about matters of value are liable to correction. Objectivity is an important idea. It is crucial for our understanding that we can be fallible, and thus to learning the limitations and strengths, as well as the importance of our judgments. But when we make value judgments as opposed to judgments of science it is usual to suppose that there is nothing ‘in the real world’ that provides any standard for correction. The argument here is that through the idea of imputation, we are able to see how objectivity is the result of a creative endeavour that imputes correctability to value judgments. Since the activity of stipulating only makes sense where it institutes a value, this argument for objectivity provides an abstract scheme for all significant judgments of value. The value of objectivity lies in its providing a sense in which personal judgments, when expressed in actions, are ones to which at least some other people can respond and make corrections.

A further argument here is that making good moral judgments is a skill fundamentally dependent upon internal engagement between knowledge of others and oneself. It consists of seeing others from the ‘inside’ and as more than mere external reflections of ourselves; a person exercising such a skill must be capable of judging that others are ‘like me’. It also requires a sense that the other ‘can be learned from’. None of this sociology of a reflexive/self-reflective process is externally determined. The standards generated by the process are not ‘absolute’ or ‘timeless’ but rather arise from an empathetic understanding that ‘other people are like me’. It would be an affront to rationality to refuse to see important similarities between oneself and others. To understand this requires care and reflection; this is why it is important to understand moral judgment as a skill.

As a way of bringing together these two ideas of imputation of objectivity and of reflective and argumentative skill, the conclusion analyses some recent comments by a prominent judge. Deciding questions of law in controversial appellate cases require making judgments of moral value.<sup>2</sup> Lord Bingham, the senior law lord and former Chief Justice of England, has recently claimed that there are no right answers to legal questions. The argument in the last part of this paper is that he, and others who share his view, are wrong. This is partly because they underestimate the vitality in the assumption that their ultimate judgments might be fallible. Perhaps, too, it is because they do not sufficiently appreciate how legal argument is a different skill from rhetoric, where ‘being correct’ is of little, if any, importance. Law is argumentative, through and through, and that is important, since, apart from all else, it justifies the whole of the appellate procedure on matters of law. Given this value, there are compelling reasons for supposing that the moral arguments that judges such as Lord Bingham advance in support of their decisions are intended to establish right conclusions.

### **Imputation and truth**

The nature of truth is not a central issue of moral objectivity. Truth is primarily a property of statements or propositions. Take the phenomenon of lying, which exploits the trust induced in others that speakers normally intend their statements to be expressive of their beliefs. The

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<sup>1</sup> My thanks to the British Academy for appointing me Senior Research Fellow for 2006-2007 to allow me time to write this.

<sup>2</sup> According to all contemporary theories of law, judicial arguments in controversial cases involve making moral judgments one way or another.

liar expresses as true what he does not believe.<sup>3</sup> Questions of objectivity, however, concern the correctability or otherwise of judgments. Because ordinary language is so imprecise and we often use ‘true’ as a synonym for ‘correct’ or ‘right’, the nature of truth does not pose too much of a difficulty, although, where matters of value are concerned, people become anxious about any talk of ‘truth’. Perhaps a quest for ‘truth’ sounds like a vital step in philosophical thought - that we have to ‘get at the truth’. But if we accept that moral judgments may be right, we then have to accept that statements expressing those judgments are true. We can distinguish whether an act is right from a statement or proposition that it is right, so we can distinguish ‘right’ and ‘true’. The issue is therefore not about the nature of truth and morality, but about whether moral judgments can be objective, and that question concerns whether such judgments are capable of being corrected.

Nevertheless, we can look at judgment and truth in a way that draws out a creative function in making judgments of value. Stipulative truths are truths we create by imputing truth to some expressed act. We do so without directly depending on a correlation between what we stipulate and some existing feature of the world, for we can make it true that ‘ $A = 2B$ ’ by pretty much declaring it to be so.  $A=2B$  is not true by virtue of its describing our use of language for there may be no such a use. And by relying on other stipulative definitions, which need not coincide with language use, as to what ‘=’ and ‘2’ mean, we can deduce further true propositions, that, for instance,  $A$  divided by itself equals one, or that ‘ $2A = 4B$ ’. The point is not just one of mathematics.<sup>4</sup>

Stipulative definitions suggest a way of understanding morality that opens up more clearly the possibility of correction and thus the possibility of objectivity. While stipulation stands as true in a formal, although somewhat empty sense, its legislative nature makes the reasons for the stipulation significant. It does this more surely than by looking to the practical reasons that people engaged in any particular practice actually provide themselves. One reason is that it conjures up the idea of a single author whose reasons for stipulating we can challenge. Merely to suppose that there is a justification ‘in the practice’ is confusing because people have different and conflicting ideas as to what justifies a practice. Those engaged in a practice characteristically provide different reasons for their engagement. Sometimes practices can ensnare and entangle people from which they remain detached (for example, they become subject to totalitarian rule against their wishes). Mostly, however, people engage in practices but see those practices in different lights.

The temptation to suppose that there is an explanation or justification for the practice ‘embedded in’ the practice somewhere is great. It represents a philosophical and creative conservatism; it builds upon human experience, put into practice, and there is always the possibility of modification, radical re-interpretation, and even abolition. It is nevertheless important to remind ourselves that justifications for a practice can be ideal. They can pre-date the practice; they can exist in books without any hope of our putting that ideal in place. Stipulation does not require that there even be a practice. Stipulative truths, as opposed to dictionary truths, do not rely on the actual practices of human beings.

There is a definite but barely perceptible merger between the stipulative nature of language and the idea of proposing. Proposing, perhaps better called ‘creating’, is something

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<sup>3</sup> And so dogs and cats, which do not have a language, have no means by which to tell lies.

<sup>4</sup> When we argue by reducing something to absurdity (an argument *reductio ad absurdum*), we employ hypothetical stipulation in the first steps. Take the argumentative put-down ‘If pigs could fly...’ A formal way of putting it is: ‘Let us stipulate what you said is true. It would follow that pigs could fly, which is obviously false. And so it follows that what you said could not possibly have been true.’ The argument makes use of a stipulated truth, only to conclude that, on that assumption; a contradiction follows, showing the initial stipulation to be false. Imagining it to be true is insufficient, though. To enter the argument, we have to ‘make the assumption’ that something is true, and so it (hypothetically) becomes true by stipulation. This is one way of showing the intimacy of the connection between imagination and truth; you imagine it to be so, then you make it so, and in the case of *reductio* the argument shows the imagined state of affairs to be false.

that we can accomplish without using language. We make proposals for our own lives, in shaping the course of our characters and our relationships with other people, without doing so by the signifying to others of our intentions. On the other hand, creativity suggests very keenly the making of something and, given that is natural for us to be social and to express to others our creations, it is also natural to associate the creative function with the production of language-cognate materials. Or, perhaps putting this round the other way, that it is natural to suppose that works of art, and other forms of creation, are for this reason language-cognates. There is, at any rate, a link between stipulative definition, which is a function of language, and the creative function. It is evident in the way that we naturally describe artistic works as 'true', or say such things as that the music 'speaks to us' or expresses 'profound truths about human nature'. What we mean is that the work of art is like a statement of truth about some aspect of the world that is different from what we could present as an empirical description. It is this lack of direct connection with empirical description that makes it easier to ascribe truth through the idea of stipulation rather than through the dictionary to propositions about matters of creative value. That is to say, while it is easy to ascribe truth through stipulation it would be hard to do so through dictionary definition regarding things that have creative value. We can propose as true that Beethoven's last string quartets are profound and rely on the idea of stipulation to provide the sense of truth, untrammelled by any requirement of empirical objectivity. This is the case whether we are looking for the correct use of the word 'profound' or for empirical facts that support this proposition. The proposal stands or falls on the merits of the artistic judgment. We can go further. If we can connect truth to judgments of value – proposals – then that suggests the possibility of ascribing objectivity to value.

