RESPONSIBILITY IN LAW AND MORALITY

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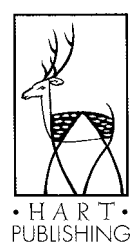

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In Honour and Loving Memory of
Phyllis and Stanley

Preface

In The Anatomy of Tort Law (1997) I argued for an understanding of tort law in terms of ideas and principles of personal responsibility. Referring to that book, Simon Deakin and Basil Markesinis have written that, although the development of liability insurance and vicarious liability means that individuals rarely pay tort damages, "one still finds tort lawyers who are willing to justify most tort rules by reference to rules of morality" (Tort Law, 4th edn. (Oxford, 1999), 6). In this book, I explore in more detail the relationship between law and morality. In the process I also reflect upon the relationship between legal reasoning and moral reasoning, and between philosophy and law as academic disciplines. While I discuss the nature of vicarious liability and the impact of liability insurance on tort law and the tort system, I simply assume that viewing tort law (as well as criminal law, contract law, administrative law, and so on) in terms of personal responsibility is a fruitful exercise, apt to reveal at least part of the truth about some very complex legal and social institutions. I certainly reject the idea—implicit in the comment of Deakin and Markesinis—that rules of law "regulating impersonal legal entities or the possible liability of innocent absentees" are not of "moral" significance. Readers must judge for themselves how well my initial assumption about the moral nature of law survives the scepticism of Deakin and Markesinis.

This book could not and would not have been written without the time for reading and reflection that my present post gives me. Equally important is the intellectual stimulation afforded by the vibrant multi-disciplinary environment of the Research School of Social Sciences at the ANU. I owe various other debts of gratitude. Tony Honoré's marvellous work on responsibility provided the initial stimulus for my interest in the topic. He was also kind enough to read the entire manuscript and to give me extensive and penetrating comments. I received great help from Niki Lacey, Declan Roche and an anonymous referee, who all read complete drafts and gave me the benefit of their wisdom. Declan was unfailingly encouraging. Allan Beever, Tony Connolly, Jim Evans, Desmond Manderson and Pete Morris read and commented perceptively on various chapters at various stages; and Tony Connolly gave more of his time teaching me about philosophy than I could decently have hoped for. I enjoyed and benefited much from stimulating discussions with Claire Finkelstein, Leo Katz and (as ever) Jane Stapleton. Andrew Ashworth helped me on several points of criminal law. I can only hope that none of these friends will feel that they wasted their precious time attempting to set me straight, or that the results are any of their responsibility!

Peter Cane
Canberra, 10 January 2002

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Moral and Legal Responsibility

1.1 PROSPECTUS

1.1.1 Starting points and themes

LIKE "RIGHT", "DUTY" and "property", "responsibility" is a fundamental legal concept, a basic building block of legal thought and reasoning. It is even more abstract than these other concepts, and it tends to appear at a later point in chains of legal reasoning than its more concrete companions. It is rarely an "active ingredient" in legal rules—a notable exception being the problematic idea of "assumption of responsibility" in tort law.[1] Indeed, as a first reaction one might be tempted to say that "responsibility" is not a legal concept at all. "Liability" comes much more readily to the legal mind than "responsibility". But the two terms are certainly not synonymous. In tort law, for instance, a person may be responsible for harm in the sense that they caused it by their negligence, but be immune from liability for that harm. In many jurisdictions, judges and witnesses enjoy immunity from tort liability for reasons having to do with the functioning of the legal system as a whole.[2] Just as importantly, a person may incur legal liability even though they were not in any sense responsible for the event that triggered the liability. Restitutionary liability of an innocent, passive recipient of a mistaken payment[3] or beneficiary of a fraud[4] is a good example.[5] There may, in brief, be both responsibility without legal liability, and legal liability without responsibility. Responsibility is an important criterion of legal liability, but not the sole criterion.[6] Putting the point another way, liability is a trigger of legal penalties and remedies, whereas personal responsibility is one (but not the only) trigger of legal liability

On the other hand, it is true that "responsibility" is used much more commonly outside the law than in legal discourse to express ideas that underlie both it and "liability". Thus we tend to speak of "moral *responsibility*" and "legal *liability*". I think we do this partly because "liability" refers primarily to formal, institutionalised imposts, sanctions and penalties, which are characteristic of

[1] See 6.5.1.1.

[2] Cane (1996), 228–33. In some jurisdictions advocates, too, enjoy immunity from liability in negligence: *ibid*., 233–7; but note *Arthur J.S. Hall & Co* v. *Simons* [2000] 3 WLR 543.

[3] Virgo (1999), ch. 8; Burrows (1993), ch. 3.

[4] *Foskett* v. *McKeown* [2000] 2 WLR 1299.

[5] Criminal offences of possession provide other instances: Ashworth (1999), 111–12.

[6] See further 2.6, 6.6.

law and legal systems but not of morality. "Responsibility", by contrast, refers to the human conduct and the consequences thereof that trigger such responses. This difference of usage does not, however, indicate that ideas of responsibility are less important in law than in morality.

"Responsibility" is a term that is used in many different senses, and it is no part of my project to stipulate how it should be used. This book offers an account of responsibility from a distinctively legal point of view. As a result, my basic concern is with a conception of responsibility that is bound up with (but distinct from) the idea of exposure to sanctions. This is a book about law, not a work of philosophy. Although it does not provide a detailed account of any particular area of the law, or of the law of any particular jurisdiction, the book is about particular areas of the law (those in which the idea of responsibility plays an important part), and about the law of actual legal systems. It is not about law and legal systems in general, or about "the idea of law", or even about "the idea of legal responsibility".

My decision to write the book was partly provoked by two casual observations and a conviction. One observation was that philosophers interested in concepts, such as responsibility, that play an important part in practical reasoning[7] in both law and morality (and which I shall refer to as "complex" concepts),[8] pay surprisingly little attention to the legal "version" of such concepts.[9] This is, perhaps, a result of the artificiality of the boundaries between academic disciplines. But it also reflects, I think, a certain view about law that seems to me to be implicit[10] in much philosophical analysis of complex concepts. To people who take this view, law and legal concepts often seem artificial and contrived, the product of political power and unprincipled compromise between opposing ethical positions, consisting of arbitrary rules designed to solve "practical" problems such as problems of proof. By contrast, "morality" is seen as "natural" and, at its best, the product of calm, rational and principled reflection on the nature of the world and of the place of human beings in it. According to this account, morality is in some sense prior to and independent of social practices in general, and of legal practices in particular. Whereas law is necessarily a social phenomenon, a matter of convention and practice, morality is ultimately non-conventional and critical, providing ultimate standards for the ethical assessment of law and other social practices.[11] Joel Feinberg puts the point well when he speaks, in relation to responsibility, of:

> "a stubborn feeling . . . even after legal responsibility has been decided that there is still a problem . . . left over: namely, is the defendant *really* responsible (as opposed to 'responsible in law') for the harm?"[12]

[7] i.e. reasoning about what to do and how to behave.

