

**How Should Judicial Decisions be  
Justified? An Investigation into  
the Role of the Judiciary from a  
Political Perspective.**

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**Abstract**—this dissertation argues against the judicial practice of justifying decisions on the basis of interpretation and constructed Parliamentary, or legislative, intent. It is accepted that there are cases where the application of the law is simple and such cases call for both decision and justification on grounds of what the law is. What we question is the desirability of allowing judges to legitimise their decisions easily, via the media of interpretation and constructed intent, when they are making controversial decisions or trying to justify a whole practice. We note that interpretation and implied intent make appeal to democratically passed law, i.e. to democracy. Our argument is that in those situations where democracy is appealed to, a better justification would instead make use of reason. It is laid down that a more honest and transparent approach, requiring judges to be explicit when they make discretionary decisions, would carry more legitimacy. We maintain that legitimacy is an essential aim of judicial decisions because the judiciary indirectly wields the coercive power of the state.

The main body of this work is divided into two chapters. The first looks at how decisions are made and subsequently justified in “hard cases”. We investigate the traditions of formalism and realism, before engaging with the Hart/Dworkin debate. It is argued that judicial decisions made in hard cases will be products of discretion—even if they are also interpretations of the law. It is shown that this generates normative reasons for judges to justify their decisions by appeal to reason rather than democracy. The second chapter investigates the justification for judicial review. It is argued that review has moved beyond its traditional *ultra vires* justification and that, ultimately it needs to be based on common law principles rather than some manifestation of Parliamentary intent. As with Chapter One, we seek to demonstrate that appealing to reason guarantees legitimacy better than (false) appeal to democracy.

## Introduction: Political Power and the Role of the Judiciary

*In societies like ours the command of public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgements and decrees—*Oliver Wendell Holmes, 1897: 61.

We have set out to investigate the role of the judiciary in modern society. However, before describing how we shall go about doing this, it is worth setting out briefly why we should want to embark upon this task.

Political theorists of the past, such as Thomas Hobbes, have been able to view the state with great optimism. He believed the state was responsible for ending the ‘continual fear and danger of violent death’ associated with the *bellum omnium contra omnes* of the state of nature.<sup>1</sup> It thereby frees man from a ‘solitary, poor, nasty, brutish, and short life’.<sup>2</sup> Even John Locke, who saw more clearly the defects of the Leviathan state, placed great hope in some of the state’s functions. Most famously he wrote that: ‘*the end of Law* is not to abolish or restrain, but *to preserve and enlarge Freedom*: For in all the states of created beings capable of Laws, *where there is no Law, there is no Freedom*’.<sup>3</sup> There is still much of truth and insight in the words of both authors, but in modern society, more than ever, they require qualification.

A post-twentieth century society cannot view the state with such optimism. We have learnt harsh lessons from totalitarian fascist and communist states which have rightly made people nervous about centralised state power.<sup>4</sup> Ralph Miliband’s words ring at least as true now as when he first noted in 1969 that, ‘more than ever

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<sup>1</sup> Thomas Hobbes, *Leviathan* (Oxford, OUP, 1996) 84.

<sup>2</sup> *Ibid.*

<sup>3</sup> John Locke, *Two Treatises of Government* (Cambridge, CUP, 1988) 306.

<sup>4</sup> This view is also put forward in John Schwarzmantel *The State in Contemporary Society* (New York, Harvester Wheatsheaf, 1994) 5.

men now live in the shadow of the state'.<sup>5</sup> We are right to be fearful about the vast and centralised coercive power of the state. Whilst it brings great benefits in terms of efficiency and security it also carries potentially intolerable costs, for, 'the risk is that the centrally organised power may well be used for the oppression of numbers with whose support it can dispense'.<sup>6</sup>

So too, we have been well taught that just as law can—and should—be the harbinger of freedom, it can also be distorted towards wicked and oppressive ends.

Our point is not a Leninist one; this is not a call for the eradication of the state<sup>7</sup> but the above does seem to support the conclusion that it is essential for the coercive power of the state to be checked and regulated as thoroughly as possible. Indeed, these limitations on power should be as true for the judiciary, which is simply one branch of the state, as it is for any of the other limbs of the Leviathan. The reason Justice Holmes is quoted at the beginning of this introduction is the clarity with which he demonstrates why the judicial function is particularly worthy of scrutiny. It is precisely because "the command of public force is entrusted to judges" who determine whether "the whole power of the state will be put forth" that we should be doubly concerned about the legitimacy of the judicial branch of the state. To the extent that judges indirectly wield vast amounts of state power, the manner in which they perform their duties is deeply important from a political perspective. The existence of Locke's freedom under the law depends for its realisation on the administration of that law—and therefore on the role of the judiciary.

It is these political insights which frame and animate the discussion which is to come. Throughout this work we are concerned with the proper strength of the

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<sup>5</sup> Ralph Miliband, *The State in Capitalist Society* (London, Weidenfeld and Nicolson, 1969) 1, also cited in above n 4 at 3.

<sup>6</sup> H.L.A. Hart, *The Concept of Law* (Oxford, OUP, 1997) 202.

<sup>7</sup> V.I. Lenin, *The State and Revolution* (London, Penguin Books Ltd, 1992) 16-21.

judiciary and its interaction with other branches of the state because of the political impact these factors have. It is now time to return to the more concrete aims of this work.

We have made the obvious point that state power requires restraints and have noted that there also need be ways of checking judicial power, since the ability to determine what is punishable also makes judges able to unleash the coercive power of the state. Clearly it is essential that the judicial function is performed properly or, to be more accurate, legitimately. Our investigation into the role of judiciary will therefore be concerned with two aspects of the judicial function: firstly, with the reality of how judges decide cases and secondly, with how they justify their decisions.

To anticipate much discussion, we should note in passing that the basis on which a case is decided need not necessarily match the justification a judge gives for his decision. Our focus in the chapters that follow shall be on the political consequences of both how judges do decide cases and, as importantly, the combination of this reality with the justifications judges give for their decisions. Where a gap exists between how a decision is justified and how a decision is made this will translate into a difference between what the judiciary does and what it is perceived to be doing. It is this difference that seems to carry political significance. After all it is not by what the judiciary do that they themselves are judged, but by the public's perception of what they do. As Lord Devlin once wrote: 'The judge who gives the right decision while appearing not to do so may be thrice blessed in heaven, but on earth he is no use at all'.<sup>8</sup> It is justification, perhaps more than the decision reached, which appears to be the crucial factor in legitimising judicial decision making.

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<sup>8</sup> Lord Devlin, 'Judges and Lawmakers' (1976) 39 *The Modern Law Review* 1 at 3.

The purpose of this work is to consider how judges make decisions and how it is best for them to justify these decisions given that they indirectly wield large volumes of state power. Judicial decision at present seems to gain legitimacy by a mixture of appeal to reason and appeal to democracy. An appeal to reason is evidenced by the fact that judges do not simply give verdicts but also explain what has made them choose one way rather than another. By appeal to democracy, we refer simply to the democratically passed legislation that judges base their decisions on and interpret, or the broader legislative intent they may appeal to in justifying their actions. It is right that both reason and law are fused together to generate judicial decisions. The central focus of the following two chapters will be on situations where it is not clear what the correct mixture of these two “legitimizing factors” is. Hence we investigate the different political positions occupied by constructing and interpreting legislative intent—the democratic appeal—versus admitting to judicial creativity—which must then be justified by appeal to reason. Our thesis is that wherever there is ambiguity the latter is the better position to hold primarily because the former would allow more license to the judiciary.

The body of this dissertation is split into two chapters. The first chapter, “Hard Cases”, looks at how judicial decisions are made and justified when the law, as it stands, does not appear to give clear guidance on which party to decide for. We investigate the appropriateness of four different ways to decide such cases. These are; to use only black-letter law, to act wholly as a lawmaker, to use discretion, and to interpret the law. Each method represents a different mix of legitimating factors. Ultimately we argue that judicial discretion, with its reliance on appeal to reason, represents the best way for the judiciary to explain its decisions in hard cases.

The second chapter, “Judicial Review”, compares the current orthodoxy, with two different—and normatively more interesting—ways of justifying the review function of the judiciary. The three justificatory models we consider are; orthodox *ultra vires*, common law, and modified *ultra vires*. Again we seek to show that there are politically significant consequences to choosing one of these models over another. This second chapter also allows us to demonstrate how the justification for its actions is crucial in setting constitutional boundaries for the judiciary. The thesis developed in “Hard Cases” is carried forward into “Judicial Review” and it is argued that the best way of legitimating this second politically important function of the judiciary is by reason. Doing otherwise stretches the appeal to democracy too far and voids it of content.

# Chapter One: Hard Cases

*There may indeed be cases which the law seems unable to determine but in such cases  
can a man?—Aristotle, 2000: 140*

## 1.1 Illusions and Difficult Decisions

Following the works of Ronald Dworkin<sup>9</sup>, there has been an increased recognition of the sharp qualitative divide between the two types of case coming before the courts. On the one hand there are easy, or ‘textbook’, cases and on the other there is the phenomenon of the hard case. Paradigms of the former are found in violations of traffic laws, for example, where a driver has parked on double yellow lines or where another has broken the 50 mph speed limit. Such offences are perhaps too trivial to reach court, but they do provide clear examples of the easy case. We all acknowledge that, in the first case, the law prohibiting stopping and parking on double yellow lines has been violated and, in the second example, that the 50 mph speed limit rule has been broken.