Stipulation and value connect just because it makes sense to ask for the value of any stipulation. A common form of stipulation is the military code where the value of a good code – a good stipulated meaning – is its resistance to being broken. We find another, less discernible form of stipulation in the corporate logo, where an institution stipulates some symbol to be representative of what it aims to achieve. The corporation makes it so by proclaiming – stipulating – it to be so. The value of the logo is the test for whether the corporation achieves its end. In mathematics, stipulating some particular function of a symbol will have value, perhaps efficiency, or just elegance. So if a mathematician stipulates 'A = x' and then intends to use 'x' according to its conventional meaning of 'multiplies', then the stipulation is impractical. It is inefficient and inelegant for it does the subsequent calculations a disservice by creating ambiguity. 'Axx' could mean 'A multiplied by x' or it could mean 'A multiplied by x multiplied by x' and these produce different answers. The lack of value in the stipulation will merge with the truth function at some stage, for a stipulation that failed to have any value at all could be neither true nor false; the truth of a stipulation cannot be merely the truth of the fact that someone stipulated. Rather, the stipulation is that something is true. But if there is absolutely no value in saying something is true, and we assume, reasonably, that stating things to be true is stating a (non-circular) value, then it must be that both language and value are functions of stipulation. None of us seriously supposes that there is value in all things. We find some things have no value at all. Would there be any value in stipulating that 'A=A', that something equalled what it equalled? Consider the value, for example, in stipulating that it was true that 'A= not-A'? How could there be value supposing it to be true that something was false? The answer to that is that the extent of artistic value – creativity in general - in some sense has no bounds. To say there is truth in contradiction, as a proposition concerning the current state of western society, or of mankind, is an underlying theme of movements such as nihilism and surrealism, and others. It has a sort of sense. Creation is an intentional act and it is difficult to see what the point would be of intentionally creating something of no value at all. We must think of a case, unlike the case of stipulating contradiction that, truly, has no value. At any rate, it cannot

make sense to say that something that has no value is true. There is therefore a gap between objectivity and truth in the case of science that is not present in cases of value. No stipulated truth is true where there is no value in stipulating it thus. So a contrast emerges between empirical and value judgments. While the judgment of perception when we see the stag and calculate its distance from us is different from our *statement* that ‘the stag is 100 metres away’, our judgment that this is the most valuable way of seeing something or of doing something, is not so different from the statement that seeing or doing it this way is true. While there is a clearly discernible gap between physically perceptive judgments and statements concerning their truth, there is no comparable gap between value judgments and the truth they express.

### **The sociology and objectivity of value**

The above provides a solution to the much-discussed question whether moral arguments are ‘subjective’ or ‘objective’, and whether they are ‘cognitive’ or ‘real’. Stipulation properly understood provides a case for saying that value judgments can be more than just asserted trivial truths. Value judgments are true or false because they consist of proposals the truth or falsity of which turns on the value judgments that support them. ‘The right judgment is the one that is supported by the right reasons’ is not circular but explanatory: the *definiendum* contains more than the *definiens*. When working out whether a work of art is good, the problem of objectivity is no more than that of looking to the best reasons that support that judgment; the same goes for moral and legal judgments. So the invocation of stipulation provides an answer to the moral sceptic who says that value judgments cannot be right or wrong just because there is no empirical evidence in support. Our response need only be to confront him with a moral problem and point out that his response – there is no meaning in what we do when we judge something good or right - provides no reason for judging at all.

Consider alternatives to the sceptic. Take the question whether abortion is always wrong. Is it just that people ‘prefer’ that it never happen or, if it is not the same thing, is it that they have a ‘subjective’ feeling that it is always wrong? Many people would say that this way of looking at morality is ‘honest’. It is common, too, for people to say that ‘for them’ abortion is always wrong but of others who disagree, that ‘it is true *for them* that abortion is sometimes permissible’. The mixed intuitions so often articulated in this way are confused. When pressed, people are generally not willing to admit that their moral views are merely matters of taste, such as what they like to eat, but they will reject what they perceive to be the arrogance of someone else making that decision; in fact, this seems to be one of the determining pivots of discussion outside professional philosophical discussion.<sup>5</sup>

We can deal with these two widespread views – ‘subjectivity’ and ‘arrogance’ with comparative ease. First, it cannot follow from the fact that something seems morally right to us, individually, that all moral views are ‘subjective.’ All beliefs are subjective in this sense: no one can say that we do not believe something if in fact we do. Yet beliefs do not embody right judgments merely because someone believes those judgments to be right. Second, it does not follow that when people announce their moral views that they are being arrogant. Some people overstate their belief in themselves, true, but they could also be stating the truth. In fact, relatively few people are arrogant in this way. Maybe we need to preserve ‘arrogance’ in this context for fundamentalists, or for dictators, or preachers; but the ordinary person who ventures a view about what is morally right is not being arrogant. At any rate, the charges of ‘subjectivity’ and ‘arrogance’ do not directly concern the appropriateness of how we should think about moral questions. They are, rather, conversational tactics,

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<sup>5</sup> The majority of law students, in my experience, think that morality is ‘subjective’ and that to think otherwise is ‘arrogant’.

avoiding the confrontational possibilities of engaging in argument about sticky moral problems. Here is a suggestion. A start to having a serious discussion about what is morally right would lie in our belief that morality is objective. That is, we should believe that what is morally wrong or right to do can be mistaken, or wrong, or incorrect, or revisable, particularly in response to what other people say, and to our rethinking our own experience. Part of the problem with the word 'objective' is that it is ambiguous. It suggests a. that a person's 'subjective' understanding can be wrong, and that people should not think that morality is a matter of 'owning' what they believe. More important, it suggests b. that a person's 'subjective' understanding can be wrong only where there is an 'object in the world' by virtue of which that person's 'subjective' understanding is wrong.

It is rational to suppose that we might be wrong in what we think we ought to do; it makes us careful – it allows for our thinking our judgment could be different, and better – and that view encourages the making of more reflective and therefore wiser moral decisions. It would encourage us to revise our initial view, and to consider the worth of reasons in favour of that view. If these reasons are sensible, then morality is objective and the alternative, 'pure subjectivism' gets us nowhere. The irony is that, if we accept this simple argument, we can return the charge of arrogance to those who believe in 'subjective' morality. If our views about matters of moral value were entirely subjective, our statements of what is morally required would be infallible, because to be right we need only report what, as it were, 'our mind says'. In that light, in claiming objectivity for our view of what morality requires shows, we recognise we could be wrong; we recognise the possibility of correction of our view. That exhibits humility, not arrogance.

People like proof. It appears in scientific understanding, but not for 'value' judgments. Why do many scientific judgments require proof but not moral, or artistic judgments? We have a personal and overwhelming interest in stability and constancy in the outside world, in our being able to predict what will happen and so our survival depends on it. We have what we could call an internal reason, too. Our sense of our freedom depends on our having a relatively stable view of what we can do, of our own identity and the world that immediately surrounds us. With the certainty that comes with science, we can predict what we might do, or what might happen to us. So the proposal that we view science as that body of knowledge that attaches significance to certainty of prediction make good practical sense. But stipulation implies choice, and it seems outrageous to suppose that we 'made it true' that science is a branch of knowledge that requires proof. But why should it be outrageous? If we make that stipulation for a branch of knowledge, we shape its contours by reference to our particular practical interests. It is not as if by stipulation we are making the world 'something that it is not'; rather, we are bringing out the sense of what we should regard as significant, and the success of the stipulation is measured by reference to the practical consequences of supposing that 'such and such propositions of science are true'. So we can say that there must be practical purpose involved in stipulating proof for science.

What about morality? Would it be a good proposal to stipulate proof or demonstration as the truth condition of propositions of morality? That is unappealing. The only way one could even start thinking about what it would mean to *prove* a particular proposal about moral conduct would be by pointing to a convention of moral behaviour, or to some promulgated rule or pronouncement - what legal philosophers sometimes call a 'social fact'. The content of such conventions, facts or pronouncement, would be relative to the beliefs of those engaged in them. But such conventions, facts and pronouncements could not exist independently of the reasons supporting them, and so we would have to prove the content of those conventions, and so on; this suggests an infinite regress. In any case, morality governed by proof would dismantle morality's hold on us. It would privilege certainty over all else. What would be the point in that? First, it is desirable that people

themselves judge what is right by reference to content, and by reference to themselves and others, and not by reference to conventional behaviour. Certainty is not as clearly in our interest as prediction is in science, given the array of everyone's actual and possible actions and the enormous variations in natural events. Second, it is desirable that people are responsible for their actions, an idea partly implicit in their having a point of view and thinking 'for themselves'; these are important components of what it is to be free. Both these fundamental requirements of moral reasoning assume that people should make an independent check to see whether they are making a mistaken judgment.

What, then, of the opposite proposal, that morality be a matter of 'pure subjectivity'? The truth conditions for moral propositions would be merely that a person believes it to be wrong. That is clearly a non-starter because of the irresolvable conflict it would generate, for all points of view, however much the conflict, would be right (which would mean that 'right' would not signify much, if anything).<sup>6</sup> Because of this, it is necessary to add to the idea a rider that the consequence would be that it is wrong only for that person.<sup>7</sup> The question is not that this is absurd by any analysis of the way we treat morality but whether this would be a sensible idea for us to adopt. But if we did adopt this idea, it would stop argument dead: there would be no more to moral argument than the registering of a belief.<sup>8</sup>

Take a 'moral scientist' who argues that the important question is the 'metaphysical' status of morality's claims to objectivity. Scientific work, the moral scientist says, has vindicated its own 'metaphysical' status, and so the tests of scientific objectivity should apply equally to moral judgments. He says perhaps something along the lines of '... the *only* tenable guide to the real and the unreal is science, and the epistemological standards we have inherited from successful scientific practice'. And what 'vindicates' science's 'metaphysical' status? 'It 'delivers the goods', he says.<sup>9</sup> The argument relies on that value, and does so at the cost of ignoring other values that we might weigh in the balance. If 'delivering the goods' as far as prediction is concerned is valuable, why are other values not only minimally respected but irrelevant? There is a plausible case for saying that good moral judgments have 'delivered the goods'. It is not enough just to say that if the methods of science are applied to morality then we find there is no counter-part in the world that would predict what the morally right point of view is. That suggests that the right value in place is that of prediction. So what value is there this argument?