[8] Very many legal concepts are complex. An example of a non-complex legal concept is "tort".

[9] An exception is Wertheimer (1996), esp chs. 2 and 5.

[10] And sometimes explicit. See, for instance, the discussion of the views of Lewis in 2.5. Witness Nagel's much-quoted statement that strict liability "may have its legal uses but seems irrational as a moral position": Nagel (1979), 31; and the statement of Velasquez cited in 2.3 at n. 55.

[11] Coady (1991), 375; Sumner (1987), 90–1 (speaking of moral rights).

[12] Feinberg (1970), 30 (original emphasis). Feinberg goes on to cast doubt on the value of this way of thinking about responsibility. This attitude is not exclusive to philosophers. Consider, for

In this view, moral propositions can be "true" in a way that propositions of law cannot; and moral responsibility can be "real" in a way that legal responsibility cannot.

The second observation was that many theorists who call themselves "legal philosophers", and who are interested in complex concepts, tend to address their work to, and to engage the concerns of, philosophers rather than lawyers. They seek, first and foremost, to make contributions to debates in social, moral and political philosophy, not to debates about law, legal policy and legal practice. Their analyses often start with ideas found in philosophical literature that is, to a greater or lesser extent, unconcerned with and unaware of law; and their main aim is to interpret legal practices using "philosophical" ideas and modes of analysis. Some of the more abstract theorising about corrective justice in tort law provides a good example of this technique.

The conviction that provoked this book was that careful study of the legal concept of responsibility and of the legal practices associated with it could tell us a good deal not only about legal responsibility, but also about responsibility more generally. The idea is that by starting with a body of legal materials and with the legal version of the complex concept of responsibility, we can add to and enrich analyses of responsibility that more or less ignore the law. As I will argue in due course, this is because law possesses institutional resources that enable it to supplement extra-legal responsibility norms and practices, to influence thinking about responsibility outside the law, and to provide a way of managing, if not resolving, extra-legal disagreements about responsibility.

The analysis in this book has three main underlying strands that will, to some extent, be intertwined. One is concerned with the nature of law and "morality" respectively, and with the relationship between them. I do not mean this to be as ambitious as it sounds. I will not attempt to analyse the concept of law, or of a legal system, or of morality; and I will not attempt to give a thorough account of the relationship between them, or of their respective purposes and functions. But I do need to mark out two "normative domains"—that of law and that of morality—in order to be able to explore certain comparisons and contrasts between the versions of responsibility associated with each. The distinction between law and morality will also enable some comparisons and contrasts to be drawn between "moral reasoning" and "legal reasoning" as techniques for generating normative conclusions about responsibility.

The second strand is more substantive: what can we learn about responsibility more generally by analysing legal responsibility in particular? The analysis I offer of legal responsibility will be based on, and will elaborate, two related arguments. The first is that legal responsibility can fruitfully be understood as a set of social practices serving a number of social functions. The second argument is that legal responsibility is relational in the sense that it is concerned not

instance, the view that "[o]ne of the major distinctions between criminal law and other methods of constraining people's behaviour is that a criminal conviction often conveys a message of moral as well as legal censure": Arenella (1989), 61.

only with the position of individuals whose conduct attracts responsibility, but also with the impact of that conduct on other individuals and on society more generally. By contrast, much philosophical analysis of responsibility focuses on agents at the expense of "victims" and of society.

The reason for this concentration on agents provides the third underlying strand of my analysis. A common argument in the philosophical literature is that the essence of responsibility is to be found in what it means to be a human agent and to have free will. According to this approach, responsibility is a function or aspect of human agency and free will; and a proper understanding of responsibility requires a "naturalistic" or "quasi-scientific" account of "the facts" about human agency and freedom. There is disagreement amongst philosophers about what freedom means, about whether human beings are free in the relevant sense, and about the relevance of freedom to responsibility. The importance of this is that on one view, if human behaviour is unfree in the sense of "causally determined", humans "are not responsible" for their behaviour. Nevertheless, both in law and "morality" we regularly hold people responsible, and treat people in certain ways on the basis of our judgments of responsibility. Our responsibility practices have developed, and thrive, independently of "the truth" about human freedom. In this book, I am not concerned with whether a naturalistic account of responsibility is possible; or, if it is, with what the "truth" is about responsibility. My concern is with responsibility practices and with the concepts and ideas of responsibility on which they are based—in other words, with "conventional" responsibility.

Of course, those who believe that a naturalistic account of responsibility is possible, and that some naturalistic account is true, would argue that responsibility practices that conflict with the truth about responsibility (which, to adopt and adapt Rorty's phrase, do not "mirror nature")[13] should be abandoned. Because my concern is with responsibility practices that have developed independently of "the truth" about human freedom, I will not consider whether the moral and legal responsibility practices I examine and seek to illuminate are consistent with the natural truth about responsibility (whatever that might be).

1.1.2 The structure of the book

The structure of the book reflects its starting point in the project of seeking a better understanding of the relationship between legal and moral responsibility and between legal reasoning and moral reasoning. The analysis throughout is informed by seven recommendations for helpful ways of thinking about responsibility that are set out in chapter 9 by way of a summary of the main arguments of the book. In the spirit of these recommendations, chapter 2 deals with taxonomies of responsibility ideas, taking as its point of departure H L A Hart's

[13] Rorty (1979).

well-known catalogue of responsibility concepts. This chapter introduces two distinctions that are central to my analysis . One contrasts historic responsibility with prospective responsibility, identifying the former with the issue of "what it means to be responsible" and the latter with the issue of "what our responsibilities are". The other distinction introduced in chapter 2 is between three different paradigms of legal responsibility—the civil law paradigm, the criminal law paradigm and the public law paradigm. The distinction between the first two paradigms plays a particularly significant role in the discussion of responsibility and culpability in chapter 3.

The main issues tackled in chapter 3 are the relationship between responsibility and luck, the importance of outcomes (as opposed to conduct) as a ground of responsibility, and the moral status of negligence-based and strict legal liability in light of the emphasis on choice in many philosophical accounts of responsibility. Chapter 4 deals with causation. There are large philosophical literatures on both causation and responsibility, but less has been written that directly addresses the relationship between the two concepts. This is the focus of discussion in chapter 4.