These cases can be seen as ‘textbook’ cases precisely because the decision reached in them follows from syllogistic reasoning. The ‘textbook rule’, found in statute or common law, plus the agreed facts of the case generate a verdict.<sup>10</sup> This is because such cases fit nicely with well established laws and it would be highly irregular for the judge to decide in any but one way. Hence it is accepted that for easy cases the judicial process is—and ought to be—mechanical.

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<sup>9</sup> See particularly Ronald Dworkin, ‘Judicial Discretion’ (1963) 60 *The Journal of Philosophy* pp. 624-638; and ‘Hard Cases’ (1975) 88 *Harvard Law Review* pp. 1057-1109.

<sup>10</sup> Dworkin, ‘Judicial Discretion’ 626.

From a political perspective adjudicating easy cases formalistically is highly desirable: Lon Fuller once argued that amongst other aspects of its ‘inner morality’ good law needed to be non-retroactive, consistent over time, and congruent with adjudication.<sup>11</sup> It is evident that formalism in judicial decision making perfectly suits these three constituents of procedurally just law. Furthermore, as Justice Scalia, one of the leading advocates of formalism has noted, restricting the judge to following the law is to promote ‘the general rule of law’.<sup>12</sup> This is beneficial for three reasons; (i) it is the best method of ensuring equality of treatment, (ii) it keeps arbitrary judicial decision to a minimum, and, (iii) the rule of law places sovereignty in the hands of the legislature which, in a democracy, is made up of representatives of the people.

It should be clear that there is a definite answer to the question “what should we expect from judicial decision in an ordinary case?” Strict adherence to the rules in these cases helps maintain procedurally just law, created by a legitimate governing body. It is therefore highly desirable. However, formalism’s lack of robustness is brought into focus when we broaden our outlook to consider a second species of case; those instances where complexity is involved.

The hard case describes those situations ‘that are in one way or another unlike textbook cases’.<sup>13</sup> Dworkin finds five instances of these.<sup>14</sup> Hard cases exist where:

- (1) The courts override a textbook rule in favour of a different decision.

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<sup>11</sup> Lon Fuller, *The Morality of the Law* (New Haven, Yale University Press, 1964).

<sup>12</sup> Justice Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 *The University of Chicago Law Review* 1175 at 1176; see also Frederick Schauer, ‘Formalism’ (1988) 97 *Yale Law Journal* pp. 509-548 on this point.

<sup>13</sup> Above n 9 at 627.

<sup>14</sup> *Ibid.*

- (2) The textbook rule is ambiguous and it is not clear whether it applies in a particular instance.
- (3) Two, or more, textbook rules seem to apply to the case and the court must decide which is to prevail.
- (4) There may a gap in the law where either no textbook rule seems relevant, or one must be expanded to cover the new case.
- (5) The textbook rule includes vague words such as ‘reasonable’ or ‘significant’ the meanings of which cannot be settled by recourse to facts.

Given the context of the hard case, we can begin to see why labelling a judge “formalist” has taken on a pejorative meaning. Here formalism is associated with a denial of choice.<sup>15</sup> Frederick Schauer has argued that judges are most often labelled as formalists for one of two vices. Firstly, they may be seen to be ‘enslaved by mere marks on a printed page’.<sup>16</sup> This criticism suggests that rigid adherence to the letter of the law is overly restrictive of judicial discretion. Rules are by their nature restrictive and there will always be circumstances when judges are disabled from making the best possible judgement if they choose always to be bound by the law. The substantial benefit of judges being able to draw on factors outside of black-letter law is that they can take issues such as policy, substantive justice, and particular circumstance into consideration—all of which may help achieve a better decision. Indeed, it is even admitted by supporters of the formalist approach that ‘announcing a firm rule of

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<sup>15</sup> Schauer, ‘Formalism’ 511-538.

<sup>16</sup> Ibid 521.

decision can... inhibit courts'.<sup>17</sup> On this reading formalism seems a somewhat conservative paradigm. Furthermore, when associated with decision on the basis of a literal reading of the law, formalism appears to struggle deeply even to recognise let alone solve hard cases. Instance (1) of the hard case surely will not be recognised by the formalist judge, for the idea of overruling a textbook rule is itself unappealing to the judge who is a formalist. Nor does the formalist doctrine seem to cope any better at solving the problems of instances (2) – (5); there is no insight into these problems to be gained from an approach which demands merely that the rules be strictly followed.

Formalism can also have negative consequences on a second level. Schauer has argued that judges can—and have in the case of *Lochner vs. New York*<sup>18</sup>—used adherence to the rules to mask situations where they have actually made a choice. Here a decision would be labelled formalist when a vagueness or ambiguity that existed in the law was denied by a judge, thus making his decision appear forced by the letter of the law. Nevertheless the obligation to decide one way would only have arisen because the judge had himself chosen not to recognise the case as abnormal. Hence there is an argument that insincerely “adhering” to rules can be used in adjudication to advance policy decisions favoured by the judge and restrain outcomes he dislikes. Again, it is only when potentially hard cases arise that judicial deception becomes a concern; when there is no controversy surrounding the law judges have neither reason nor the means to act in a lawmaking capacity.

In fact, it seems difficult to reconcile formalism with actual judicial practice. Two senior British judges, Lord Reid and Lord Devlin, give pause for thought on this issue. As Lord Reid famously puts the point:

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<sup>17</sup> Scalia, ‘The Rule of Law as a Law of Rules’ 1180.

<sup>18</sup> Above n 14 at 511.

There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the Common Law in all its splendour and that on a judge’s appointment there descends on him some magic knowledge of the words Open Sesame... But we do not believe in fairy tales any more.<sup>19</sup>

So too Lord Devlin has written that ‘I am not one of those who believe that the only function of the law is to preserve the status quo’.<sup>20</sup> Rather, as Devlin continues, at least in Common Law ‘there is a general warrant for judicial lawmaking’.<sup>21</sup> In reality, the historical persistence of hard case problems has made it unthinkable for any judge or academic to endorse a pure model of formalism.

This should be no surprise. However, an early twentieth century critique of the formalist model has spawned a second, distinct way of understanding judicial decision making. This school, known as American realism, claimed that in fact judges based their decisions on what they thought was fair and supplemented this with legal reasoning to rationalise their decision.<sup>22</sup> Germs of this approach are to be found in the works of Oliver Wendall Holmes. He argued that ‘behind the logical form [of judicial decision] lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement’ for ‘such matters are really battle grounds where the means do not exist for determinations that

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<sup>19</sup> Lord Reid, ‘The Judge as Lawmaker’ (1972) *12 Journal of the Society of Public Teachers of Law* 22.

<sup>20</sup> Above n 7 at 1.

<sup>21</sup> *Ibid* 9.

<sup>22</sup> See Brian Leiter, ‘American Legal Realism’ in Golding and Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford, Blackwell, 2005).

shall be good for all time'.<sup>23</sup> These claims were taken on by the realist movement, which perceived quite clearly the problem of the hard case, and subsequently saw the law as indeterminate in such situations.

We find Karl Llewellyn, for example, preoccupied with the question 'how, and how much, and in what direction, do the accepted rule and the practice of decision making diverge?' for he believed that we needed to 'approach the data afresh'.<sup>24</sup> Max Radin and Judge Hutcheson were more explicit: Radin perceived that judges in difficult cases had a habit of 'working their judgement backwards' by reaching their conclusion on the basis of what they thought desirable and then selecting a standard that fitted with this result. Indeed, even statute could be manipulated by the intelligent judge. Due to its generality, the demands of statute were 'not solid steel, but rubber... and if you are a little clever it will catch or let out the situation you are deciding'.<sup>25</sup> So too Judge Hutcheson makes almost the same argument that 'judges really do try to select categories or concepts into which to place a particular case so as to produce what the judge regards as a righteous result'.<sup>26</sup>

We have in the realist-lawmaking model an alternative—indeed a polar opposite—view of judicial decision from that advanced by formalist. Instead of decisions being deduced by careful reading of the law, it is believed that actually judges will decide what is just, or fair, and then either choose an appropriate law to support their judgement or, where this is not possible, create a new law.

There are two political respects in which the lawmaking model seems normatively more desirable than its formalist counterpart. It must first be noted that if

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<sup>23</sup> Justice Holmes, 'The Path of the Law' (1897) *10 Harvard Law Review* 457 at 466.

<sup>24</sup> Karl Llewellyn, 'A Realistic Jurisprudence—The Next Step' (1930) *30 Columbia Law Review* 431 at 444, 453.

<sup>25</sup> Max Radin, 'The Theory of Judicial Decision: Or How Judges Think' (1925) *11 American Bar Association Journal* 357 at 359, 360-1.

<sup>26</sup> Judge Hutcheson, 'The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) *14 Cornell Law Quarterly* 274 at 285.

judges are acting in the way the realist describes we are being sold a deception by formalism. One of the merits of realism is that it looks past the judicial rhetoric in hard cases and questions whether the actual decision fits with a formal interpretation of the law. Thus a realism about the law is surely politically desirable to the extent that it encourages judges to be open and candid about the decisions they are making.<sup>27</sup> It brings transparency to judicial decision.