A grander attack on the moral scientist confronts his claim that scientific method has the value of 'delivering the goods'. This judgment is an explicit value-judgment and so is not

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<sup>6</sup> If religious belief includes knowledge by virtue only of strength of belief, and so not subject to correction, then it must surely be ruled out as a ground for morality. Why accept a God, belief in which entailed irresolvable conflict? Religious belief, defined this way, is different from belief in ultimate premises, such as that 'life is precious' or 'people must be treated with respect', because these are reasons that can be seriously countermanded. 'Life is precious' can be countermanded by reasons referring to the different ways life can be precious (e.g. in the case of abortion). Those countermanding sorts of reason are just not available where someone declares that their belief is 'What they understand God to say'; that reverts to belief, and that means conflict. Is it impermissible to suggest that one could not believe in a cruel God? Or that one's belief in God should be determined (or abandoned) according to the value that holding that belief would contribute to ours, and others, lives? Most religious people would disagree that religious belief entails conflict, in spite of the empirical evidence; but they need more of an argument than that which supports their own religious belief, namely, that it is just intensity that marks it out from other beliefs.

<sup>7</sup> Evidenced in statements such as 'I think abortion is always wrong but that's just my opinion and that woman who is having the abortion, well, that is right for her.' This rider is inconsistent with religious belief.

<sup>8</sup> Students have increasingly accepted the 'subjectivity of morality' over the past two decades. Thirty years ago, it was always possible to have a class argument about the rights and wrongs of abortion, with the class divided on how certain specific cases should be resolved. Nowadays that is rare: students will say 'it depends on your own point of view'; when they are reminded that our beliefs can be mistaken the retort usually is that it is arrogant to suppose that one person could tell another what is the right or wrong way to act.

<sup>9</sup> Quoting Leiter, 'Law and Objectivity' in *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford: OUP, 2002) 969, 985.

subject to scientific method.<sup>10</sup> Therefore, an account of the primacy of scientific method comes from another domain; it looks fair game for the domain of morality. To match the iconoclastic ‘delivering the goods’, we can easily say that science has failed miserably to ‘deliver the goods’. It has delivered us global warming and nuclear waste, while morality delivered us with democracy, rights and toleration. This is rhetoric, of course, because on each side ‘what is delivered’ has been selective. The main point is that the moral scientist can only be convincing on a shared supposition that science is the dominant, or only, form of knowledge. The argument about delivery certainly does not prove that the domain is dominant.

### **Moral judgments as a skill**

If morality were only ‘I think it so’, it is not clear that anyone could challenge our views, even by reference to reasons that we have previously announced that are contrary to our views. One can argue that ‘what a person thinks’ must take into account what ‘the person as a whole has said’ but this smacks of the artificial; she could always say ‘I have changed my mind’. So if the thought alone counts, we would not be responsible for not having responded to reasons, and so we would not be responsible if our act was wrong. If morality were subjective in this sense (‘pure subjectivity’), there would be no need to give reasons at all. One would just act. One’s own view, however arbitrary, would be the right view and that would mean one is infallible. (Here is arrogance of just as grand a kind as supposing one were always objectively right). It would follow from this view that there were no rights and wrongs to morality at all.

But responding to correction, seeking advice, changing one’s mind, acknowledging one’s error, are all either actions or preliminaries to actions in the form of disposition-altering thoughts. Such attitudes of preparedness to argue, and to accept reasons for one’s action, are attributes of personal responsibility. Having these attitudes means you think that you need to justify your action, at least to the extent that it is in conformity with reasons that you have already subjectively considered. As soon as we talk of a person’s response to reasons, the objectivity – the correctability - of judgments begins. Reasons are subject to what are established practical requirements of rationality. They must be consistent and they must incorporate some minimum requirements of factual accuracy. And so even people supposedly in the ‘subjective’ state of possessing their own private reasons can intellectually embarrassed by other people: ‘your own reasons don’t stand up’ they can say.<sup>11</sup>

There are also important moral reasons that have special status. This is where people say that they just accept something as having ultimate or supreme value such as ‘treat people with respect’, or ‘you should never hurt anyone’, or ‘always respect life’ and leave it at that. Often people describe such reasons as their ‘ultimate premise’ or ‘fundamental belief’ and many connect that idea with their religion. It is a form of reason that is hard to attack; it is usually does not rely on historical facts and is too abstract to give rise to a charge of inconsistency. If there are truly ‘one’s own reasons’ it is here that they lie, and they constitute a kind of subjectivism. In this area there is a truth lurking in the idea that moral views in a common way of speaking ‘are true for you’.<sup>12</sup>

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<sup>10</sup> Richard Dawkins would strengthen his arguments about the paucity of religious belief by an acknowledgement of his own values. The argument against religion need not attack religious values; it is only necessary to attack the reason-less element in religious claims. See Dawkins, *The God Delusion* 2006 Bantam Press.

<sup>11</sup> Devlin’s argument that we find out what morality is by asking a cross-section of the community what they believed overlooked the argument that their beliefs in what was morally right might be rationally unsound. See Dworkin *Taking Rights Seriously*, the chapter entitled ‘Legal Moralism’.

<sup>12</sup> See above, n.5

Moral judgment can be challenged not only on ground of consistency or factual weakness, but also on the ground that they fail to reflect one's sense of what other people are like. People's ideas of who they are do not arise, at least solely, from within themselves. This idea expresses itself most naturally in the form of a metaphor, that of correcting oneself by reference to one's reflection, as we might see ourselves if we could somehow abstract those parts of us that are ours alone. I can be internally consistent, I can make good inferences from fact, my reasons are my own, not another person's - I do not just report what other people think - yet the resulting moral view is still correctable if I am not 'true' to what I am like as a human being. Take someone (perhaps like Nietzsche) who is consistent in his belief that the best moral life is led by those who are intolerant of physical and mental weakness and lack of discipline, who is himself physically and mentally strong, and who supports institutions and creeds that promote and entrench the superman who is physically and mentally strong. Can we attack his belief – advanced as a moral viewpoint better than the beliefs of others – providing reasons that could appeal to this person, reasons that we can justifiably say to him that he is wrong? Nietzsche represents significant strands in political movements, some that became well established. We can use racism as an example. People are consistent in their belief that certain ethnic groups deserve lesser treatment than other groups. They do not always rely on historical facts. There is a difficulty in criticising their view as logically inconsistent because there is nothing in logic alone that rules out, for instance, using the predicate of 'being Jewish' to describe how certain groups of people should be treated.<sup>13</sup> We cannot bring a charge that the bare logical distinction between different races is morally 'arbitrary'. If you stick to your belief that, say, blacks are different from whites, and that different consequences attach to that description, you are open to various charges, true, but it is not the usual or clear case of being inconsistent. To attack the racist requires more.

The attack requires something that gets at the racist's own being, to require him to compare his own self with those he thinks different from him. This requires a kind of hypothetical psychological-moral self-insight which would be got to along the following line of reasoning. We can accept, as a generalised objective truth, that people are similar in various ways. Indeed, people are similar to the extent that our senses of what is 'normal' or 'natural' borrow from this generalised fact, in a relationship of empathy. So it is 'normal' or 'natural' to feel particular degrees of physical or psychological pain in response to particular degrees of intervention. It is 'natural' for parents to be upset by their child's illness or death to varying degrees. It is 'normal' to respond to particular works of art, or to particular foods, or to feel repulsion at particular acts, such as torture. We would fail to develop much of a sense of human 'normality' without being prepared to accept some obvious truths for which no great deal of empirical enquiry is necessary. There are, as Hart said, echoing Hobbes, certain 'truisms' about human nature which it is 'natural' for us to accept as a matter of ordinary and contingent fact.<sup>14</sup>

Now imagine that people are *identical* in these different sorts of way. They in fact are capable of having exactly the same responses and feelings to every experience. Each person is capable of suffering precisely the same degree of pain, of feeling the same intensity of pleasure, and is capable of the same judgment about whether an artefact was beautiful or not. Since we are alike in more ways than we generally suppose it is not difficult to imagine this further step of our being exactly alike in our capacities. We would assume, too, that everyone knows that everyone has exactly the same capacities.