The main topic of chapter 5 is a discussion of corporate responsibility against the background of philosophical accounts of the relationship between personality and responsibility. The analysis of grounds and bounds of responsibility in chapter 6 rests on the idea, first introduced in chapter 2, that a full account of responsibility requires analysis not only of what it means to be responsible, but also of what our responsibilities are. In other words, responsibility practices are concerned not only with allocating the costs of harm on an historic basis, but also with distributing risks of harm.

Chapter 7 explores various ways in which rules and principles of responsibility are used as resources to achieve practical objectives other than their straightforward application and enforcement. In particular, the chapter deals with settlement of civil claims and criminal prosecutions, selective enforcement of criminal law, and the impact of liability insurance on principles of legal responsibility. Chapter 8 examines the third of the three paradigms of responsibility introduced in chapter 2—the public law paradigm. The basic argument is that the distinctiveness of this paradigm resides in the answer it gives to the question of what our responsibilities are rather than to the question of what it means to be responsible. In terms of the relationship between moral and legal responsibility, the discussion explores the relevance of concepts of responsibility in public law to the philosophical debate about the distinction between public and private morality.

The present chapter lays the groundwork for the detailed examination in later chapters of various aspects of responsibility. I will first mark out the respective domains of "law" and "morality" in terms of their institutional landscape. Secondly, I will argue that by virtue of its institutional characteristics, law makes a distinctive contribution to our responsibility practices; and that, for this reason, it deserves careful attention in its own right, and should not be

viewed as a distorted reflection of morality. Thirdly, I will explore some comparisons and contrasts between "legal reasoning" and "moral reasoning".

1.2 THE INSTITUTIONS OF LAW AND MORALITY

1.2.1 Law

The contrast between law and morality is deeply embedded in our thinking about responsibility. Neither of the contrasted concepts is straightforward, and the nature and content of both are contested.[14] For my purposes, however, it is not necessary to become involved in debates about such matters because my main concern is with responsibility understood as a set of social practices. Whatever view is taken about the value of positivism as a theory of law, no-one has any difficulty identifying the law of the state in which they live[15] as a set of social practices because the "domain of law"[16] is thick with formal institutions of three broad types: law-making institutions, law-applying institutions, and law-enforcement institutions.[17] There are two archetypal law-making institutions: legislatures and courts. Courts are also the archetypal institutions for applying general laws to particular cases. An important aspect of law-application is law-interpretation. Law-enforcement (which also involves law-application and law-interpretation) is primarily the province of "police" (understood in a very broad functional sense) and of courts (similarly understood).[18] In terms of responsibil-

[14] For a useful survey of approaches to the definition of "moral" and "morality" see Wallace and Walker (1970). The seminal jurisprudential discussion of the nature of morality is Hart (1961), 167–80.

[15] Although the discussion in this book focuses on law in this formal sense, much of the analysis could also be applied to less central instances of "law".

[16] The word "domain" is not ideal for describing the relationship between law and morality because it carries a general suggestion of separation and differentiation. It is important to note, therefore, that I use it only to bring out the significance of institutions. I certainly do not want to suggest that in terms of their subject matter, law and morality inhabit different domains. There may be some topics on which the one speaks and the other is silent, or vice versa; but there are very many topics on which both have something to say. And, of course, when both speak, they may or may not say the same thing. In terms of substance and subject matter, it may be helpful to picture our normative life in terms of a tapestry in which law, morality and so on, are intricately interwoven. So I use the imagery of domains in relation to institutional landscape, and of a tapestry in relation to the content of various normative systems.

[17] This is more true of "municipal" law than of international law. The main focus of this book is on municipal law, but I say a little about international law in 2.4.1.

[18] Courts, not "police", are the archetypal law-appliers because their interpretations of the law have an authority lacking in interpretations by police. On the other hand, police can typically exercise discretion in deciding whether and when to enforce the law. Such discretion to enforce the law selectively may be seen as conferring *de facto* law-*making* power. For instance, by limiting prosecutions for strict liability offences to cases of serious fault, environmental authorities may effectively change the nature of the offences in question (see Hawkins (1984), 161–2; Hutter (1988), 115–17; Hutter (1997), 9; the phenomenon is discussed in 7.3). Again, by the use of "extra-statutory tax concessions", revenue authorities can effectively modify the statutory rules of tax liability. In short, legal institutions typically exercise a complex mix of the three basic legal functions.

ity, law-making institutions make rules and enunciate principles about what our responsibilities are and about when we are responsible. Law-applying institutions bring those rules and principles to bear on concrete cases, in the process interpreting the rules and principles and resolving disputes about what our responsibilities are and about when we are responsible. Law-enforcement institutions apply various coercive techniques to maximise the incidence of "responsible behaviour" and to penalise and repair adverse consequences of "irresponsible behaviour".[19]

There is another very important sense in which law is highly institutionalised. Legal rules and principles are extensively documented. Legal literature falls into two broad categories which can be referred to as "legislation" and "common law" respectively.[20] Common law literature consists essentially of the reasons for decisions given by "superior" and, in particular, appellate courts. The analysis in this book is based on the legal literature of what might be called "Anglian" legal systems—that is, legal systems the conceptual structure of which is derived from that of English law. Legal literature provides us with a large amount of valuable source material for analysing legal responsibility that is lacking in the case of moral responsibility.

The two categories of legal literature I have identified—legislation and common law—reflect different methods of law-making which might be called "law-making through legislation" and "law-making through adjudication" respectively. The latter, as its name implies, is incidental to law-application and law-interpretation by courts.[21] Putting the point crudely, the legal legitimacy of legislation depends primarily on compliance with a complex set of rules governing the identity of the legislator and the procedures of law-making, and only secondarily on the content of the law. The content of legislation can affect its legal legitimacy to the extent that courts have the power to test that content for consistency with "superior" rules of law such as may be contained in a constitution or bill of rights. But the basic position is that while courts have the power

[19] For further explanation of the ideas of "when we are responsible", "responsible behaviour" and of "what our responsibilities are" see 2.1.2.1.

[20] The sense in which I am using the term "common law"—to refer to a body of legal literature—is closely related to another meaning of the term that refers to the judge-made law which is embodied in the documentary common law. "Common law" is used in at least two other senses: to refer to legal systems based on English law, in contrast to "civil law" legal systems based on Roman law; and in contrast to "equity". This last distinction is the product of a bifurcation in the English court system that no longer exists. However, the distinction between common law and equity is still conceptually important in English law and in many legal systems derived from English law.