A second politically advantageous characteristic of this model is that in its openness to judicial law making it facilitates dynamism in the law and allows that it be responsive to ideas of substantive justice. It captures both the idea that justice is better served by allowing judges to take particulars into account in cases where general rules are shown to need exceptions and also Holmes' intuition that:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply exists from blind imitation of the past.<sup>28</sup>

Nevertheless, for all its political merits a pure model of the judge as lawmaker in hard cases evokes criticism precisely on the grounds where we found the formalist model to be desirable. Formalism was praised for its ability to promote procedural justice and sustain the rule of law, as well as its democratic credentials. By contrast where substantive justice is at the heart of judicial decision elements of procedural justice, such as predictability will not be guaranteed. Right—as the judge sees it—may take

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<sup>27</sup> This is the agenda of some realists as Leiter's, 'American Legal Realism' makes clear.

<sup>28</sup> Above n 22 at 469.

priority over the democratic will and ultimately there is a risk that the judge may be seen to have sovereignty over the law.

## **1.2 Modern Responses to the Hard Case**

From the above we should have gained some idea of what hard cases are and how they have been approached in the past. However, formalism and realism should be seen as two extremes. While they nicely demarcate the area within which both the ideal role and the reality of judicial decision are to be found, in their pure forms neither the judge as lawmaker nor the judge as mere follower of the law seem adequate accounts. So we proceed with the following realisations: it must be concluded that a more sophisticated model of adjudication is needed, one which finds an acceptable medium between formalist and realist thought or discovers a way to move beyond these boundaries. This new model will necessarily engender a compromise of legal/political ideals. We must concede that the judge faced by a difficult case deserves some sympathy. He is called upon to make a decision which is democratic, procedurally just, and rule-based, but at the same time also substantively just and transparent. He is thus torn between conflicting ideals. An adequate model of judicial decision must make concessions to ideals on both sides of this divide.

In what remains of this section we set out the two most promising modern responses to the problem of judicial decision. These are H.L.A. Hart's arguments for judicial discretion and Ronald Dworkin's model of the law as an interpretative enterprise.

### **1.2.1 Judicial Discretion**

For Hart, formalism and realism were illusionary—the former a ‘noble dream’ in which the law is always sufficient to settle cases and the latter a ‘nightmare’ where judicial decisions are free-wheeling, uncontrolled acts of lawmaking.<sup>29</sup> For him the truth is to be found in a middle-ground somewhere between these extremes. The reality of hard cases is that judges have discretion which is creative but also restricted.

Hart’s understanding of what we have called the hard case is unique and interesting. Arguing against formalism he points out that:

Fact situations do not await us neatly labelled, creased, and folded, nor is their legal classification written on them simply to be read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand with all the practical consequences involved in this decision.<sup>30</sup>

The force of his argument rests on a semantic distinction between the core and periphery meanings of words. Hart argues that a word, his example is “vehicle”, must have a settled meaning. That is, there will be certain objects that everyone familiar with the word “vehicle” would take to be instances of a vehicle because they have all—and only—the requisite characteristics of vehicles. Yet it is clear that words do not merely have core, but also penumbral instances. These are debatable cases where it is not evident whether the item is an instance of the word. Take the case of the

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<sup>29</sup> H.L.A. Hart, ‘American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream’ (1977) *11 Georgia Law Review* pp. 969-989.

<sup>30</sup> H.L.A. Hart, ‘Positivism and the Separation of Law and Morals’ (1958) *71 Harvard Law Review* 593 at 607.

vehicle in the park<sup>31</sup>: There is a rule that there are to be no vehicles in the park. Is a child who rides his electrically-propelled toy car breaking this rule? Will driving an aeroplane through the park break the rule?

As we know, these cases raise problems of the penumbra. It looks as if the child is riding a vehicle, but it is unlikely, when the law was first drafted that we even considered excluding him from using the park. By contrast, we certainly do not want it to be possible for aeroplanes to use the park, even though they may have some features [such as wings] which may distinguish them from what we believe constitutes a vehicle. What we have is a hard case; a decision needs to be made as to whether the aeroplane is a vehicle and whether the toy car is a vehicle. It is evident that this decision cannot be produced automatically. As Hart has put the point ‘logic is silent on how to classify particulars—and this is the heart of judicial decision’.<sup>32</sup>

According to Hart the hard case is a product of a breakdown in communication. Non-mechanistic cases will arise because legislators cannot know in advance every situation that could possibly occur and so when they make laws they are designed to be general, then refined in the courts. In Hart’s words ‘ignorance of facts’ breeds ‘indeterminacy of aim’.<sup>33</sup> Therefore Hart, like the realists, believes the law is indeterminate, or to use his well-known phrase ‘open textured’. Of course, this statement needs qualification. Hart is also makes it explicit that the majority of cases are plain—what we have termed easy—and can be dealt with by syllogistic reasoning. The facts of these cases fit with the core meaning of the law and all that must be done by the judge is to apply to law to the case.

Yet logic is of little use the hard case. Here it is the responsibility of the judge to decide ‘whether the present case resembles the plain case ‘sufficiently’ in ‘relevant’

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<sup>31</sup> This famous example can be found in *Ibid* 607-615 and *Above* n 5 at 127-130.

<sup>32</sup> *Above* n 29 at 610.

<sup>33</sup> *Above* n 5 at 128.

respects'.<sup>34</sup> Therefore the question for the judge, in Hart's model, is should Case B—and those cases analogous with it—be considered suitably similar to an already decided case, Case A, such that the law which determined Case A should be extended to cover Case B? Indeed, where the language of 'sufficient' and 'relevant' is used, it should be clear not only that syllogistic reasoning must break down, but subsequently the decision maker will be left with a choice. As Hart has shown, this does not mean the judge's decision will be arbitrary. Although choice will not create syllogistically reasoned outcomes, it can still generate rational and publicly justifiable decisions. Where the rules can no longer guide judges, social aims and policies must be appealed to for the decision to be intelligent and justifiable. Furthermore 'some essential continuity between the clear cases of the rule's application and the penumbral decisions' must be maintained.<sup>35</sup> The law may have run out in hard case situations, but only partly so for the rules still maintain their settled core of meaning even if they cannot resolve a particular case. Thus the judge who is faithful to his role furthers the determinacy of a general law, 'filling in the gaps by exercising a limited law-creating discretion'.<sup>36</sup> He neither sets aside his law books entirely, nor tries blindly to follow the law. Instead, he: 'both makes new law and applies the established law which both confers and constrains his law-making powers'.<sup>37</sup>

### **1.2.2 The Judge as Interpreter of the Law**

Dworkin's judge is a somewhat different creature and, when hard cases arise, he acts very differently to how Hart suggests he would. One reason we should not be

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<sup>34</sup> Ibid 127.

<sup>35</sup> Above n 29 at 612.

<sup>36</sup> Above n 5 at 272.

<sup>37</sup> Ibid.

surprised by this is that whilst Hart tried to navigate a middle way between formalism and realism Dworkin attempts to go beyond that dichotomy. He argues that ‘the ancient question of whether judges find or invent law’ is ‘unhelpful’, for: ‘we understand legal reasoning... only by seeing the sense in which [judges] do both and neither’.<sup>38</sup> What is meant by this?

We must start by understanding that what law is, according to Dworkin, is very different from what Hart believes the law to be. For Dworkin, law is an interpretative concept and judges are themselves engaged in a process of constructive interpretation to make sense of it. Thus their task is ‘imposing purpose on an object or practice in order to make the best possible example of the form or genre it represents’.<sup>39</sup> Put in more concrete terms, judges are trying to achieve two things when deciding cases. They produce decisions that will both present the law in its best light and will fit with previous cases that are relevantly similar. By doing this they accept the essence of law as integrity, i.e. they accept that legal claims have both forward and backward looking elements. The implications of this will become clearer as we look at how Dworkin deals with hard cases.

In Dworkin’s model the law does not run out and leave discretion for judges. Instead, ‘the rights thesis’ is endorsed. This argues that in hard cases ‘judicial decisions enforce existing political rights’.<sup>40</sup> Whereas Hart’s judges are left to make a decision that must be based on policy, Dworkin believes legal principles, which confer rights and are themselves a constituent of law, are decisive factors in the hard case. Far from the law running out in such situations, the judge is obliged to weigh the competing rights claimed by plaintiff and defendant against each other whilst also checking the extent to which each relevant right fits in with an interpretation of the

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<sup>38</sup> Ronald Dworkin, *Law’s Empire* (London, Fontana Press, 1986) 225.

<sup>39</sup> *Ibid* 52.

<sup>40</sup> Dworkin, ‘Hard Cases’ 1063.

wider aims of the law. The case is decided on this basis. Thus Dworkin's combination of decision on the grounds of political rights and interpretation guarantees that law will not go silent and [strong] judicial discretion is never a legitimate option for the judge.