In this imagined situation, it is a crucial question whether, if we knew others were identical in such ways, there would be any room for correcting other people's judgments.

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<sup>13</sup> 'Being Jewish' is morally relevant in various contexts; Nazi reparations, for instance.

<sup>14</sup> *The Concept of Law*, 2<sup>nd</sup> ed. Oxford: O.U.P. 1994 ch.IX

The knowledge that we have the same capacities would provide a metric; that is part of the hypothesis. In fact, it is not a strange idea to suppose that we are exactly alike in many ways. Some people make this mistake, in fact and fail to give any other possibility a second's thought and, as a result, can make impossible demands on others. The untrained nurse in a children's home, for example, or a nursing home, or a psychiatric hospital, who has to be taught that the very young, the very old and the mentally disabled do not have the same sorts of capacity as he himself has. Apart from these special cases, it is an intelligible thought experiment to suppose that we have the capacity to make these judgments but differ in experience, intelligence, maturity and our level of education. People will make different judgments but even according to this hypothesis there will be a corrective possibility.

Surely judgments ranging from the moral to the aesthetic could be made: 'think how the mother would feel, contemplating abortion'; 'imagine being burgled'; 'that can't hurt that much'; 'if you work at eating olives the bitter taste becomes the best bit'; 'that perfume is too sweet, although it smells good at first'; 'lack of vibrato in that quartet movement works best'; 'you can be upset without realising it'; 'think what it would be like to be economically dependent on a spouse'; '*The Birth of Venus* stuns at first sight, but it is not the best of Botticelli'. Many of these sorts of statement are part of our daily experiences. They are not just appeals to internal reasons that can be attacked on grounds of inconsistency or misunderstanding of the evidence available. Rather, they are appeals to a different sort of judgment. They work by way of getting another person to see that, within them, is the possibility that they can 'come to see' how things are for them, by seeing how another understands that matter. It is a form of reflexive understanding that allows correction. One should hesitate to call it either 'external' or 'internal'; rather, it draws upon the essential likeness between people. The argument shows that there is at least the possibility of objectivity in the hypothetical situation where people are, as we might put it, subjectively the same. The strength of the argument arises from the hypothesis that we have identical capacities, which suggests the possibility of agreement in judgment.

Correction gains its sense in this imagined situation from the possibility of being nudged in the right direction by the equally capable but more experienced and perceptive. The imagined situation establishes how people of similar capacities might correct the subjective judgments of each other without merely finding internal inconsistencies. That conclusion undermines the popular belief in 'pure subjectivity'. The essence is that a person can be brought to understand that his initial judgment was right or wrong by the judgment of someone else because there is a non-subjective basis for correction. In other words, the 'purely subjective' judgment itself is insufficient even when logically consistent and relying on historically adequate grounds.

Let us now imagine a second hypothetical situation ('hypothesis II'). According to this, people's capacities are different, which seems closer to what we experience in reality. While people continue to make similar judgments ('murder is wrong'; 'intense cold is painful'; 'Beethoven wrote serious music'; 'we should respect human life') their judgments differ in significant ways, even after the probing, pointing out, and educating. They differ, for example, on whether euthanasia is murder, or on matters concerning the difference between Beethoven's earlier and later quartets. We assume that people have in various areas fundamentally different capacities for judgment; some are more intelligent than others, others know more, some have wider experience and some are more sympathetic. So, while people in general agree that in certain circumstances murder is wrong and human life should be respected some will make the judgment that in particular circumstances to carry out an abortion is wrong and others will make the opposite judgment. Many people take the abortion debate to be exactly like this; however much you try to persuade, cajole, argue and so on, people will remain fundamentally convinced in their different judgments.

But the second hypothetical situation brings in something from the first hypothesis, which is that people have similarities that can be inter-subjectively corrected. The second hypothetical situation brings out something we know, that people can be brought to see something by a person who has a superior (or, let us say, different) capacity. Or, rather, there is an argument that derives from basic similarity that brings with it the knowledge that some people can see things better. It is not a question merely of doctrinal education but closer to the idea of understanding that others can have better skills. Some people have better vision; some people can do sums faster than others can. In case of making value judgments, people understand that there are some who are capable of making better judgments than others; sport, music and business are obvious examples. But these differences between people are understood, and often admired, for the link that they have to those who lack them. We can see ourselves, as we see others, in the possession of such skills; true, we do not have them, but we can understand, in some obvious senses, what it would be to have them.

We can add a third hypothetical situation. Imagine that in this third situation, there are people whose judgments could never match. It is not even clear that these people are even capable of judgment. That thought experiment is entirely fanciful, however, because it builds into the situation the requirement that these characteristics are the characteristics of people. Yet how would we identify them as people? It is impossible to suppose that some people could routinely make judgments that were the exact opposite of ours ('murder is desirable, even required'; 'pain is pleasant'; 'food is unnecessary') on every point, and that we could still identify them as people. The closest we get in the idea is to radically different species, ants, say; even then, this assumes the mysterious assumption that ants make judgments, and any plausibility the imagined hypothesis has arises from supposing ants are like people because they are alive, and have heads and legs. This third hypothesis does not make sense and it is only included here because this possibility together with the other two exhausts the field.<sup>15</sup> We can drop it.

The philosophically important hypothetical situation is therefore 'hypothesis II'. The first allows correction, and thus objectivity in value, but this second hypothesis allows us to consider the possibility of fundamentally incorrigible differences. In a situation where people's capacities are different, are they incorrigible? Moral experience shows that our judgments can change; that people can persuade, convince and bring us to see something as the right state of affairs, or the right way to act. Or we simply learn from the practices of other cultures, or from historical example.<sup>16</sup> The ingredients for correction lie in the appreciation of this sort of situation.<sup>17</sup> The corrigibility of value, which so many philosophers find problematic, does not arise from the scientific domain; that domain is not dominant for value. Instead, we should view corrigibility in the domain of value more appropriately as improvement of a skill. Some musicians are not only better than other musicians, but can bring others to see how and why it is better to do things they way they do. It is a sense of correction that demonstration by example, the development of talents, and the extension of the capacities of the lesser skilled best brings out. That sense of correction is

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<sup>15</sup> See for discussion about the projection involved in making judgments of humanity: Williams, *Making Sense of Humanity* Cambridge: C.U.P 1995

<sup>16</sup> For a wonderful account of how we might learn from other cultures – here between people in France and Brazil in the 16<sup>th</sup> century - see David Wiggins' discussion of Montaigne's 'On the Cannibals' (*The Complete Essays*, trans. & ed. Screech, London: Allen Lane, 1991) in 'The Objectivity of Ethics' in *Ethics: 12 Lectures on the Philosophy of Morality* 2006 London: Penguin books 325, 337-353

<sup>17</sup> If something is right from my point of view only because it is my point of view, then there is no sense in which a change in my point of view is a change in the rightness of my point of view. The earlier point of view was right because the criterion of rightness, under the subjective account of morality, is just that it is my point of view. My view changes, but we can say nothing about its rightness or wrongness. Since we are here not taking account of how we speak about these matters, agreeing that the matter runs deeper than that, it is not sufficient to argue that as a matter of ordinary discourse people do not talk like that.

obviously present in almost any situation of teacher and pupil. It would be silly to say there is no correct way to play the violin; but equally silly to suppose that the skill could be taught merely by conventional instructions such as ‘no vibrato in this passage’, ‘it goes at this speed’, ‘understate, don’t overstate’. Such statements are accompaniments to demonstration. Even then, the pupil might not ‘get it’ and is taught, ‘See how I do it with the bottom half of my bow’ or ‘*That* is the right sound’. This idea of correctability is not that of ‘hypothesis I’ because it does not assume that the pupil has the capacity of the teacher; on the other hand, correctability in ‘hypothesis II’ is compatible with the development and creation of capacity: the pupil can become more skilful. If we suppose that moral reasoning is more like the exercising of a skill we get nearer to appreciating the status of moral correctability, and thus to the question of whether it makes sense to say that moral reasoning is objective.<sup>18</sup>

There are obvious differences between the violinist’s skill and being moral. Nevertheless, the similarity is sufficient to suggest that there is a sense of correctability that meets the ‘hypothesis II’ case where there is neither unanimity in judgment nor radical difference. Consider an analogy between music teaching and moral reasoning. It seems wrong to say of two great musicians that, because they play a great violin concerto differently, one at least stands in need of correction. On the other hand, some philosophers would say that the analogy works precisely to show that moral reasoning is not objective, and this is because of the ‘great musician’ point. Can we say that because Isaac Stern played the Beethoven violin concerto in the right way,<sup>19</sup> all the other great violinists must have got it wrong? Even then, objectivity for the ‘hypothesis II’ group of points of view could still be possible in many, if not most or all cases. It is a matter of lowering our sights and considering those improvable skills to the point where it no longer makes much sense, as in the case of the great musicians, to think things could be better.<sup>20</sup> It certainly makes a lot of sense to say that the way you played unaccompanied Bach just then, albeit perfectly in tune and with no significant deviation from time signature and expression markings was correctable. Any skill can be improved somewhere along the line and this is all that is necessary to establish the possibility of ‘hypothesis II’.