[21] Judges make law in two senses: the enunciation of rules and principles, which have never been enunciated before, to cover situations with which the (written) law has not previously dealt; and the alteration of previously enunciated rules to cover situations formerly covered by the previously enunciated rule or principle. Typically, judicial law-making (in contrast to legislative rule-making) has retrospective effect. This principle should be distinguished from the so-called "declaratory theory" of judicial law-making which says that judges do not create or change the common law but only discover law that is, and in some sense always was, "out there" (Cane (2001)). Rejection of this absurd declaratory theory does not detract from the undoubted importance of historical continuity in the common law: Postema (1986), esp ch. 1.

to interpret and apply legislation, they do not have the power to disapply or amend it. The source of the legitimacy of the content of legislation is essentially political. In a democracy, the substance of legislation is a product of deliberation, consultation and debate (as well as of bargaining and compromise) conducted via the representative and participatory mechanisms loosely referred to as "the political system". The limited power of courts over the content of legislation is reflected in the fact that the very words of legislation are authoritative (or, in other words, the formulation of legislative provisions is canonical). The canonical authority of legislation is designed partly to promote certainty and stability in the law, and partly to limit the law-making power of unrepresentative, unelected and democratically unaccountable courts.

By contrast, the legal legitimacy of judge-made law depends heavily on its content and on the nature and quality of the reasoning used, and the reasons given, to support and justify that content. As a result, and because judicial law-making is typically incidental to the consideration of concrete cases, the terms in which the rules and principles of the common law are expressed are not canonical. Formulations of common law rules and principles are essentially provisional and open to reconsideration and revision in the light of further experience and of changes in values and outlook.[22] In this and other respects, judicial reasoning about complex concepts, such as responsibility, bears noteworthy similarities to "moral reasoning" about such concepts. I will explore this point in more detail in 1.4.

The importance of judicial reasoning to assessment of the legal legitimacy of the common law deserves to be emphasised. The legal legitimacy of legislation depends in no way on the reasoning supporting it—although, of course, it may be crucial to its political legitimacy. This is an important reason why courts are generally unwilling to have recourse to *travaux preparatoires* and records of parliamentary debates in interpreting statutes. Such materials rarely speak with a single voice. But more fundamentally, any force they might be given threatens to undermine the canonical status of the *ipsissima verba* of the legislative text.

There are certain other features of the judicial law-making process that deserve mention here. First, although debate, deliberation and consultation are just as important a feature of law-making by adjudication as of law-making by legislation, the participants in the adjudicative law-making process are predominantly lawyers—judges, advocates and attorneys, and (indirectly) legal academics.[23] The democratic credentials of the common law process are very weak, to say the least. Secondly, just as the canonical form of legislation promotes

[22] The conflict between the inflexibly canonical authority of legislation (including written constitutions), and the desirability of taking account of new experience and changes in values, lies at the heart of the deep theoretical and practical problems inherent in the judicial task of statutory (and constitutional) interpretation. Judicial interpretations of legislation have the provisional character of the common law, not the canonical quality of legislation.

[23] See Simpson (1973). For a normative theory of the role of academics as policy advisers see Kaplow and Shavell (2001).

certainty and stability in the law, so the principle of *stare decisis*,[24] the rules of precedent,[25] and judicial adherence to the values of coherence and consistency[26] promote certainty, stability and predictability in the common law. These rules, principles and values limit the provisionality of the common law. The features that limit its provisionality also, to some extent, make up for its lack of democratic legitimacy.[27] Another technique developed by courts for dealing with the "democratic deficit" of the common law is appeal to "common sense" and the values of the "ordinary" (or "reasonable") person as a basis for legal norms. This important feature of judicial reasoning is examined in more detail in 1.4.1.

Thirdly, even though the formulation of common law rules and principles is provisional and open to reconsideration and revision, nevertheless, the rules and principles are authoritative until they are revised by a court with the power to do so. By contrast, very many people recognise no external moral authority. Furthermore, when a court is confronted with a dispute or question about the meaning or application of a complex concept, the court must usually[28] make an authoritative decision to resolve the dispute or answer the question. By contrast, moral disputes can sometimes be left unresolved, and moral questions can often be left unanswered. This is one of the reasons why the legal versions of complex concepts are often thought "inferior" in some sense to their moral counterparts.[29] However, while we can sometimes leave moral issues unresolved, life constantly presents us with the necessity of moral choice. Moreover, it is by no means obvious that the quality of reasoning about complex concepts, and its conclusions, will necessarily be lower if the reasoning has a practical point. Indeed, reasoning that lacks a practical point (one might think) is likely to "miss the point".

A major claim of this book is that because of the nature of the judicial law-making process,[30] and because most of the basic conceptual building blocks of legal doctrine have been developed by courts, not by legislators, the literature of the common law provides extremely valuable (and, perhaps, indispensable) material for developing a thorough understanding of complex concepts such as responsibility, both in their legal versions and more generally.[31] Although legislation is now quantitatively a much more important source of law than the courts, the conceptual structure of much legislation is that of, or at least is derived from, the common law. More importantly, the legislative law-making process is not expected to conform to the rigorous standards of rationality and

[24] This principle tells courts to pay respect to relevant earlier decisions.

[25] These rules establish the hierarchy of authority of judicial decisions within the court system.

[26] This set of rules, principles and values helps define the "historicism" of the common law: Postema (1986), ch. 1.

[27] Reason-giving is also important in this regard.

[28] Unless the dispute is beyond the court's jurisdiction.

[29] Feinberg (1970), 26.

[30] Most notably because of the importance of the quality of judicial reasoning to the legitimacy of the common law.

[31] Similarly: Lloyd-Bostock (1983), 261.

reason-giving that apply in the judicial law-making process; and (consequently) the reasoning that underpins legislative rule-making is not as well documented, or as systematic and focused, as judicial reasoning in support of law making through adjudication. Because of the way the legislative process works, it is often notoriously difficult to ascertain the "purpose" of statutory provisions from the diverse documentary products of that process. Because my main concern in this book is with how people think and reason about responsibility in legal and non-legal contexts, the literature of the common law provides a much more fruitful basis for acquiring an understanding of legal concepts of responsibility than does the literature of legislative processes.