It is useful at this stage to consider Dworkin's hypothetical judge, "Hercules", for he shows the true complexity involved in a faithful application of the interpretive method. It should not be forgotten that Dworkin endows Hercules with 'superhuman skill, learning, patience and acumen' precisely to equip him for the demands of his labours.<sup>41</sup>

Let us assume Hercules considers a case that turns on a controversy over a constitutionally established principle, such as *Everson vs. Board of Education*.<sup>42</sup> The issue here centred around whether a law providing free buses to parish schools would enshrine an established religion in the law and therefore be unconstitutional. Dworkin argued that were Hercules to be deciding such an issue, he would first seek to discover what the aims of the constitution are, why it exists, before setting out the principles enshrined in it. In deciding the case, Hercules would 'develop a full political theory that justifies the constitution as a whole'<sup>43</sup> by a process of testing competing constitutional theories against the reality of its existing rules and practices. Indeed, at times he would even engage in political philosophy to cache out the legal/political implications of particular rights—such as religious freedom in the above case—where they are set out only as abstractions.

Moving to hard common law cases, the question Hercules poses to himself in these instances is "does the principle the plaintiff is appealing to have gravitational force?" That is, where a principle has been set out in a previous case, are we pulled

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<sup>41</sup> Ibid 1083.

<sup>42</sup> For further details on *Everson* see Ibid.

<sup>43</sup> Ibid 1084.

towards accepting it in this case because of the ‘fairness of treating like cases alike’?<sup>44</sup> Notice Dworkin believes that Hercules will not allow policy to create gravitational force for it is the relevance of principle that decides such cases. Of course any principle used to settle the case must also fit in with Hercules’ constitutional theory, for the law must be treated by the judge as a seamless web. Ultimately, this means that the judge as interpreter of the law will be drawn to one and only one conclusion in each case.

The final observation to be made is an important one. Although Dworkin believes each judge will argue that there is one correct answer to a hard case, judges may still disagree about what that answer is. So there is a place for judicial disagreement in Dworkin’s model of adjudication, but for him it arises because judges will each have unique legal and constitutional theories. These subsequently shape different ideas of what the law is and, in specific cases, will lead some judges to acknowledge a rule or principle to be established which other judges do not accept.

### **1.3 Plotting a Course Between Scylla and Charybdis**

We began Section 1.2 by rejecting the formalist and realist approaches to judicial decision. We now have a sketch of two contemporary responses that seem better able to explain and justify current judicial practice. Hart argued that hard cases fall outside the boundaries of settled law and so are decided by judicial discretion. Dworkin’s position was that the judge decides hard cases on the basis of an interpretation which synthesises what fits best with current law and how the judge believes the case should be decided. For each judge there will only be one right

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<sup>44</sup> Ibid 1090.

answer to a case (although this right answer often differs between judges) and therefore no discretion is involved when judges make their decisions.

The goal of this section is to go one step further and evaluate these two models, mindful of the political perspective we set out to pursue. We shall proceed by laying down Dworkin's well-known arguments against Hart. We then argue that actually Hart's position mirrors reality better than Dworkin allows and, furthermore, it should also be accepted in place of interpretation for political reasons.

### **1.3.1 Dworkin's Political and Philosophical Attacks on Judicial Discretion**

Dworkin has been a particularly effective critic of positivism and it is simply not possible here to set out the argument he makes against this school in its entirety. Of necessity our focus must remain narrowly on his rejection of judicial discretion, even though this takes place within a wider debate concerning the nature of the law.<sup>45</sup> We shall consider first Dworkin's argument that a failure to account for moral principles undermines judicial discretion and second his criticism that judges argue about the grounds of law rather than penumbral meanings. Finally we will set out the political reasons that Dworkin believes make judicial discretion untenable.

One of Dworkin's early arguments against the acceptability of discretion as an explanation of judicial decision making took the following form: he argued that positivism had left out an important decision making tool, the legal principle, from its account of adjudication. As we know, easy cases are settled by rules, but something else appears to happen in hard cases. The example of *Henningson vs. Bloomfield*

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<sup>45</sup> A good analysis and summary of the debate is provided by Scott Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' in Arthur Ripstein (ed.) *Ronald Dworkin* (Cambridge, CUP, 2007).

*Motors* demonstrates this. Following a crash caused by defective parts of his car, Henningson argued that car manufacturer should be liable for medical and personal injury expenses arising from the crash. Although Henningson had entered into a contract that expressly limited the manufacturer's liability to a warranty on defective parts the court still found in favour of Henningson. The decision appealed not to laws, but to various standards, or principles which supported the plaintiff.<sup>46</sup>

Dworkin felt this, and other hard cases, demonstrated that there was another source of law which could be appealed to when the law had run out on the traditional positivist understanding. In fact, such cases were decided by appeal to legal principles. Legal principles differ to rules for whilst the latter 'are applicable in an all-or-nothing fashion', the former 'merely states a reason that argues in one direction, but does not necessitate a particular decision'.<sup>47</sup> Thus principles can have "weights" with some being more important than—and able to overrule—others whereas when two rules oppose each other, the one which is not binding will have been shown to be invalid and not a rule of law. Since Dworkin believed positivism to be 'a model of rules only',<sup>48</sup> his hard cases showed that Hart's understanding of judicial decision making was not accurate. Worse still for the discretion model, it was argued that unless principles were considered parts of the law and therefore binding on judicial decision making then judges could not use them to create law without acting unjustly. Dworkin believed that adherents to the discretion model were left with a choice. They must either jettison much of the discretionary power of the judge or it could be retained, but only at the cost of decisions being retroactive, hence unfair, when legal principles were applied to develop new law.

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<sup>46</sup> For further details of *Henningson* see Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14 at 24.

<sup>47</sup> *Ibid* 25, 26.

<sup>48</sup> *Ibid* n 44 at 27.

In Dworkin's more recent works the above criticism has been reshaped into a different form. A number of other paradigms of hard cases such as *Riggs vs. Palmer*, *Tennessee Valley Authority vs. Hill*, *McLoughlin vs. O'Brian*, and *Brown vs. Board of Education*,<sup>49</sup> have been used to illustrate that in certain circumstances 'theoretical' disagreements about the law arise.

Before continuing we need to introduce some new terms. Dworkin is now concerned with the difference between "propositions of law" and "grounds of law", where the former are true or false 'claims people make about what the law allows' and the latter are 'other kinds of propositions, [that] when true, make other propositions of law true'.<sup>50</sup> A simple proposition of law would be to state "the law allows vehicles to be driven up to 70mph on motorways". The grounds of a law are more interesting; they could be found in a statute, or in the principles or reasoning behind that law, *et al.* Using these two analytical tools Dworkin makes a second distinction between "empirical" and "theoretical" disagreement in adjudication. In cases where there is an empirical disagreement judges agree on the grounds of law, but disagree about whether a law conforming to those grounds exists. The issue is over 'what institutions have actually decided in the past' and we should be able to discharge it easily.<sup>51</sup> The opposite is true for theoretical disagreements. Here judges are arguing about what the law actually is even though they may have valid and relevant sources of law in front of them. Their more complex issue is about whether they have exhausted the grounds of law or whether they can appeal to some other source.

We are now ready to take up Dworkin's point. He believes the hard cases cited above show there to be not only empirical, but also theoretical disagreements about the law. So why does this trouble positivists, and Hart in particular?

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<sup>49</sup> For details of these cases see above n 37 at 15-30.

<sup>50</sup> *Ibid* 4, 5.

<sup>51</sup> *Ibid* 31.

It must first be recalled that positivists are committed to the idea that morality is not needed to determine what the law is.<sup>52</sup> Thus the positivist is committed to the thought that if the law sitting in front of judges is relevant and appropriate, then surely there is no further law to be discovered. The above hard cases give evidence against these commitments. Dworkin argues that positivists have tried to escape this conclusion by recourse to the claim that we have been misled in these cases: the simple reply is that judges are acting here as ‘well-meaning liars’, for even whilst filling in gaps in the law they, ‘pretend to be disagreeing about what the law is because the public believes there is always law and that judges should always follow it’.<sup>53</sup> When put this way this reply seems both unpalatable and implausible—we shall return to it later though. By contrast Hart’s response accepts the possibility of genuine judicial disagreement, categorising it as a penumbral issue. He can therefore explain away the disagreement, but, as Dworkin is keen to point out, it creates an entirely strange result. After all:

How could they [judges] think they had arguments for the essentially arbitrary decision to use the word one way rather than another? How could they think that important decisions about the use of state power should turn on a quibble?<sup>54</sup>

It must be conceded that this is a powerful argument against Hart’s theory of adjudication. Again, it stretches plausibility to think that judges would be concerned about arguing over an issue of meaning when they will, presumably very quickly,

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<sup>52</sup> See above n 29 on this point.

<sup>53</sup> Above n 37 at 41, 37.

<sup>54</sup> Ibid 41.

have identified it to be a penumbral problem and ultimately dependant on a policy choice.

We have already hinted at some of the political implications of Hart's judicial discretion model which complete Dworkin's criticisms of it. Two salient points are made against judicial discretion—which allows policy to be decisive as a last resort in hard cases. These are that it is undemocratic and retroactive when compared with decision made on the basis of principle. Consider first the democracy argument. The thought here is that judges are unelected and are politically unaccountable. They therefore have no justification for making policy decisions; it is simply not their role to make such choices, even when the law does not provide guidance for any decision. Rather, 'political decisions must... be made through the operation of some political process designed to produce an accurate expression of the different interests that should be taken into account'.<sup>55</sup> To the extent that principled decisions do not advance controversial aims they do not require this deliberative process. The second criticism of discretion-generated policy should also be familiar. If policy creates a new duty that could not have been foreseen by the agent who stands to loose out, how can this be considered fair? This is in stark contrast with a decision made on the basis of principle, where a pre-existing right is invoked that the defendant could have previously recognised as an issue. Since the right is not new, retroactive law is not produced and the defendant cannot claim that an injustice has occurred.