Of the interpretations of the great musicians, though, we can say something special. There is a sense in which Menuhin’s and Grumiaux’s playing of Bach are as equally good ‘in their own way’, and we can leave it at that. We cannot say they are ‘correct’ as each other; in some sense, we can say they are not correctable at all. This is what we should mean when say that their interpretations, the great interpretations, are true for them. It is perfectly plausible to say that great moralists give equally great accounts of what it is to do right; the margin of importance is beyond correction. Perhaps Gandhi’s insights about pacifism and humanity were as perceptive and true as were Churchill’s warlike perceptions about Hitler’s intentions. We can say the same sort of thing about evil. It is probably not necessary to ask whether Stalin was more evil than Hitler; the two of them were evil in their own ways. Nothing is gained by saying one was more evil than the other. The musicianship analogy establishes a sense in which moral reasoning can be taught and corrected, and so is ‘objective’. This sort of correctability is at first sight different from the way in which a

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<sup>18</sup> Hypothesis III might be more accurate than hypotheses I and II in particular contingent circumstances. But this is not a problem for the possibility of truth that some people are mad or mentally weak and unable ever to grasp truths.

<sup>19</sup> People express it as ‘the right way’ (‘the goal-keeper judged it correctly’; ‘Brendl got it right’); the word ‘correct’ is appropriate, too. Those who are bothered have in mind ‘correctness’ modelled on arithmetic. ‘Criterial’ is a term that has been used by legal philosophers to refer to that form of correctness: it is not just doing something correctly that is at stake but that the standards of correctness are of a particular type, namely, clear and certain and, as a result, productive of an uncontroversial result to those who accept those standards. Arithmetic, but not mathematics, is ‘criterial’ in this sense.

<sup>20</sup> See later remarks on Lord Bingham and objectivity. Are the highest appellate courts an analogous place where the different statements of the law are not correctable, the way Menuhin’s, Grumiaux’s, and Perlman’s different interpretations of the Chaconne are not correctable? It seems unlikely, not the least because of the way lawyers, and the courts themselves, unphilosophically speak.

person's errors of visual perception – the 'paradigm' point of view – can be corrected by pointing to the existence of some 'object' to the satisfaction of all points of view. It is interesting that language allows for the extension from this paradigm to cases such as musicianship and art generally. The fine musician shows 'perception' in what the music requires. Of course, there is nothing to 'see', but the analogy is powerful because it means that, similar to both visual and musical perception, 'the way things are' is significantly dependent on a person's point of view. Perhaps it is the wide-felt dependency on science that makes people suppose that the musician's perception is a non-central case of a point of view. The idea of 'the point of view' is centrally something like 'seeing the stag in the glen' or 'hearing the gurgling stream' and that seeing something musically is a kind of secondary metaphor, not so helpful. But think of the perception of matters of value as central, so that the primary viewpoint is expressed in terms of what we bring to the world, say, through the way we play a violin concerto. Use that idea as a paradigm and go back to the 'visual world' experience where reference to an external object 'demonstrates' the correct view. Given that the sense of demonstration is present in the artistic case, where one musician demonstrates to us how the violin should be played, or a musical work performed, you can get to a point where you feel doubtful why you should even suppose that the stag is 'external'. That is a feature of placing one domain more centrally than another. There are certainly elements of 'bringing us to see' in the case where someone fails to locate the stag within his field of view. In the same way, we can improve a person's skill in seeing; we can teach him to spot things that were not significant to him before.

### **Social practices and objectivity**

Common to the domains of science and value is the idea that a person makes judgments from 'a point of view'. The external object limits the scope of that judgment. That external objects exist in some sense is, relative to the scientific domain, uncontroversial. It is also hardly controversial that there are no external objects, reference to which is determinative of questions of morality. For questions of value, the existence of external objects determinative of a correct point of view would undermine the importance of that point of view. Even though it is important that individual points of view be correctable, a person cannot be wrong merely because of the existence of something external to him; that would milk him of what is special about him.

There are two ways to illustrate this. First, take a society in which people generally accept that it is morally permissible to keep people as slaves. It does not follow that because a practice of slavery exists in this society, slavery is right or wrong. To make the argument clearer, it would not follow from the fact that *everyone* accepted that murder was wrong that murder was wrong. Many believe that something different is required to explain what makes murder wrong. Murder is wrong because it causes pain, it restricts freedom, it demonstrates a lack of humanity, and it frustrates a life being lived and so on. That conclusion would justify something that is not contained in the external fact.<sup>21</sup>

It is not a particularly insightful point of logic that statements about external objects carry no moral meaning about what people ought to do; it is a matter merely of a missing premise.<sup>22</sup> As a moral point, it is very important indeed. If people thought certain external objects determined the morality of our actions, that would be a retrograde step; they would

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<sup>21</sup> A justification for treating an external object in a particular way, say, for example, by supposing that certain biological facts about a person's genes makes that person morally innocent in some situation, is not a scientific justification of that person's innocence. See Cohen, 'Facts and Principles' *Philosophy & Public Affairs* Vol. 31, No.3, Summer 2003, p.211

<sup>22</sup> It is difficult to think Hume meant anything other than this when he said that 'oughts' cannot be 'derived' from 'is's'. See generally Pigden, 'Logic and the Autonomy of Ethics' *Australasian Journal of Philosophy*, 67, p.137

lose sight of the necessity for evaluation and the rich critical power that moral discussion allows. It is the road to no morality at all. One particularly bad consequence would be political manipulation. People can create practices. What is well known as ‘political correctness’ leads precisely to that loss of richness of moral thinking. We should not equate morality merely with what a group of people, however good their intentions are, believe it to be.

There may be occasions when an initial decision is made that a particular group, or a particular person, has particularly good evaluative judgment and that, to save time, to exercise trust, what those people or that person says, should be regarded as authoritative. The decision to follow a lead in this way is itself an evaluative decision and so open to re-evaluation. If it were not so open, what counts as authoritative would only amount to parroting what a group of people, or a particular person has said. We accept what the doctor says, or what the Bank of England monetary policy panel recommends, because we have good grounds for supposing that what they will say makes good sense. What other reason could there possibly be for concluding that that their views hold authority in our lives?<sup>23</sup>

The second argument is relatively trivial but it needs to be stated. It is odd to suppose that there are external objects corresponding to moral statements in a way that would allow the same sort of correction of moral views as of visual perception.<sup>24</sup> We need not dwell on this point. Moral scientists do not themselves believe in such external objects for morality; and those who are not moral scientists obviously do not think that science constitutes the appropriate domain of knowledge for value judgments. All believe, in their daily and non-philosophically led lives that there are morally correct and incorrect ways to behave.

Note the distinction we can draw between external objects and social practices. To suppose that certain external objects corresponded to moral facts or simply *were* moral facts does seem ‘moronic.’<sup>25</sup> It is more difficult to understand the relationship between moral facts and those human rule-characterised practices such as slavery that are in some sense external – they certainly have empirically discernible, characteristic features. There are significant differences between such practices and external objects. For instance, external objects are in many cases visible. Not much more than ‘the stag of particular size antlers, and particular red colour in the particular place’ is required for correction of a mistaken view of a certain object. In the case of human practices, the attitudes and beliefs of people engaged in the practice need to be sufficiently gathered and these are things that we cannot observe within the scientific domain. For example, that human beings dominate others and that those others act in a way that primarily benefits the dominant human beings is close to but does not establish a slavery relationship. How the relationship is seen must be part of it but that is not enough either. An account of the meaning of ‘dominate’ and ‘benefit’ is not, at least clearly, reducible to empirical statements. ‘Dominate’ might require, according to some accounts, the idea of what is improper, as with some military usurpations of democratic rule and, to other accounts, proper, as with some benign aristocratic rule. We can say the same for chess pieces, say, as opposed to stags. ‘Chess’ requires a non-empirical explanation in terms of what is justified in chess playing.

The empirical – science-domain – aspect of human practices is therefore problematic. Hart attempted to define a social practice of rule following in purely empirical terms. A social rule existed, he said, when there is regularity of conduct, when deviations receive ‘hostile’ reactions from some members of the group, and those members ‘accept’ a standard

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<sup>23</sup> See Raz, ‘Authority, Law and Morality’ in Raz, *Ethics in the Public Domain* 1994 Oxford: OUP, essay 9; also see *The Authority of Law*, 1979 Oxford: OUP, ch.3. See also, Himma, ‘Just ‘Cause You’re Smarter than Me Doesn’t give you a Right to Tell Me What to Do: Legitimate Authority and the Normal Justification Thesis’ (2007) 27 *Oxford Journal of Legal Studies* 121.