Although the details of the common law may vary from one Anglian jurisdiction to another, Anglian legal systems share a large body of basic concepts. The analysis in this book is pitched at the level of common concepts, and on the whole, differences from one jurisdiction to another in the detailed application and outworking of those concepts are not relevant to the analysis and will not be discussed. To the extent that the book has a jurisdictional focus, it is English. But this is only for the purposes of illustration and exposition. Jeremy Waldron draws distinctions between "general" and "special" jurisprudence, on the one hand; and between "general" and "particular" jurisprudence, on the other.[32] The first distinction refers to the difference between analysis of general concepts such as "right", "duty" or "property", and analysis of "specific topics in law such as tort liability". The second distinction refers to the difference between analysing ideas such as "law" and "legal system" without reference to any particular set of laws or any particular legal system, and analysing the legal institutions of a particular jurisdiction. In terms of the first of these distinctions, this book is a contribution to both general and special jurisprudence. Its broad topic is responsibility, but the discussion of that concept involves reference to specific legal topics. In terms of the second distinction, it is a contribution to particular jurisprudence, at least in the sense that it focuses on a family of legal systems the conceptual structure of which is based on English law.

1.2.2 Morality

From a sociological point of view, the moral domain may also be described as highly institutionalised. Indeed, John Searle invented the term "institutional facts" to describe social practices such as promising, and to account for their normative content.[33] More concretely, "institutional structures" such as families, schools, churches and interest groups play significant roles in establishing, maintaining and reinforcing extra-legal norms (as they do in the case of legal norms). Some of these institutions recognise individuals or bodies that perform

[32] Waldron (1999), 4–8, 45–8.
[33] Searle (1964); Searle (1995).

functions essentially similar to those performed by state legal institutions. There are religious courts, for instance, and many social groups have norm-making and norm-enforcing mechanisms and (a more or less rudimentary)"norm-literature". Such norm-related activities may generate normative systems in which concepts of"responsibility" play a part. On the other hand, from a normative perspective, the institutional aspect of the moral domain differs from that of the legal domain in at least two related ways. First, many people recognise no body or individual with the power to make moral norms.[34] For many people, there are no moral tribunals with power authoritatively to interpret and apply moral norms, and no moral police with power to enforce moral norms. Breaches of moral norms may be met by sanctions and moral obligations of repair, but typically these are not meted out or administered by formal morality-enforcing institutions.[35] For many people, morality is a purely matter of values, unclouded by claims of authority. Secondly, law and legal institutions of the four types discussed in 1.2.1 make a universal claim of legitimate authority over their subjects, to which the authority-claims of all other normative institutions recognised by those subjects are subordinate.[36] Moreover, this claim to universal authority is underwritten by the state's claim to a monopoly of legitimate force.[37] On the basis of these two observations we can say that law is institutionally based in a way and to an extent that morality is not.

My purpose in making this point is not sociological or descriptive but analytical. I am not concerned to map the relative degree of institutionalisation of the legal and the moral domains respectively. Instead, the contrast I want to draw is between two "ideal-type" normative domains in both of which responsibility norms play an important part, but one of which (law) is rich in the four types of institutions I have discussed, while the other (morality) is essentially devoid of such institutions. In other words, I will treat law and legal responsibility norms as institutionally based, but morality and moral norms of responsibility, by contrast, as not institutionally based.[38] The reason for drawing the distinction between law and morality in this stark way is this. While I assume that the

[34] In the law and economics literature, non-legal rules are called "norms": e.g. Posner and Rasmusen (1999). Hart's view was that the idea of a "moral legislator" was a contradiction in terms (Hart (1961), 175–8). This opinion was a corollary of his claim that the key to understanding "law" lay in the union of primary and secondary rules; or, more precisely, in the addition of secondary rules to primary rules. As a result, he drew a sharp distinction between law and morality, and gave relatively little attention to the common law which, as I will argue later (see esp 1.4), bears important structural similarities to morality. Although common law rules can be created by deliberate act, they are more like custom and conventional morality than like statutory legislation.

[35] Hart apparently believed that whereas the internal point of view was a condition of the efficacy of law, it was part of the definition of morality (Hart (1961), 179–80). Even if this is correct, it does not follow that sanctions play no role in the moral domain.

[36] Raz (1979), ch. 2.

[37] Sumner (1987), 70–9.

[38] For a similar approach see Sumner (1987), 87–90. To the extent that extra-legal normative systems possess institutions like those found in the legal domain, they can be treated as analogous to law for the purposes of the analysis in this book.

project of subjecting human conduct to the governance of (responsibility-generating) rules is shared by law and morality, one of the main aims of this book is to explore implications of the fact that for the purposes of furthering this project, law possesses institutional resources that morality lacks. This is not to say that morality and moral institutions do not play a crucial role in furthering the project, for they obviously do. But my aim is to focus on legal institutions and on their distinctive contribution to the project.

More particularly, I will argue that by reason of law's institutional resources, the legal "version" of responsibility has a richness of detail lacking in the moral "version" of responsibility. Because law is underwritten by the coercive power of the state, courts cannot leave disputes about responsibility (for instance) unresolved. A refusal by a court to find for a claimant effectively involves a finding for the person against whom the claim is made. And because moral sanctions are typically non-physical (censure and disapproval) and are not backed by institutionalised coercion in the way that legal sanctions are, there is much less pressure in the moral sphere than in the legal system to provide determinate answers to detailed questions about responsibility. The law does (and, indeed, must) provide determinate answers to many detailed questions about responsibility which may never explicitly arise outside the law or, which, if they do arise, may never (have to) be given a determinate answer. Morality can afford to be vague and indeterminate to an extent that law cannot. It is for this reason that law can make a contribution to thinking and judgement about responsibility outside the law as well as within it.[39] Law possesses the institutional resources needed to provide answers to many detailed questions about responsibility. Such answers are, of course, subject to critical assessment. But if they are found acceptable, they enrich our store of principles and practices of responsibility.

1.3 THE RELATIONSHIP BETWEEN LAW AND MORALITY

It was argued in 1.1.1 that many accounts of the relationship between law and morality (and between legal and moral responsibility) rest on the idea that morality is a source of ultimate values whereas law is purely conventional. This approach may involve no more than treating moral judgments as having a "certain priority" over law as "grounds for assessment" of human conduct in the structure of practical reasoning.[40] On this basis, although law may be criticised in moral terms, morality is not subject to criticism in legal terms. But Hart, for instance, seems to go further when he contrasts law with morality by saying that "morality is something "there" to be recognised, not made by deliberate human choice".[41] This state-

[39] Similarly Kenny (1978), 2.

[40] Pettit (2001b), 234–5.