### **1.3.2 A Defence of Judicial Discretion**

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<sup>55</sup> Above n 39 at 1061.

This completes our portrayal of Dworkin's attack on Hart's adjudicative theory. To recap, it was three-pronged: the first argument deployed was that Hart's model did not adequately account for the existence of principles as sources of law. These fill in the gaps Hart saw in the law and show that the pivotal role Hart assigns to judicial discretion is misleading. The problem of judicial disagreement was then raised. Surely, if judges were arguing about a penumbral point they would realise this and justify the law in terms of policy, not what the law is? Finally, two political issues were mentioned. It was noted that discretion-based decisions would be retroactive and anti-democratic.

However, we do not believe Dworkin's arguments are decisive. In what remains of this section we shall try to insulate the discretion thesis from the aforementioned attacks, before illustrating that interpretation comes with its own undesirable political side-effects.

*Reply (1): Some form of political compromise is necessary*

We shall deal first with the political branch of Dworkin's criticism. The question to be answered is, "is judicial discretion undemocratic and retroactive?" To deal with this quickly, I do not think that a qualified reply of "yes" is overly damaging to Hart's theory.

Remember Hart is in search of an acceptable middle-route between formalism and realism. Now the above criticisms should be familiar from those we associated with the lawmaking judge of the realist model. To the extent that Hart goes off course in his quest for a middle-route it is fair to suggest he strays towards realism. Criticism of him for this is entirely just. In fact, Hart himself seems to recognise this arguing,

not that his model actually is democratic, but that some judicial lawmaking is ‘a necessary price to pay for avoiding the inconvenience of alternative methods of regulating them, such as reference to the legislature’ and that ‘the price may seem small if judges are constrained in the exercise of these powers’.<sup>56</sup> Likewise, Hart does not seek to avoid criticism that lawmaking is retroactive, but instead moves to mitigate its negative political connotations. Here he argues that retroactivity only offends justice because it disappoints legitimate expectations. However, to object to his theory on these grounds seems ‘quite irrelevant in hard cases since these are cases which the law has left incompletely regulated and there is no state of clear established law to justify expectations’.<sup>57</sup>

Clearly we should be mindful of the undemocratic and retroactive elements to the judicial discretion model—indeed we shall pursue the first of these objections further towards the end of this work. Nevertheless the challenge is to come up with a better, that is less politically defective, model of adjudication. The following paragraphs intend to show that Dworkin has not achieved this. Hart once commented that ‘formalism and rule-scepticism are the Scylla and Charybdis of juristic theory’.<sup>58</sup> If his metaphor is sound, then any theory of law will inevitably drift towards one of these polarities. Given the negatives associated with formalism, towards which it will be argued Dworkin slides, then we should perhaps be content with Hart’s moderate rule-scepticism.

*Reply (2): There are hidden premises in the “One Right Answer” argument which make it unpersuasive*

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<sup>56</sup> Above n 5 at 275.

<sup>57</sup> Ibid 276.

<sup>58</sup> Ibid 147.

Dworkin's first attack on Hart's theory challenged the central place it gave to judicial discretion. It is summarised below as the "One Right Answer" argument:

"One Right Answer": The law does not run out; principles decide hard cases. These principles, or rights, are part of the law and judges have no choice but to enforce them. Furthermore, since there is only one correct answer to each case the judge decides, he does not have the strong discretion Hart allows him.

When set out as it is above, we begin to see some interesting premises in Dworkin's argument. To hold it relies (a) on a distinction between principles and rules, (b) on principles being part of the law, allowing the law to be viewed as a seamless web, and finally, (c) that a unique answer exists to every case and judges are obliged to reach their decision on the basis of that answer—making decision non-discretionary. All of these premises are strongly contested.

Take premiss (a): it certainly appears that something akin to principles is accepted by Hart as law, but he does not accept the sharp distinction between rules and principles. For him the distinction is in reality a matter of degree. As well as rules that decide cases, there are also 'near-conclusive rules' and 'generally non-conclusive rules' which judges do appeal to in hard cases.<sup>59</sup> Yet far from these rules meshing together to create the Dworkinian seamless web of law, as (b) suggests, it is precisely such non-conclusive legal standards that Hart believes create gaps in the law and the need for judicial discretion.

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<sup>59</sup> Ibid 263.

There does seem an intuitive implausibility to the idea that law exists for all situations, or, to give Dworkin a more charitable reading, that at the very least the law always fits nicely together. Much of the argumentative force for this idea comes from various judicial opinions, taken from hard cases, which share the commonality that the judge has claimed to have interpreted the law rather than written it. This then provides warrant to the thought that even in the most complex situations the law always gives guidance. Yet some scepticism is in order here, for it is in the interest of the judge, and arguably the stability of the law, that he makes this claim. As John Mackie puts the point: ‘even where new law is being made, it will seem fairer if this fact is concealed and the decision is believed to enforce only existing rights’.<sup>60</sup> Perhaps we should instead regard judicial opinions as justifications for the result the judge has reached, or even acts of persuasion to cloak the decision with justice. Viewed in this way, opinions are more likely to emphasise the decision’s continuity with current law. Thus we should not be surprised if in reality there are divergences between the justifications judges give for their decisions and the actual reasons they had for making their choice.

However, it is premiss (c) that feels the least satisfactory of the three. We should first clarify Dworkin’s position on discretion. His dissatisfaction with it is not total.<sup>61</sup> He admits that judges can exhibit discretion, but only in its ‘weak’ sense. This type of discretion is compatible with non-reviewability and the ability of exercising judgement. It contrasts with the “strong” discretion Dworkin believes that Hart’s model permits to judges. This second type of discretion exists where ‘decision is not controlled by a standard furnished by the particular authority we have in mind when

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<sup>60</sup> John Mackie, ‘The Third Theory of Law’ in Marshall Cohen (ed.) *Ronald Dworkin and Contemporary Jurisprudence* (London, Duckworth, 1983) 163.

<sup>61</sup> For his discussion on judicial discretion see above n 45 at 32-40 and above n 9 at 624-638.

we raise the issue of discretion' so no entitlement is violated even if the decision is wrong.<sup>62</sup>

Kent Greenawalt writes persuasively against Dworkin's denial of strong discretion. In his words: 'all the advocate of strong "discretion" wants to assert is that an official can permissibly choose in two or more different ways, that no one is entitled to have him choose in one rather than another of these ways'.<sup>63</sup> It is Dworkin's sharp distinction between weak and strong discretion that is misleading. Effectively what this does is to empty strong discretion of almost all its content. We can see this when we consider Greenawalt's example of a judge at a beauty pageant. Here the judge is asked by those running the event to "choose the candidate who you think is best looking". It can now be argued that strong discretion has been eliminated because a standard has been imposed. Indeed, providing our judge acts conscientiously, there will only be one correct decision he can make. Nor does it matter from a practical perspective that the criterion was subjective rather than objective but unknowable; either way the judge can only reach the single right answer, assuming he acts in good faith. However, this runs counter to the powerful intuition that when the standard imposed is suitably general and allows for a sophisticated individual assessment to be decisive, then discretion is being described, albeit limited discretion.

The crucial point is that discretion is widened or narrowed by the generality of the standard invoked. Thus the strong/weak distinction seems to be clumsy, it confuses rather than clarifies. Furthermore, if, as we have argued, the distinction can serve no real practical purpose then Dworkin's attack on discretion becomes only an

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<sup>62</sup> Above n 45 at 34.

<sup>63</sup> Kent Greenawalt, 'Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges' (1975) 75 *Columbia Law Review* 359 at 366.

‘insubstantial verbal exercise’.<sup>64</sup> We ought to conclude with Greenawalt that discretion is possible, even given Dworkin’s theoretical commitments. ‘Discretion exists so long as no practical procedure exists for determining if a result is correct, informed lawyers disagree about the proper result, and a judge’s decision either way will not widely be considered a failure to perform his judicial responsibilities’.<sup>65</sup>

*Reply (3): A reconsideration of hard cases*

On the basis of the above, we believe the “One Correct Answer” argument is insufficient to demonstrate that judicial discretion is invalid. It was not true that Hart had omitted principles from his model and they did not seem to secure a seamless web of law as Dworkin had hoped. Furthermore, we showed that Dworkin’s strong/weak discretion distinction ran against intuition and was insufficient to rule out judicial discretion from decision making.

Having laid this attack to rest, we now turn to Dworkin’s second argument, which we shall label “Theoretical Disagreement”. A summary of the argument is provided below:

“Theoretical Disagreement”: Judges disagree about what the law is, even when authoritative law stands in front of them. They are not debating penumbral issues but rather whether the source in front of them is sufficient to discharge the case or whether other sources are relevant.

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<sup>64</sup> Ibid 371.

<sup>65</sup> Ibid 386.