<sup>24</sup> Mackie *Ethics* 1977 Penguin ch.2

<sup>25</sup> See Dworkin ‘Objectivity and Truth’ 25 *Phil. & Pub. Affairs* 1996

of conduct that 'justifies' those hostile reactions. It seems common sense to say we can observe regularities in human conduct; human beings regularly eat and drink, for example. What marks the difference between mere regularity and rule-governed conduct is the presence of a standard against which we assess regular behaviour. Although Hart thought that acceptance was 'reflective' and expressed an 'attitude', and in that sense was 'internal', he was adamant that the question whether people accepted a standard was an empirically observable fact.<sup>26</sup> As many have pointed out, the question of what amounts to an acceptance could call up answers of a non-external kind. Acceptance on moral grounds would be one, or economic or self-interested grounds could be others. However, Hart was clear. If we understand human practices not through an analysis of how people generally speak but as proposals, then matters are different. For then, his theory of rule following explains what people do when they offer a particular justification for assessing conduct: they are assessing the conduct by reference to an empirically what-is-accepted external fact. We *could* regard the identification of human practices as a matter within the scientific domain as a proposal concerning the practical advantages of seeing it that way. It is appealing to think of some practices as law in the form of an austere self-denying ordinance, one that eliminates value judgments from the identification of the practice. Hart did precisely this in *The Concept of Law*. In Chapter 9, he claimed that it is not a matter of 'linguistic propriety' (meaning it is not a matter of looking to a dictionary), that we choose between different 'conceptions' of law, but that it is a matter of considering the 'practical merits' of adopting either (that is, it is a proposal). He chose a wide conception of law – we should identify law as existing within the scientific-domain and identifiable solely by empirical means – over a narrower conception that requires judgments of moral value for identification.<sup>27</sup>

Leaving the practical merits of his theory of rule-following to one side, Hart was guilty of a confusion in his account of rules in his characterisation of the 'internal' point of view, that is, the acceptance by some members of a group of the standard against which conduct is to be judged. His mistake was to explain the idea by reference to an idea of detached empirical acceptance. We can take this as a proposal for his theory of law (in which case the proposal stands or falls on its merits) but it cannot be a sensible proposal for rule-following in general. Let us suppose that all cases of rule following are like Hart's account of rule following for law. It would mean that there would be no useful sense in which we could 'get into the mind' of those following any practice and that would remove any questioning about the point or role of the rule. It would be a disastrous proposal for education. Imagine teaching mathematics, or rugby, or Latin, or philosophy just by describing to people 'what is regularly done'. Acceptance as 'the empirical fact that people accept' is not a useful way of expressing acceptance. To accept something, even without reason, marks out an attitude; that attitude can only be the attitude of a person, with a point of view. It shows not just your willingness to think and behave in a particular way but also shows an endorsement. Accepting a rule is not the same as 'accepting that' one has, say, a particular disposition; it is, rather, an announcement that about one's future conduct from which one is free to depart.

Freedom to act is part of rule following. People who follow rules must also be capable of failing to follow them. Otherwise there would be no practical use in coming to the conclusion that they were following them.<sup>28</sup> Good practical sense requires that a person who

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<sup>26</sup> On Hart's views about the role of acceptance in rule following, see Michael Moore *Educating Oneself in Public: Critical Essays in Jurisprudence* 2000 Oxford: OUP Collected Papers.

<sup>27</sup> These arguments are clear in ch.9 of *The Concept of Law*, particularly 209-210.

<sup>28</sup> Freedom is implicit in 'habitual behaviour', too. As a matter of habit, most people sleep at night but it is habitual only because people have the freedom to sleep at other times. Compare this with just sleeping in general. It is odd to think people 'habitually' sleep; rather, they have to do these things. Habit merges into addiction where there is no longer freedom to deviate. And yet we are free to become addicted (the exception being the child born to an addicted mother) which is why none of us is addicted to water.

must conform to a standard should understand the reasons for that standard. Under Hart's account, however, rule following can only be explained in terms of detachment from such reasons. This must be wrong. So the idea of an empirical identification – an 'external' identification – of 'the acceptance' of a standard leaves something out of account. Merely understanding that others accept a rule – concentration camp guards, for example – is not the same as accepting that rule. Hart wants to allow for this and calls this detached sort of understanding the 'moderate' external point of view.<sup>29</sup> Actually, this view is no different in substance from what his theory claims for the 'internal' point of view. Although Hart was right to see that there was something 'internal' and therefore important about rule following, he was wrong to locate the identification of that 'internal' attitude in the scientific domain for the usual case.

The issue is important because we frequently need to obtain a significant sense of the purpose that various practices have in people's lives so that we can live harmoniously with them.<sup>30</sup> Just asking people what purpose the practice has for them does not advance us because we have then to evaluate the reports that we receive; we only have our own point of view. Even if we took a 'representative' report of the points of view of others, we would still have to evaluate that report. Moreover, in that sort of case, there is an evaluation required for the separate and important question of what counts as 'representative'. In Hart's theory of law, in which 'official' acceptance of certain rules determines legal validity, the question of who constitutes an official raises the same problem. One way of tackling this point might be to concede that evaluation is necessary in accounting for the non-empirically determinable purpose or significance in human practice, and then provide an empirical account of those purposes reported by those who are clearly engaged in the practice. We, as theorists, do not then say what we think the purpose of the practice is, but defer to what those engaged in the practice say about their practice.<sup>31</sup>

We should reject this proposal. First, and obviously, there is the possibility or even likelihood of divergent accounts. We would have to evaluate what counted as one engaged participant's view about what the purpose of the practice was over another. A detached account lacks the intellectual means for adjudicating between them. A less obvious but stronger reason is that we have to make an evaluation in order to choose as significant the views of the engaged participant. What scientific-domain reason compels us to choose the particular participant? In choosing a particular person to be the determiner of what is significant, we make detachment significant, the way Hart chose for law. That might be a good proposal but then, of course, that proposal is still open for evaluative assessment. Sometimes it is the best way, sometimes it is not. Personal diaries, autobiographies, contemporary biography, reports, even accounts books, give a good account of historical events. But it could not – obviously – always amount to a good account of history. In some cases, yes. Pepys' diaries, or Anne Frank's, or Captain Cook's maritime logs are examples. We need to assess the significance of diaries and we base our selection of them, and whatever other historical materials, on their significance; some, perhaps many, reports will have no significance at all.<sup>32</sup> This is just another way of saying that decisions about what is significant are evaluative and not in the detached scientific-domain.

One reason for the difficulty in providing an external account of human practices is, as Hart himself perceived, assessing the significance of rules. What practical purposes are served by the idea of rules and rule following? Rule-type reasons fundamentally concern

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<sup>29</sup> *The Concept of Law*, ch.6

<sup>30</sup> See MacCormick, *Legal Rights and Legal Theory* 1978 Oxford: OUP, 275 (appendix) for an excellent example illustrating this point. What could the Lilliputians make of Gulliver's watch without having any clue that it was for telling the time?

<sup>31</sup> This seems to be Dickson's approach in *Evaluation and Legal Theory* (2001) Oxford: OUP.

<sup>32</sup> Imagine that we thought that a proper historical account of anything would include all blogs.

actions that are identifiable by their general class, and the general purpose of the idea of rule following is to provide a rational constraint on arbitrary action, that sort of action justified on a whim. That constraint is internal, however, not external. To suppose that it determines your behaviour independently of what, overall, you should do suggests a spatial difference between you and the rule 'out there'. Here the ugly head of 'moral science' rears up. Hart's analysis of rules led him astray on this point, partly perhaps because he was concerned with the existence of what he called 'social' rules, and they are so clearly part of the idea of law. There is no good reason for restricting an account of rules in this way. Many of the appeals people make to rule following do not refer to actual practices. It follows that there is no useful metaphorical sense that one can 'draw down' a rule that governs conduct from an externally situated position. Another way of illuminating this point is to say that what is special about rules is their patterned requirement of generality and uniformity rather than their 'externality'.

Take the following four moral judgments to be true and then propose a rule that would justify a judgment on the set of facts at the end:

1. It was wrong that Caleb maliciously dissolved paraquat in his wife's limejuice and thereby killed her.
2. It was not wrong that Mrs Krebs intentionally strangled her husband in self-defence when he was about to crush her.
3. It was wrong that Mr Korba encouraged Steerforth to drop a marble tile from a crane into a procession, injuring a journalist.
4. It was not wrong that Dr. Crum, who is insane, kicked a hen to death when he did not know what he was doing, let alone that what he was doing was wrong.