[41] Hart (1961), 176. He seems to consider this formulation to be another way of saying that morality is not "made" in the way that statutes are "made". But these two propositions are obviously quite different in meaning. Morality could be the product of deliberate human choice without

ment apparently attributes to morality an "objective" quality that law lacks. Philip Pettit identifies three different notions of objectivity in ethics: semantic, ontological and justificatory.[42] To hold that morality is semantically objective is to believe that moral statements report "how things are" according to the speaker's "view of things".[43] The ontological objectivist additionally believes that moral judgments are like colour statements. Just as we see things as red because they are red, and not vice-versa, so we judge things as being morally good or bad because they are morally good or bad, and not vice-versa. Justificatory objectivism involves the further belief that there is a single set of values that everyone must use as grounds for assessing human conduct. From the perspective of justificatory objectivism about morality, there might seem little or no reason to concern oneself with legal responsibility concepts and practices. The important thing is to decide what it means to be morally responsible according to the set of values that is accepted as the proper basis for moral judgment. To the extent that legal rules and principles of responsibility coincided with morality, they could be viewed as a reflection and reinforcement of it; and to the extent that they diverged from standards of moral responsibility, they could be dismissed as immoral and unacceptable. This, I think, captures a common approach to the relationship between law and morality.

For my purposes, a problem with this approach is that it views law and morality as totally separate normative domains that exist side-by-side but do not interact with one another; and it implies that studying the law can teach us nothing about responsibility concepts and practices outside the law. On the contrary, my view (which is consistent with both semantic and ontological objectivity about morality) is that morality and law are both parts of a rich tapestry[44] of responsibility (and other normative) practices, and that all parts of the "responsibility tapestry" deserve and require careful attention if we are to make sense of the whole. It is not helpful, it seems to me, to treat law as an autonomous normative system, or to analyse the extra-legal meaning and use of complex normative concepts, which are found both inside and outside the law, without referring to the legal use of such concepts. Judges often assume that what they are doing in developing legal concepts is to bring into the law normative practices and understandings that already exist in society and outside the law.[45] For this reason

being made by a moral legislature. There is a world of difference between saying that morality is not legislated and saying that it is "out there waiting to be discovered".

[42] Pettit (2001b).

[43] Pettit (2001b), 236.

[44] See n. 16 above.

[45] Kaplow and Shavell argue that insofar as "social norms" (i.e. non-legal rules) are based on factors other than the well-being of individuals (the central concern of welfare economics) they provide an unsuitable basis for legal "policy-making" (Kaplow and Shavell (2001)). In their view, academic lawyers have an obligation to base their policy recommendations exclusively on welfarist considerations. This requirement does not apply so strongly to judges, they say, because they have competing role responsibilities (Kaplow and Shavell (2001), 1306–19). The authors provide no welfare-based criteria for choosing amongst competing rules (Kaplow and Shavell (2001), 988), no guide as to how to identify social norms that do not promote welfare, and no indication of when judges are justified in incorporating such norms into the law despite their failure to promote welfare.

alone, it seems worthwhile at least to allow of the possibility that legal concepts may embody social practices and understandings that exist outside the law; and that by studying legal concepts that have counterparts outside the law, we might learn something about those extra-legal social practices, as well as something about the law. In the process, of course, we must be alert to the possibility that the nature and content of extra-legal normative concepts may change when they are brought into the law. But this is no reason to ignore the law in seeking to understand widely used normative concepts.

Viewing the relationship between law and morality as being symbiotic in this way also opens up the possibility that just as we may appeal to morality to tell us what the law ought to be, so we may appeal to the law as providing a pointer to sound thinking in the moral sphere.[46] For instance, many would argue that by its rejection of capital punishment, English law takes a position superior to a strong strand in its favour in "popular morality". In other areas, too, some might want to argue that the law is, in some respects at least, a "moral exemplar". Anti-discrimination law and environmental law provide plausible examples. It is easy to think of instances when the law has been changed in response to changes in "popular morality". But equally, law can influence the way people think in the moral sphere. In Hart's words:

> "legal enactments may set standards of honesty and humanity which ultimately alter and raise the current morality; conversely, legal repression of practices thought morally obligatory may, in the end, cause . . . their status as morality to be lost; yet, very often, law loses such battles with ingrained morality, and the moral rule continues in full vigour side by side with laws which forbid what it enjoins."[47]

A second problem with the "separatist" approach to the relationship between law and morality is that it gives little or no weight to the fact of moral disagreement. As Jeremy Waldron puts it, moral discourse is characterised by "difference, controversy and disagreement".[48] Difference of opinion is endemic to the moral domain. If moral disagreements are deep and important, social conflict may result if people are free to act in accordance with their own moral opinions. One way of controlling such conflict is for the law to adopt a position on the issue in question and to use its institutional power to enforce compliance with that position.[49] Of course, the law's intervention does not resolve the moral disagreement, and it may not eliminate social conflict.[50] But in a democratic society, even those who think that the law is morally wrong have a (moral) reason (although, of course, not a conclusive reason) to respect and comply with it. By virtue of its institutional resources, the law can ameliorate the potentially negative social effects of moral disagreement.

[46] Similarly Raz (1982), 933–6.
[47] Hart (1961), 177. See also Robinson and Darley (1997).
[48] Waldron (2000), 43.
[49] Honoré (1993). See also Raz (1979), 50–2.
[50] Witness the instance of abortion law in the USA. Views about abortion are so polarised that there seems little prospect of legally-driven accommodation.

This argument can be pushed a little further and stated more positively. Productive and fulfilling social interaction is possible only within a framework of agreed norms and behaviour. When people disagree (as they frequently do) about the norms according to which social life ought to be conducted, law provides a mechanism for making and enforcing choices amongst competing views. The contribution it can make to facilitating cooperative and productive social life gives those whose views are not embodied in the law a reason to comply with it regardless of the dissonance between what it requires and their own vision of the ideal society. Even where there is widespread agreement in the moral domain, law can, by reason of its institutional resources, provide valuable reinforcement to morality. In other words, law can be (and is) used to make up for morality's institutional poverty. In this way, the law can be what Braithwaite calls a "moral educator".[51] The fact that the law may provide us with reasons for action in these ways reinforces the point that we should not ignore the law in seeking to understand complex concepts such as responsibility.

There is yet another respect in which law and morality are in symbiosis or, as Honoré puts it, in which morality may be dependent on law. Sometimes we *need* the law in order to identify the morally right thing to do.[52] The reason is that morality:

> "has to be based on values that can be defended as worth pursuing. But these values are so general that they do not by themselves determine how people should behave in a given instance. We can seldom proceed by a process of deduction from the values to the required behaviour".[53]

For example, says Honoré, although members of a community have a moral obligation to pay taxes, "apart from the law no one has a moral obligation to pay any particular amount of tax".[54] The underlying point is that law possesses institutional resources that morality lacks, and these enable it to answer detailed questions about responsibility, for instance.