This second argument is tricky. It must be conceded that there are a number of cases where judges do genuinely appear to be disagreeing and their disagreements have the appearance, at the very least, of being about which piece of law actually settles the case: some judges may say we need look no further than a particular statute, whilst others believe it is right to use a certain legal principle to resolve the case. We take Dworkin's challenge to the positivist as a challenge to explain away coherently such theoretical disagreements in the law.

We shall suggest two ways in which this can be done. We might initially counter Dworkin by arguing that something particularly abnormal occurs in those cases which feature theoretical disagreement. A large concession is made by this argument. It concedes that in truth Hart's model has no ability to track this type of case. It argues instead that some of the cases Dworkin brings up are not hard, but "exceptional" cases. If we return to our categorisation of hard cases (see pages [-]) it may be argued that there is a difference between instances (1) and (3) of the hard case and instances (2), (4), and (6). Of the second group of hard cases, (2) and (6) are clearly recognisable as problems of the penumbra, whilst (4) is a situation Hart would expect judicial discretion to be used in. But what of (1) and (3)?

These two types of case are notable because, at least *prima face*, they are not instances when the judge is called upon to fill in a gap in the law. They are also notable because they tend to be where Dworkin picks his example hard cases from. *Riggs vs. Palmer* is a typical situation (1) case. In that case Elmer murdered his grandfather to ensure the grandfather would not be able to change his will and he would therefore inherit. It was ultimately decided that even though a valid will existed Elmer would not be given the inheritance on the principle that a person should not

profit from their own wrongdoing.<sup>66</sup> However, from Hart's position we can say perfectly happily that the textbook law should have been followed. The other judges were mistaken in not agreeing with Judge Gray that the textbook rule needed to be followed even though it lead to a morally reprehensible result. If we believe that the principle appealed to was a moral and not a legal principle, then the majority acted extra-legally although in line with substantive justice. This is not to say that these judges acted in a reprehensible manner. As Hart himself once put it 'we say that laws may be law but too evil to be obeyed'.<sup>67</sup> Nevertheless, it can be argued that the majority went outside their role as judges and that the case was therefore "extraordinary".

This matters because it suggests the that there never should have been a theoretical disagreement. The textbook rule should have been followed and the hard case should never have arisen—judges could have discharged their moral obligation by referring the issue to the legislature so that it might be changed in the future.

Using a similar logic, situation (3) cases would also seem more like exceptional cases than issues of theoretical disagreement. Given that these are cases where two laws collide and one must be prioritised over another, if judges use extra-legal principles to make their decision, these seem closer to an act of lawmaking and disagreeing over policy than disagreeing over interpretations of what the law actually is.

However, although the exceptional cases reply does seem capable of silencing Dworkin's theoretical disagreement argument, it has significant costs attached. First, from a descriptive perspective it seems quite weak; Hart himself admits that 'the

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<sup>66</sup> For more on this case see above n 37 at 15-20.

<sup>67</sup> Above n 29 at 620.

frequency and importance of such disagreements cannot be denied'<sup>68</sup>—thus the idea that these cases are “exceptional” seems to be a misnomer. The implication of the exceptional cases reply would be that judges are acting extra-judicially quite often. It is therefore feels like a deviation too close to realism.

We should also remember that Hart does actually seem to accept principles as legal standards. So if we intend to defend his thesis we need to change tack.

The second way of defending Hart is compatible with his concession that ‘arguments from... non-conclusive principles are an important feature of adjudication and legal reasoning’.<sup>69</sup> This reply is not too dissimilar to the one Dworkin ascribes to the positivist school, but we shall give it a more generous reading in the light of which it seems significantly more successful. It allows that while judicial disagreement does occur in those hard cases Dworkin describes it is not over a penumbral issue. Instead, when a number of judges are faced by the same case that involves a choice between adhering to a textbook rule or using a general and non-conclusive principle to overrule this, disagreement will be caused by judges using their discretion differently. Furthermore, since the disagreement is caused by discretion it is based on a disagreement about policy not about the grounds of the law.

This way of understanding judicial disagreement contains a healthy dose of realism; it sees judges not as arguing about what the law is. In reality they know that when two legal standards collide the law will be what they say it is, providing they can justify their position. Instead they are arguing about how much discretion should be used and the precedent it sets for future cases. Where judges are called upon to decide a type (1) or (3) case, they must be aware the rules and principles appealed to

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<sup>68</sup> Above n 5 at 258.

<sup>69</sup> Ibid 263.

both have a legal status—this can hardly be at issue. The real questions are normative ones; what action is publicly justifiable? What is the correct policy to promote?

Let us return to look at *Riggs*. The principle appealed to here was highly general and as such was also highly indeterminate. Applying this principle would have involved both a quite transparent and a sizeable use of judicial discretion. Given this, Judge Gray's dissent seems really to result from a belief that correcting the textbook rule would be an abuse of judicial power. As he argued: 'The matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature, and within the limits of which the determination of this question is confined'.<sup>70</sup> Thus his dissent looks more like a general policy concern, one echoed by Lord Devlin, when he argued 'judges are not concerned about social justice... they might not administer the law fairly if they were constantly questioning its justice or agitating their minds about its improvement'.<sup>71</sup>

Our suggestion is that it is reasonable to view with scepticism those judicial opinions that claim to be purely interpretation of the law (see page 29). We have argued that in hard cases the law is indeterminate and judges must surely realise this. On this basis we might return a question to Dworkin: if the law is indeterminate and this is realised by judges, then why does it make any sense for them to be arguing about what the law is? Surely judges realise that by the nature of hard cases, the law "isn't" and that it is only sensible to speak of what the law will, or should, be?

Of course, on this reading we are left with no choice but to accept the unwanted baggage that judges must ultimately be viewed as 'well-meaning liars'. This is slightly unfair, as there is no reason why an act of judicial discretion cannot also be an interpretation of the law. It must nevertheless be conceded that if such

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<sup>70</sup> Justice Gray, cited in Alan Hutchinson and John Wakefield, 'A Hard Look at 'Hard Cases': The Nightmare of a Noble Dreamer' (1982) 2 *Oxford Journal of Legal Studies* 86 at 96.

<sup>71</sup> Above n 7 at 7.

discretion is expressed only as an interpretation some deceit has taken place. We will have more to say on this point later, exploring whether it is desirable that such judicial deception be done away with or whether it retains a valuable role as a public safeguard. For now there is one final, but highly important point to be made before we can conclude our discussion of hard cases.

### **1.3.3 A Political Problem for Interpretation**

Dworkin has repeatedly claimed that his model both best describes the actual process of adjudication and provides politically the best way of understanding it. In response, we devoted much of the Section 1.3.2 to defending Hart's description of judicial decision making—although we did briefly reply to Dworkin's claims of "anti-democracy" and "retroactivity" against judicial discretion. However our evaluative emphasis is still on the political implications of the judicial function and in this section we shall set out a serious and decisive political objection to the interpretive model.

We have suggested (on page 27) that Dworkin's adjudicative theory slides towards formalism and it is this claim that we shall justify in what follows. In Section 1.1 we highlighted as one type of formalism the situation where a judicial decision had been made, but was being hidden behind adherence to the law. To the extent that Dworkin's model represents a seamless web of law with one right answer for each case it rules out the notion of judicial choice. However, we shall argue precisely that judicial choice does exist within Dworkin's model and that it pervades decision in hard cases. Necessarily this criticism is both descriptive and normative. We argue that to identify hard cases judges do more than simply interpret the law. If this is correct

then Dworkin's theory camouflages a substantial element to judicial decision, simultaneously obfuscating the political power of the judiciary—which is worrying from a political perspective and reminiscent of formalism.

For Dworkin's judge, who believes in law as integrity, fit and substantive justice are meant to act as checks upon one another when he embarks on constructive interpretation. Thus treating similar cases alike is supposed to restrict the judge from implementing his own conception of the substantively just outcome in every case, whilst in the rare circumstances when abstract justice is violated he is bound to disregard precedent and make a principled decision. Dworkin argues that each judge has a unique 'threshold of fit' which determines the range of interpretations of the law he accepts.<sup>72</sup> This threshold states the constraints a judge believes binds the judiciary and is itself determined by his political and moral beliefs.

It is the combination of this threshold of fit, based on political morality, with the judge's view on substantive justice, itself deriving from his political and moral views, which generate a problem. As Sheldon Leader puts it: 'The dominant reason for the different ways in which the threshold of fit is set lies in the different attractions to each judge offered by the [substantive] outcomes in the case'.<sup>73</sup> The point is that if a judge believes an outcome to be particularly desirable he can simply tailor his threshold of fit to permit that substantively just interpretation. So it appears that the balancing check of fitness capitulates to the aim of substantive justice whenever Dworkin's judge feels the latter is sufficient.

A similar point is alluded to by Alan Hutchinson and John Wakefield. They note that Dworkin's identification of hard cases is always made retrospectively. Hence we are never told what the distinctive features of a hard case are, except in the

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<sup>72</sup> See above n 37 at 255.