Mr Klutz sees that Pok Choi is out of his mind on medication and tells him, for a joke, that he is about to be seduced by Nagel, who is standing nearby. Pok Choi throws a carburettor at Nagel. Nagel, thinking he is being attacked, trips Pok Choi up, killing him.

What is the significance of saying that a decision is justified if it is 'in accordance with a rule?' Could a person merely look at this particular set of facts and make an overall judgment on it, without having to refer to 1.- 4.? It is not clear, however, what that claim would amount to. We would expect a person who said that Klutz had done nothing wrong, full stop, to give a reason, or at the very least, to acknowledge that there were reasons which he could not articulate. This last is not a difficult idea; we can do all sorts of things – make judgments when we drive, we cook, run, catch a ball, do a mathematical calculation, where we are aware that explanations of how we do these things exist but we cannot say what they are. We could ask a person who made such a judgment whether, if the same facts arose in a day's time, they would also disclose something wrong. It would be surprising if he said his judgment would be different. We could also ask this person their views on 1.-4. and it would also be surprising if he did not have views. If he thought that 1.-4. all disclosed moral wrongs, then we could put it to him that he was guilty of an inconsistency: how, if he thinks that foreseeing harm which it is in a person's power to prevent, and then causing that harm, is morally wrong, could he think that Klutz had done nothing wrong?

Reflection on intuitively made judgments can bring us to alter our judgments; we can adjust them to fit logical patterns. The pull towards patterning is powerful and it is an attack on our moral judgment to show that our judgments do not form a pattern. Nevertheless, to say that we are required to judge in a consistent manner is often overstated. We think of the requirement as one of rationality, of logic. But the sort of consistency demanded here is not one of logic – quite. The two statements 'It is morally wrong to harm another carelessly' and 'it is not morally wrong to harm another carelessly' are contradictory; to borrow from the

logical vocabulary of all possible worlds, the statements cannot both be true nor can they both be false. Both these statements state moral facts. They also imply rules to the effect of what people ought and ought not (or must and must not) do.<sup>33</sup> It is appealing to see rule following as a result of ‘creating a pattern’ to test consistency in argument; it allows us to say that a person has failed to create a sufficient reason in logic for their judgment that a particular action was immoral. That person can revise their judgment in any of the five situations, or they can contest the charge of inconsistency.<sup>34</sup> But consistency cannot be the only test, because it is obvious that we can behave in a way that is consistently wrong. Often just what is meant by a person being ‘internally’ inconsistent is that the reasons that they provide, while presenting a consistent pattern, do not in some other sense ‘add up’; they fail to meet some other test, the precise nature of which needs pinning down.

## Objectivity in law

The argument for objectivity in law can only be stronger than that for moral judgment. A case for proposing a conception of correctable moral judgment is superior to one that is not correctable; also, we learn that the source of correction is something that lies within ourselves. Whether we follow Bentham and Hart, who said that law and morality were strictly demarcated disciplines, or whether we think that legal judgments are only a type of moral judgment, it is common ground that when lawyers and judges discuss controversial cases they are arguing matters of morality. So the arguments about moral objectivity apply to legal arguments. However, there is an additional element in the case of controversial legal argument; that practical sense requires that some person or institution must make a decision. And of course, since the argument is moral, it must remain sensitive to substantive reasons. If it were only that a decision must be reached, judges would not be necessary. Nor would lawyers be necessary, because the need for a decision could in most cases be determined by the court clerk simply throwing dice with the attendant advantages of speed and economic efficiency. Rather, we expect judges to reason their way to a decision; the point of the final vote is that where there are differences after argument, and these differences cannot be reconciled, the vote is necessary. No one supposes that a court case, before which the arguments for the litigants are presented, would consist only of a voting mechanism. Therefore, there is a different factor in play in relation to legal argument that is the institutional requirement for a decision. Given the argument from stipulation, there are good practical reasons supporting a conception of judicial decision-making in which judges should consider the reasons advanced by litigants, provide counter-reasons where necessary, produce their own reasons, and take all this business seriously, not just as a callous piece of verbal word-play before tossing a coin. These two reasons, the existence of a social mechanism, plus a good reason for accepting an argumentative-type conception for it, support the view that the arguments for correctability – for objectivity – add to the arguments for the objectivity of moral judgments.

Is there a right answer to the question as to whether the New Zealand All Blacks play better rugby than the English team? We cannot settle the question as a matter of empirical fact,

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<sup>33</sup> Normative logic is a different sort of thing since people are often subject to conflicting rules. Morality might require someone both to break the law (in an emergency, say?) and require them to comply with that law. But if the concepts (say of ‘conflict’ and ‘contradiction’) were determined by their practical purpose we might not need to assume that and assume something else, such that normative conflicts are always resolvable through, perhaps, categories such as ‘emergency’, ‘martial law’, and so on. Hart noted the differences in normative logic, about which a great deal has been written without reference to its point, by saying that although conflicting norms do not ‘contradict’ each other they ‘contradict’ in the sense that they imply the ‘logical impossibility of joint conformity’. See Hart ‘Kelsen Visited’ in *Essays in Jurisprudence and Philosophy* (1983) Oxford: OUP

<sup>34</sup> They thereby engage with us in Rawls’ idea of ‘reflective equilibrium’.

like a scientific matter. People certainly talk as though there were a right answer to the question; at times, it seems that many people can speak of nothing else. Even ignoring the phenomenology of people's attitudes, there is an added factor, that there is a carefully designed social arrangement by which we seek answers to that question: the international rugby test matches. Of course, many people will say that, in spite of the points superiority of one team over another, they were largely undeserved. Nevertheless, the mechanism is in place. For the final arbiters of those scores, for which there are finely-tuned rules, namely, the referees and rugby judges, it seems odd to suppose that their decisions were merely 'preferences'. Their decisions are frequently challenged, impugned, contradicted and criticised on the basis that they were incorrect. The sorts of criticisms seem derived from what people would expect from the nature of the institution of refereeing and judging. These criticisms accordingly seem to be something over and above general value judgments as to which team played better rugby, for it is usual for commentators to say that although one team won the Test match series, it was one on 'points' alone, not good rugby.

What about a banal case? A prize is to be awarded for the child under 12 wearing the 'nicest' beachwear. Three judges will vote. We could say that the three judges need only vote their own personal taste and that this is not a matter of 'judging' at all. What if the rules require each entrant to provide reasons why their particular beachwear is the 'nicest'? The judges have to consider those reasons. What if an entrant wears something that looks good but is unsuitable for the beach? What if another wears something rude? Even in this banal case, the logic of the judging forces through a particular way of thinking, one in which competition between reasons seems a natural way of describing it. If two of the judges outvoted the third on the ground that they were both related to the winner (one was her mother, the other her aunt) it seems difficult to say that there was judging at all. What is the best conception of judging that is at stake? Again, we can stipulate that it should be the fairest. And so, in the banal case, because it appears that an entrant would have a reasonable cause for complaint that the judges had treated her unfairly if they merely voted, the logic of judging in the case requires that the judges act on the assumption there is a right answer. Someone will object, of course, that 'you cannot get a right answer out of nothing'. There are two answers to this. If you think this is a reasonable objection, then consider whether you are just fixated by a – perhaps pseudo – account of what amounts to correctability in science. Such a right answer is clearly not available here. If you think it should be available, then you need to show why making value judgments should be treated as part of the same body of knowledge as scientific knowledge. But you also need to show why you think that the judges in the banal case should not make an effort to distinguish the 'niceness' of one competitor's beachwear over another's.

To the banal case we can add another, one that some might want to call the 'mad' case. One way we often draw a distinction between matters of pure subjectivity and other matters is by using the ideas of 'taste' and 'judgment'. My liking white bread, vinegar and black pepper with oysters is not to everyone's taste. We think that my liking for it is for me only, and that no one can say that there is a right answer to that question. That I have that taste we might say is naff, but I cannot be mistaken; we must accept that I 'like' it. Whereas if I make a judgment about a finer point of rugby, that judgment invites a counter-argument; someone can say my judgment is wrong and I too can admit, if convinced by what he says about the nature of scrums, say, that I was wrong. That does not appear to work with matters of taste. I can learn better tastes, but I cannot say I had made mistakes in the past about what tasted good; rather, we take it that my taste has changed. Let us stipulate that 'taste' means 'non-correctable' because it serves a purpose that such circumstances be non-correctable, and that 'judgment' means 'correctable' (again, as above, in the sense of correcting a skill). That stipulation will make some suppose this really is a 'mad' case. We now hold a competition,

in which people are invited to say which of six different vegetables tastes ‘the best’. There is an entry fee; and the prize is substantial and so it would not be correct to say that nothing hangs on the outcome. Should we say this competition is only a sham? The judges have a duty to decide, with reasons, which entrant is right, which entrant has correctly identified what vegetable tastes best. What it is tempting to say has happened, of course, is that something that many people thought was entirely a matter of taste has become, by the requirement of a decision – the practical outcome of the judging – a matter of objective judgment.