To the extent that such answers are morally acceptable, they supplement and become part of morality. To the extent that such an answer is itself contentious, it can contribute to social stability and cooperation by providing an authoritative guide to behaviour for those who disagree with the answer as for those who agree with it.

1.4 MORAL REASONING AND LEGAL REASONING

The basic argument in 1.3 is that the relationship between law and morality is symbiotic. This is especially so in relation to complex concepts such as responsibility:

[51] Braithwaite (1987), 569. See also Robinson and Darley (1997).
[52] Honoré (1993). See also Finnis (1980), 284–9.
[53] *Ibid*., 4.
[54] *Ibid*., 5.

moral ideas about responsibility are absorbed into the law, and the law influences the way people think about responsibility in the moral domain. Because law is highly institutionalised and morality is not, there are certain obvious differences between the way legal and moral concepts of responsibility are developed. Nevertheless, the argument in this section will be that when courts develop rules and principles about responsibility, they are engaged in essentially the same reasoning processes as people use in the moral domain when developing rules and principles about responsibility.

1.4.1 Practical and analytical reasoning

For the purposes of this book, "legal reasoning" refers primarily to judicial reasoning directed to the formulation of common law rules and principles. Law-making is the prime function of appellate courts, whereas dispute resolution and law application is the prime function of "trial" courts. In many Anglian jurisdictions there are several levels of appellate courts. In the present context, the legal reasoning of "final" appellate courts is of the most importance and interest because such courts are least bound to give authoritative weight to decisions of other courts and to their own earlier decisions; and, consequently, most at liberty to base their law-making on arguments that they consider to be "the best", regardless of whether they can be found in the legal literature. In particular, final appellate courts are freer and more willing to appeal to "morality" in relation to issues such as responsibility. However, the degree of constraint imposed on lower-level appellate courts by the principles of *stare decisis* and the rules of precedent should not be exaggerated. Except in rare cases, relevant judicial reasoning exerts no more than a persuasive influence on any appellate court, and it usually leaves ample room for consideration of arguments not drawn from or developed in the existing "authoritative" legal literature.[55]

By "moral reasoning" I mean reasoning that takes place in the non-institutionalised environment of the domain of morality. It is useful to distinguish between what we might call "practical moral reasoning" on the one hand, and "analytical moral reasoning" on the other. By "practical reasoning" I mean reasoning directed towards developing moral rules and principles to govern one's own and other people's conduct.[56] By "analytical reasoning" I refer to analysis of moral rules, principles and practices. Analytical reasoning may be concerned, for instance, with understanding how we use moral language and how we understand moral concepts, both in general and in relation to particular moral language and concepts. It may also be concerned with the nature of practical moral reasoning in general, and with the quality of particular examples of moral reasoning—concerning responsibility, for instance. This distinction is

[55] Reasoning by analogy is important in this context. See 1.4.3.
[56] Jamieson (1991), 479–80.

important for my purposes because I want to suggest that insofar as legal reasoning appeals to morality as a source of legal rules and principles, it is in one way analogous to analytical moral reasoning, and in another to practical moral reasoning. It is analogous to practical moral reasoning by virtue of the fact that in laying down legal rules and principles judges are purporting to establish norms for their own and other people's behaviour. Judges, as well as citizens, are subject to the legal rules and principles they lay down.

However, for reasons related to ideas of democracy and separation of powers, it is not an acceptable justification for any particular judge-made rule or principle that the judge who made it thinks that it ought to be the law. This is one reason why *stare decisis* and precedent are important constraints on judicial law-making, and why ideas such as consistency and coherence play such an important role in judicial reasoning.[57] One way in which judges may attempt to justify their law-making is by reference to social practice and "community values". It is not unusual for judges to appeal to "commonsense morality", or "ordinary usage", or what "the ordinary person" thinks and does, in order to resolve normative controversies.[58]

In its emphasis on consistency and coherence, and in its appeal to community values, judicial reasoning designed to justify particular legal rules and principles bears notable similarities to philosophical analysis designed to provide an account of moral concepts. Philosophers, too, often start with "commonsense" assumptions and intuitions. For instance, Michael Bratman begins his well-known book on intention[59] by saying that "much of our understanding of ourselves and others is rooted in a commonsense psychological framework", and the word "commonsense" is used liberally throughout the book to describe the concepts Bratman is analysing. The philosophical technique of "reflective equilibrium" involves working such intuitions, convictions and judgments about a particular moral issue into a coherent analytical framework, discarding along the way any that do not "fit". At its best, legal reasoning by final appellate courts about complex concepts seeks a reflective equilibrium.[60]

An important difference between judicial and philosophical use of the technique (apart from the fact that philosophers tend to use it more self-consciously and rigorously) lies in the respective starting points. Courts have at their disposal a large literature containing rules, principles and judgments that provide raw materials for the equilibrium-seeking exercise. Because morality lacks an equivalent literature, and because few philosophers take advantage of the legal literature, the starting points for the philosophical equilibrium-seeking exercise tend to be self-generated, a product of the theorist's own observations and speculations. To the extent that any particular court is "bound" by precedents found in the literature, it may not be free to discard rules, principles or judgments that

[57] MacCormick (1994).
[58] I will use the term "commonsense" to cover this constellation of related ideas.
[59] Bratman (1987).
[60] See also Sunstein (1996), 17–19, 32–3.

cannot be fitted into a larger theoretical framework. But as I said earlier, the strength of this constraint should not be overestimated. Anyway, final appellate courts are typically free to discard any precedent they choose, and to follow the equilibrium-seeking procedure in essentially the same way as philosophers do.

Because the purpose of judicial law-making is different from the purpose of conceptual analysis, appeals to commonsense and social practice serve different purposes in the two contexts. In the context of judicial law-making the appeal to social practice is in pursuit of normative legitimacy, whereas in the context of conceptual analysis, it is in pursuit of epistemological validity. The assumption underlying judicial appeals to common sense is that the law ought to embody community values on matters such as responsibility; [61] whereas the assumption underlying philosophical appeals to common sense[62] is that widely-held ideas about responsibility, for instance, are likely to contain more than a grain of "truth" about the nature of responsibility.