<sup>73</sup> Sheldon Leader, 'Impartiality, Bias and the Judiciary' in Alan Hunt (ed.) *Reading Dworkin Critically* (Oxford, Berg, 1992) 251.

most general terms that hard cases require the application of principles and not syllogistic reasoning. This leads Hutchinson and Wakefield to argue that ‘a “hard case” is a “hard case” simply because of the controversy over what has actually been decided rather than the nature of the legal dispute itself’.<sup>74</sup> To put the objection in Dworkinian jargon, it is only because a judge has decided to allow the dispute within his threshold of fit that a hard case exists. Likewise the reverse is true: ‘If the judge decides there is no genuine disagreement, she is entitled to treat the case as an “easy case” and employ syllogistic reasoning’.<sup>75</sup> This is why it was tempting to consider some of the more obscure manifestations of “hard cases” as “exceptional cases”—ultimately it seemed to matter less in such cases what the settled law was and more whether the judiciary felt the rules to be suitably just.

However, if we have characterised Dworkin’s model fairly it must now be conceded that it has some unsavoury political implications. Firstly, it appears to encourage the formalist vice of writing law behind the pretence of reading, or in this case interpreting, it. Moreover, secondly, and as a consequence, it renders the law vulnerable to ideology:

At crucial points, judicial decisions will be allowed to vary in the respect they accord to the constraints of fairness and procedural due process as a result of outcomes [the judiciary] want to achieve. This allows judges to claim that the political principles they prefer fit best with the law, when actually the law is seen as it is because it fits best with the political principle they wish to favour.<sup>76</sup>

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<sup>74</sup> Above, n 69 at 93.

<sup>75</sup> Ibid 95.

<sup>76</sup> Above n 72 at 253.

We have thus charged Dworkin's model with falling descriptively and normatively short of the judicial discretion thesis. It is a serious concern that the deception which led Dworkin to characterise Hart's judges as 'well-meaning liars' may be endemic and disguised by a disinterested façade under the interpretive model. On the evidence of hard cases alone, judicial discretion appears to be politically the more robust paradigm.

### **Chapter Summary**

We have come to the end of a long chapter and it is worth briefly recapitulating some of the ground covered and conclusions reached. We began by looking at the formalist and realism models of judicial decisions, finding these to be politically unacceptable, but useful as poles on which to hang the hard cases debate. We then investigated the two most promising modern replies to hard cases in the form of judicial discretion and interpretation of the law. In the final section we joined the Hart-Dworkin debate at the site of adjudication. We argued that neither Dworkin's "One Right Answer" nor his "Theoretical Disagreement" theses was sufficient to undermine the descriptive power of the judicial discretion model. Ultimately—if we leave as unsettled the descriptive debate between Hart and Dworkin—there seems to be a political trade-off between their models: with judicial discretion comes the reality of anti-democratic law being made by the judiciary, which may in some cases be retroactive. Nevertheless, we have tried to show that the interpretive model is liable itself to be pervaded by judicial discretion. Worse still, it will permit judges the support of having only interpreted democratically passed law, ensuring reason is not the primary check on judicial decision making. In its own way interpretation appears

to give no less license to the judiciary than the discretion model, that it carries with it an additional political cost gives us reason to reject it.

## Chapter Two: Judicial Review

*The fact that the most arbitrary powers of the English executive must always be exercised under Act of Parliament places the government, even when armed with the widest authority, under the supervision, so to speak, of the Courts—Albert Venn Dicey, 1902: 357.*

### 2.1 The Second Role of the Judiciary; a Second Politically Salient Debate

We have discussed at length the first and most obvious task assigned to the judiciary. Judges must make a decision, whatever the complexity of the case at hand, on the basis of what the law is and/or what the law should be (depending on one's view). Ultimately, Chapter One argued against interpretation of the law in hard cases on the grounds that judicial discretion could all too easily be disguised as "interpretation". Our suggestion was not that such a practice was pervasive, but that it could take place unnoticed and subsequently unchallenged. In short, a license to interpret the law would permit significant judicial discretion and law making behind the scenes. Worse still, these alterations to the law would appear the products of democratic decision when in fact they are the retroactive decisions of unelected officials. On these arguments we rejected as incomplete Dworkin's account of how hard cases are decided and also questioned the normative force he claimed for it.

Yet the function of the judiciary goes beyond simply deciding what the law is/what it should be. Judges are also tasked with protecting the individual from abuses

of administrative power by agents of the state. This duty is discharged in judicial review. Broadly defined, judicial review is the exercise by the judiciary of a supervisory jurisdiction over the executive. In such cases the courts are concerned with the lawfulness of an act or decision implemented by a public body. Therefore, unlike the hard cases discussed in Chapter One, what is at issue in review cases is not substantive justice but whether the right procedures have been followed. The question put to judges is not “has the right decision been made?”, but rather, “has the decision been made in the right way—i.e., legally?”

This second facet of the judiciary’s mandate has a similar claim for our attention as did the role of the judge in hard cases. The former was of interest because it had both legal and political implications. We evaluated it primarily by the latter. The role of the judge in judicial review has a similarly strong political as well as legal significance: It is a feature of the modern state that along with its substantial coercive power comes a formidable ability for it to enforce its administrative decisions against the individual. Consequently, it is a genuine concern that even a democratically elected government could ride roughshod over the rights of individuals and minorities within its borders. No less a philosopher than John Stuart Mill has made the point most forcefully that ‘the limitation... of the power of government over individuals loses none of its importance when the holders of power are regularly accountable to the community’.<sup>77</sup> This supports the political importance of judicial review. To the extent that wrongful uses of administrative power can be challenged by this method, judicial review must be seen as an essential safeguard of the individual’s liberty. Yet the political significance of judicial review goes further.

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<sup>77</sup> John Stuart Mill, *On Liberty* (London, Penguin Books Ltd, 1985) 62.

Judicial review is a highly important balancing factor to the separation of powers in the United Kingdom. The scope of review to challenge the lawfulness of decisions made by Ministers, government departments, local authorities and other public bodies,<sup>78</sup> sets the judiciary against the executive, thereby providing a way to check administrative power. In the most extreme circumstances—most famously the case of *Factortame (No. 2)*<sup>79</sup>—judicial review can even bring into question the sovereignty of Parliament. Therefore given that the grounds for review set and legitimise the limits within which it can be undertaken, they must also be seen to directly determine the power of the judiciary within the constitutional framework. This further demonstrates that the justification for review is of great political significance.

In the United Kingdom, which is our exclusive focus in this chapter, the constitution is unwritten. It follows that review cannot, as elsewhere, gain its legitimacy and scope from a neatly laid out document. The grounds for review here are as strongly controversial as they are politically important. Over a number of years support for the original “orthodox” *ultra vires* doctrine has been eroded. In place of this doctrine two others have been laid down. These are the common law model and a modified version of *ultra vires*. The next section, Section 2.2, explains and analyses this debate.

The final part of this chapter, Section 2.3, is dedicated to an evaluation of the common law and *ultra vires* models. It will be shown that behind the debate between *ultra vires* and common law are two positions that will be familiar from Chapter One: The first position, which underpins *ultra vires* is that judicial review must be based on

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<sup>78</sup> As set out in the 2006 Research Paper ‘Judicial Review: A Short Guide to Claims Made in the Administrative Court’ available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf>

<sup>79</sup> *Factortame Ltd and others v. Secretary of State for Transport* [1990] AC 85.

*interpretation of the intent of the legislature*, that is, Parliamentary intent. By contrast the common law model emphasises *the role of judicial creativity* in developing review. It argues that intent is both a worse and a less honest basis for this second judicial function. Thus the debate on extra-jurisdictional appeal takes place upon very similar terms to the debate we have already joined on intra-jurisdictional appeal. It is hoped that in the last sections of this chapter the robustness of the thesis developed in Chapter One can be tested by bringing to bear its logic in the review debate. Ultimately, we argue against *ultra vires* precisely because it relies on the judiciary imputing an intent to Parliament in situations where it is not clear what the legislature genuinely desired. Again we accept that discretion is inevitable, but only when this is openly exercised is it guaranteed that reasonable discretion will be applied.

It remains to be noted that our evaluative framework will, as before, be political—our concern is how adopting either justification for review caches out in terms of democracy, transparency, rights, etc.

## **2.2 The Doctrine of *Ultra Vires* under Scrutiny**

We argued above that the justification for judicial review is politically significant because it matters both to the individual and the constitution where the limits of review are set. It also matters which branch of the state these are set by.

However, before addressing these issues—which is the task of Section 2.3—some groundwork is needed. This ground shall be covered as follows: we begin this section by showing why the debate concerning the grounds for review first started. Thus Section 2.2.1 seeks to demonstrate that by the early 1990s the traditional doctrine of *ultra vires* had become untenable as the sole basis for judicial review.

Section 2.2.2 briefly outlines the responses that have been laid down to replace *ultra vires*. The first model, based on the common law, is supported by those who first criticised the *ultra vires* orthodoxy. By contrast the second model merely attempts to modify the original model so that it falls into line with the criticisms set out in 2.2.1. Finally in Section 2.2.3 we investigate four of the most controversial and evaluatively significant conflicts which have arisen in the debate. Arguments (1)-(3) attempt to knock-down the common law model by suggesting it challenges Parliamentary Sovereignty, misrepresents constitutional orthodoxy, and weakens the power of review. Argument (4) replies by challenging the cogency of modified *ultra vires*. The argument is made that the only reason to hold this doctrine is that it ensures an appearance of constitutional harmony is propagated. The price of this is a Parliamentary intent that seems stretched to breaking point.