*Lord Bingham on objectivity.* Some people will find the ‘mad’ case just that but will be struck by how our conception of judging changes once we focus on the practical outcome. There are numerous people who take the taste of vegetables to be of great importance; for many, a livelihood depends on it. Vegetables aside, however, what about legal judgments? Apart from the arguments for the desirable correctability of moral judgments, it seems there is an additional argument for correctability of legal judgments arising from the logic of the judicial process alone. Not all judges agree. In a recent interview,<sup>35</sup> Lord Bingham said ‘... when you are deciding a case you usually feel that there is a choice of answers, and one doesn’t usually regard the answer that one ends up rejecting as being completely and utterly hopeless or untenable; you just regard it as an answer that you don’t prefer.’ Later on he said, ‘To say that there is one right answer and one wrong answer is just not at all how it feels.’ Admitting there was ‘disagreement’ in the House of Lords (but not as much as in the U.S. Supreme Court, or the High Court of Australia, he conceded), he pointed out how there are a ‘significant minority’ of cases in which one or two of the five members will dissent and says: ‘I don’t think the other three would say, “Well, they’re just wrong”. They’d say, “We don’t agree with them”.’ This is illuminating. Most would agree with Lord Bingham that it would be inappropriate, at least in the vast majority of cases, to say of other judges in an appellate decision that they are ‘just wrong’; indeed, that would be wrong in any academic seminar, or committee of any intellectual standing. To use Lord Bingham’s term, the ‘rarefied’ nature of the argument – where controversial issues have been very finely honed – would make the existence of an obvious mistake on either side pretty well impossible. This suggests that his understanding of what ‘the right answer’ means is too narrow. Something can be right or wrong without there having to be a thundering ‘knock-down’ argument; what is necessary is the possibility of being able to indicate, with reasons, where you think that other person may be wrong.

Does it matter? It does. People make mistakes about what they should morally do all the time; who would deny that? It is a mistaken moral view in many people’s eyes, for example, to suppose that the Government should seek to prevent stem-cell research. We can advance reasons for that view and we can countermand those reasons with reasons. We can form a view about the balance of reasons. If we all thought that matters of morality were matters merely of ‘preference’ and that there was no ‘right or wrong’ of the matter, and everyone thought the same, there would be no argument about the matter and so, whether stem-cell research went ahead would be dependent on ... well, what? According to ‘what the majority want’? Would that be morally right? No, because under the hypothesis that there is no ‘right or wrong’ of the matter, ‘what the majority wants’ is neither right nor wrong. What

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<sup>35</sup> See *The Susskind Interviews: Legal Experts in Changing Times*. Ed. Susskind. (London: Sweet & Maxwell, 2005). It is an interesting collection of interviews of members of the legal (and British) establishment. It is well done by a genial and intelligent interviewer. A mild criticism is that the book could have been more open in its selection of interviewees. These are an establishment bunch: Lord Woolf, Lord Irvine, Cherie Booth, Lord Falconer, David Pannick, QC, and others, including both Lord Bingham and John Gardner, of Oxford. Why not Michael Mansfield, QC, Professor Neil MacCormick of Edinburgh, Professor Sir Ian Kennedy, QC, Lord Justice Sedley, and many others – as those of the sort I suggest are not radical by any means - who, I think, would have provided quite a different but equally as intellectual account of things.

would happen is that people would become morally lobotomised: there would be no felt need for argument. This would be a bad state of affairs indeed.

On the top of these arguments is the extra argument for the existence of right answers in court. Think of the litigant who has a grievance that someone has infringed his legal rights and has, accordingly, taken an appeal on a decision against him to the House of Lords. He has spent a large amount of money in the hope of obtaining vindication of his rights. Now it must be reasonable for him to assume from the logic of the judicial institution - the opposing arguments presented by counsel both sides, the presence of the judges who will make 'judgment' on the question of whose view of the law is right - that there really is a right answer to the question of whether he did have that right. What would this litigant, at least, make of Lord Bingham's view? What, he might ask, have I paid all that money for?

It is instructive to consider results from the search engine on WestLaw of an internal search on the word 'correct' in the most recently reported House of Lords decisions where Lord Bingham was one of the judges. In the last case at the time of writing this paper, *Jones v. Whalley*,<sup>36</sup> he says the following (emphasis added): 'Mr Swift submitted ... that the forms ... stated the *true legal position* accurately and the form in the present case did not. But Mr Jones was not to be deprived of his rights by a misstatement in a police form. If the police chose to caution Mr Whalley and not to instigate a prosecution, that was their decision and could not deny to Mr Jones the exercise of a right he enjoyed at law. *This is in my opinion correct.*'<sup>37</sup> In the House of Lords decision immediately before *Jones*, *Crehan v. Inntrepreneur Pub Co.* Lord Bingham says: 'As already explained, *I do not, with respect, accept the Court of Appeal's approach as correct*'.<sup>38</sup> And in the case before that, *Horton v. Sadler*, he says:<sup>39</sup> 'Counsel for the appellant submitted that the effect of s.11 is to provide the defendant with a time limit defence in any proceedings brought after the expiry of the three-year period ... Thus the question for the court under s.33 is always whether it is equitable or inequitable as between the parties to override the time bar ... *This analysis is, as I think, plainly correct.*'<sup>40</sup>

It is therefore clear that Lord Bingham when engaged in judging uses the idea of correct and incorrect judgments of law. Why could it possibly be the case, then, that he thinks that there is no right answer? Is there a distinction being drawn here between the 'correct' answer and the 'right' answer? Of course not: '2+2=4' is correct, right, true and therefore 'the best answer', and '2+2=3' is incorrect, wrong, and false. It is interesting to compare Lord Hoffmann's forthrightness in this same case: 'My Lords, it is with a reluctance verging on disbelief that one is driven to conclude that *the deliberate opinions of Lord Wilberforce and Lord Diplock were quite wrong. ... for the reasons given by my noble and learned friend Lord Bingham of Cornhill, I think that they misconstrued what is now s.33 of the Limitation Act 1980.*'<sup>41</sup> (So Lord Hoffmann certainly thinks that the judgments of others can be 'completely and utterly hopeless or untenable'). Finally, take Lord Scott's statement in another very recent House of Lords case: 'It was common ground that the school had not complied with the statutory requirements of a s.64 exclusion. But *the assumption that the exclusion of the boys from the school was an exclusion to which s.64 applied was, in my opinion, mistaken.*'<sup>42</sup>

Perhaps taking sample phrases from judgments like this is unsystematic. On the other hand, the criterion of selection is appealingly straightforward, for the examples are the latest

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<sup>36</sup> [2006] 3 W.L.R. 179

<sup>37</sup> At 186, emphasis added

<sup>38</sup> [2006] 3 W.L.R. 148, at 154, emphasis added

<sup>39</sup> 2006 WL 1546650

<sup>40</sup> Paragraph 20, emphasis added

<sup>41</sup> Paragraph 22, emphasis added

<sup>42</sup> *A v. Head Teacher and Governors of Lord Grey School* [2006] 2 WLR 690, 713, emphasis added

four cases reported in the House of Lords at the time of writing this paper. The comments Lord Bingham made in a radio programme<sup>43</sup> and reported affirmatively by him later contradict what he and some of his fellow judges in fact say. It may be that, for him, the idea of correctness is licensed by the insertion as above of the ‘in my opinion’ before the use of ‘correct’, ‘misconstrued’, and ‘mistaken’. How licensed? Scientists will venture opinions and at the same time suppose them to be not only correct, but the sorts of question that are capable of being tested and found incorrect. That they are their ‘opinion’ makes no difference to that fact. One would wonder, too, why, if they believed them not to be correct, why they would venture them. Further, if something’s being an opinion makes no difference to the ‘hard truth’ of a scientist, why should it make a difference in the case of ‘soft truth’? More pertinently, because it has realistic appeal, lawyers make a great deal of money out of writing ‘opinions’ which, they believe, state the law correctly. Indeed, their skill in stating what the law is must be one major measure of their worth as a lawyer. That idea – of stating what the law is – must entail that there are correct as well as incorrect ways of stating the law.

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<sup>43</sup> In Radio 4’s programme on matters of legal interest hosted by Clive Anderson called *Unreliable Evidence*, on topics of legal interest, broadcast a discussion on the topic of whether there could be ‘one right answer’ in legal cases on 7<sup>th</sup> May, 2002. The discussants were Lord Bingham, John Gardner (Professor of Jurisprudence at Oxford University), Lord Justice Carnwath (Chairman of the Law Commission at the time) and I. Lord Bingham and John Gardner were adamant that there were no right answers in ‘rarefied cases’; I maintained there were. In the later interview with Richard Susskind, cited earlier, Lord Bingham referred to my view as ‘bizarre’.