The notion of "commonsense" is problematic for several reasons.[63] For one thing, it is ambiguous. It may mean no more than "widely held" or "shared". In that case, the word is used to make an empirical claim for which the judge or philosopher typically provides, and can provide, little or no support beyond their own intuitions and observations.[64] But "commonsense" is often also used evaluatively as a term of approval; and its use may act as a conduit to transfer that approval from the practice being analysed to the analysis itself, thus placing certain aspects of the analysis beyond debate, and begging questions about the truth or the normative desirability of the analyst's conclusions. Branding a particular view of the world as being "commonsense" at least raises a presumption that it is right and desirable. Unfortunately, the history of the human race is littered with empirical and normative propositions that were common sense to an earlier generation and nonsense to a later.[65]

A related problem with "commonsense" is that although, at a high level of generality or abstraction, there might be wide agreement about the nature and desirability of social practices, such as responsibility practices, there may be much less agreement about the details of such practices. This insight is particularly important for an understanding of common law concepts because they are bred of more-or-less small-scale disputes about legal liability. The existence of a dispute about the meaning of a normative legal concept proves that there is some level of disagreement about the concept; and provided the disputants can all make a "reasonable" argument in favour of the result they each desire, there seems no reason to prefer one result to the other on the basis that one deserves

[61] Bell (1983), ch. VII.

[62] As opposed to sociological or anthropological *descriptions* of "folk-morality".

[63] See also Lloyd-Bostock (1979) and (1984).

[64] The area of psychological research known as "attribution theory" is concerned with such empirical claims about responsibility. See e.g. Schultz and Schleifer (1983); Lloyd-Bostock (1983); Shaver (1985).

[65] Many values are also culturally specific. But this is not of great concern in the present context because so is a great deal of the law.

the description "commonsense" while the other does not.[66] However useful the language of "commonsense" may be to philosophers, we should be very wary of its use in legal contexts.

The analogy between judicial reasoning and *practical* moral reasoning is explored by Thomas Perry. Perry argues that there are several criteria of "reasonable reflection" on matters of morality: that all relevant facts should be taken into account; that our moral judgment should be made when we are in a psychologically normal state; that our judgment should be disinterested, i.e. impartial and universalisable; and that our arguments should be "sincere"—that is, the ones that we consider to be the "correct" ones, and not just arguments that allow us to reach the judgment "we want to defend".[67] These criteria he calls "the procedural requirements of moral rationality". Perry then suggests that "the major criteria of good reflection and argumentation" for judicial reasoning in cases in which the existing legal materials provide "no uniquely correct or true decision" are "practically identical" to the criteria of sound moral reasoning.[68] Cases of the sort Perry refers to are often called "hard cases", in order to distinguish them from "easy cases", which can be straightforwardly resolved by the application of an existing relevant rule of law to the facts of the case. In terms of the earlier discussion, the resolution of hard cases involves law-making through adjudication.

Cases can be hard for a number of reasons: because several intersecting or conflicting legal rules or principles are relevant to the facts of the case; because the existing legal materials contain no rule or principle relevant to those facts; or because, on reflection, existing relevant rules or principles seem no longer acceptable either at all or without some modification. Situations requiring moral judgment may, says Perry, present us with "hard" choices for similar reasons. In hard cases, judges should make themselves aware of all relevant facts and legal principles, they should be impartial and have no personal interest in the outcome; and they should reach the decision which they sincerely believe to be correct. Even so, argues Perry, as compared with individuals engaging in moral reasoning, judges deciding hard cases are less free to fashion new legal rules, and to modify and reject existing ones, because of their role-responsibility to respond to individual cases in ways that are consistent and coherent with the rest of the law, and because of the undemocratic nature of judicial law-making.

Perry's aim in comparing legal and moral reasoning is to provide support for an argument that if the procedure by which they were arrived at meets certain criteria, substantive judgments about difficult normative issues are "rationally justified" in a way that gives them a certain objectivity or validity. The success, or otherwise, of this project is of no immediate concern. It is not part of my

[66] In a normatively pluralistic society, appeals to shared values to resolve disputes at relatively low levels of abstraction are treacherous. A controversial concept from this point of view is "dishonesty": Ashworth (1999), 394–8.

[67] Perry (1976), ch. 2.

[68] Perry (1976), ch. 4.

argument that moral and legal judgments about responsibility are "objectively" valid in some sense. For my purposes, the interest of Perry's analysis lies in its suggestion that when judges engage directly in reasoning about normative issues relevant to the resolution of individual cases in the legal domain, they undertake essentially the same activity as people engaging in such reasoning in the moral domain; and that "reasoning performances" (as Perry puts it) can be judged by the same criteria in both domains. Of course, judgments about normative issues in the legal domain are authoritative, in a way that judgments in the moral domain are not, because they are underwritten by the coercive power of the state. This, no doubt, makes it all the more important that the reasoning performances of judges should satisfy the criteria of "good reflection and argumentation". But it does not, I think, weaken the analogy between normative reasoning in the legal domain and normative reasoning in the moral domain.

Do the constraints on judicial freedom mentioned by Perry seriously weaken the analogy? The three criteria of good argumentation suggested by Perry are adequate information, impartiality[69] and sincerity. The constraints on judicial freedom arise from the demands of consistency and coherence, and from the "democratic deficit" that afflicts judicial law-making. There is no obvious reason why either of these constraints should affect the ability of judges to be adequately informed or impartial. At first sight, however, sincerity may seem to present more difficulty. What sincerity basically requires is that our judgments should follow from what we sincerely believe to be the best arguments; and conversely, that we should not adopt what we think to be "second-best" arguments for the sake of justifying some desired judgment. The requirements of consistency and coherence need not impair sincerity in this sense because they are not absolutes. The law never requires a judge to sacrifice "justice" on the altar of consistency or coherence. Consistency and coherence are aspects of justice, but they do not exhaust it.

Suppose the reason that a judge gives for making a particular judgment is not that it is supported by what the judge considers to be the best arguments, but rather that (according to the rules of precedent and *stare decisis*) the "authority" of some earlier decision requires it; or because (considering the democratic deficit under which courts labour) the judgment supported by best arguments is beyond the law-making competence of the courts. In such cases, does the court contravene the requirement of sincerity? Surely not. On the contrary, the court sincerely acknowledges that it is not giving effect to what it considers to be the best arguments.[70] What these examples show is that certain values—notably predictability and stability—are more important in the legal domain than in the moral domain. There are, perhaps, three reasons for this. First, many conflicts

[69] I use this word as a shorthand for a cluster of desiderata: the judgment should be disinterested and universal in application, and the decision-maker should be impartial and have no personal stake in the outcome.

[70] I leave aside problems created by wicked legal systems. See Hart (1982), 150–1; Mureinik (1988), 206–14.