### **2.2.1 The Demise of “Orthodox” *Ultra Vires***

Sir William Wade’s statement that *ultra vires* was ‘the central principle of administrative law’ would once have been accepted as uncontroversial.<sup>80</sup> Following the simple logic of the *ultra vires* doctrine it was believed that judges decided review cases on an assessment of whether a public body had acted outside of the power granted to it by statute. If, in such cases, it could be established that a public body had acted outside of its statutory mandate then it could be asserted that the body had acted illegally. There would then be grounds for the judge to quash, i.e., set aside, that institution’s decision or, alternatively, to award damages to the plaintiff. *Ultra vires* determined the substance of review and kept administrative power in check. Better

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<sup>80</sup> William Wade and Christopher Forsyth, *Administrative Law* (Oxford, Clarendon Press, 1994) 41.

still, this all occurred without any challenge to Parliamentary Sovereignty for precisely the reason that the justification of the review was illegality—the public body had acted beyond its legislated jurisdiction. This point was highly significant for Wade, since:

Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. He is on safe ground only where he can show that the offending act is outside the power.<sup>81</sup>

Orthodox *ultra vires* is compelling for just this reason. It posits a direct link between review and Parliamentary intent which guarantees that the legislature remains sovereign over the courts. It thereby secures an important pillar of the constitution and ensures harmony between the legislature and the judiciary. Hence as an initial grounding for judicial review *ultra vires* seems a persuasive and helpful doctrine.

Yet even as early as 1985 the *G.C.H.Q.* case showed that the direct link between Parliamentary intent and the grounds for review was under pressure. In this case Lord Diplock confirmed that administrative law had ‘developed to a stage today when one can classify under three heads the grounds upon which administrative action is subject to control by judicial review’.<sup>82</sup> In addition to the solidly *ultra vires* head of illegality, two other heads “procedural impropriety” and “irrationality” were now fully recognised as bases for review. These additional heads seem to stretch the link between Parliamentary intent and review for a number of reasons that are

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<sup>81</sup> Ibid 44.

<sup>82</sup> See *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, p411.

discussed below, but it ought to be noted that the link does not dissolve completely. Instead, *ultra vires* can be given a broader reading through which not only legality, but rationality and procedural propriety are themselves assumed to be intended by the legislature. Judicial deference to Parliament can thus be maintained.

Still, the fit of *ultra vires* with the genesis of these other heads of review is questionable. Even if the broader *ultra vires* doctrine is asserted and we assume that irrationality and procedural impropriety are now tacitly intended by the legislature, they appear to have their roots, at least, in judicial creativity. This point is put forcefully by Sir John Laws. He argues that these principles are in fact ‘judicially created standards of behaviour’ that were first articulated in the *Wednesbury* case.<sup>83</sup> Thus they are categorically judicial creations which: ‘Owe neither their existence nor their acceptance to the will of the legislature. They have nothing to do with the intention of Parliament, save as a fig-leaf to cover their true origins’.<sup>84</sup>

The force of this argument lies in the thought that if judges were themselves shifting the boundaries of judicial review without Parliament’s express permission, then they were not following legislative intent. Indeed, the more closely we look at developments in administrative law, the further it seems we must move away from a direct link between legislative intent and the practice of review.

Dawn Oliver was one of the first to measure *ultra vires* against the contemporary practice of review.<sup>85</sup> Her study of a number of landmark administrative law cases suggests a number of interesting conclusions. Her thesis is that ‘judicial review has moved on from the *ultra vires* rule to a concern for the protection of

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<sup>83</sup> Lord Laws, ‘Law and Democracy’ (1995) *Public Law* 72 at 79.

<sup>84</sup> *Ibid.*

<sup>85</sup> We refer here to Dawn Oliver, ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ in Christopher Forsyth (ed.) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000).

individuals, and for the control of *power*, rather than *powers*, or *vires*'.<sup>86</sup> As Oliver points out, the courts are just as worried about abuses of power granted by common law, such as the "Royal Prerogative" which allows ministerial discretion, as they are about abuses of statutory power. Parliamentary intent does not appear to be at issue where common law powers are misused and, provided those powers are justiciable, then there does seem to be grounds for judicial review. Another area where *ultra vires* looks weak is with regard to non-statutory bodies. Judicial review cases have been brought against misuse of power by such bodies when it damages the public interest. However, again it is a struggle to find Parliamentary intent in this expansion of the scope review.

It would be too long a digression to lay out the most important recent developments in administrative law. Nevertheless, the trend seems to be towards an expanded sphere for judicial review and, as this has progressed, the link between Parliamentary intent and the three heads of review has, unsurprisingly, become more difficult to maintain. Indeed, Lord Woolf has pointed out that although a narrow *ultra vires* doctrine clearly captures the warrant for review in some cases, it cannot account for every situation where review seems to be justified.<sup>87</sup> Notably review can and should be able to take place where the non-exercise of power by a public body has unreasonable results that damage the public interest. Yet *ultra vires*—an administrative body acting beyond its powers—does not provide grounds for such a review. Nor does it capture fully the discretion permitted to judges. For example, even when an administrative act is shown to be *ultra vires*, if the judge believes it has had enough time to "bed-in" before a challenge has been made, he will often decide not to set aside that act. On these grounds Lord Woolf also condemns *ultra vires*. Having

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<sup>86</sup> Ibid 3.

<sup>87</sup> See Lord Woolf, 'Droit Public—English Style' (1995) *Public Law* pp. 57-71.

cited Lord Reid (as we did on page 11), he denounces the *ultra vires* doctrine as a piece of ‘fairy tale’ reasoning.<sup>88</sup>

Most jurists are now ready to concede the point. To the extent that *ultra vires* holds Parliamentary intent rather than judicial creativity to have been wholly responsible for the changes in administrative law, it is a reasoning that has lost touch with reality. In fact, such assaults on the orthodox model of review have successfully landed on their target. Mark Elliot, himself a leading advocate of a role for legislative intent in judicial review, has noted that, ‘few people, if any, doubt the need to replace the conventional *ultra vires* principle with a more convincing explanation for judicial review’.<sup>89</sup>

The major problem we have highlighted in this section is that whilst *ultra vires* may serve a politically important function in linking legislative intent to judicial review, an orthodox reading of the model cannot be reconciled with the reality by which judicial review has developed. As we shall see, this need not sound the death knell for *ultra vires*, but it does indicate that the doctrine needs revising.

### **2.2.2 The Contemporary Divide: Common Law and Modified *Ultra Vires***

Critics of the *ultra vires* doctrine have developed a second model of judicial review which has come to be known as the “common law” model. Having argued that *ultra vires* is both unrealistic and unable to justify the full scope of review, advocates of the common law approach urge that we replace Parliamentary intent as the central

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<sup>88</sup> Ibid 68.

<sup>89</sup> Mark Elliot, ‘Legislative Intention Versus Judicial Creativity? Administrative Law as a Co-operative Endeavour’ in Christopher Forsyth (ed.) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000) 342.

justification for judicial review. Their argument is that review is the creation of common law. Judges do—and will continue to—develop the principles of review. This is not to deny that there is a place for Parliamentary intent in the review process. There will be occasions when the sovereign Parliament wishes to control the scope of review, for example if it believed the judiciary had begun to use an unacceptable or even a publicly disliked principle to warrant review. In such cases the legislature has the power to alter judicial practice by legislating to eliminate the offending principle from the grounds for review.

Adherents of the common law model believe that by basing the justification for judicial review in common law a better picture of what is really taking place is allowed to emerge. The façade of Parliamentary intent is discarded. This also means that when it comes to legitimising the practice of review it has to be achieved in a more open manner, by a ‘reasoned justification which is acceptable in normative terms for the controls which are being imposed’.<sup>90</sup> The reply that the court was “merely following legislative intent” is removed and this ensures a more satisfactory reason is given for judicial curtailments of power.

Importantly, when set out as above, the common law model does not seem to threaten the established constitutional order. It permits Parliamentary Sovereignty by accepting that when the legislature makes itself ‘unequivocally clear’ the courts are bound to adhere to its dictates.<sup>91</sup> So the model is not a call for judicial supremacy. All it asks is that we formally recognise that the substance of review is predominantly, but not exclusively, a product of the courts. As such it provides a plausible challenge to *ultra vires* and appears to fit within the constitution as it stands.

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<sup>90</sup> Paul Craig, ‘Ultra Vires and the Foundations of Judicial Review’ (1998) 57 *Cambridge Law Journal* 63 at 90.

<sup>91</sup> This is Paul Craig’s phrase. It should be noted the ambiguous level clarity required does seem to permit a degree of licence to judges. See Paul Craig, ‘Competing Models of Judicial Review’ (1999) *Public Law* 428 at 429.

The response from defenders of the *ultra vires* doctrine has been to abandon the traditional version of the model which sought to both legitimise and provide the scope of review. In its place they have laid down a “modified *ultra vires*” model.

This model recognises the implausibility of arguing that when the principles of judicial review are applied all that has been achieved is the implementation of Parliament’s will. It is recognised that there need not be a direct link between legislative intent and the grounds of review. Hence modified *ultra vires* theorists are neither troubled by the proposition that (i) Parliament does not generally determine the scope of review, nor the related position that (ii) judges develop the heads of review. However, they do still maintain that legislative intent is at the heart of the warrant for judicial review. Indeed, the central thesis of modified *ultra vires* is that judges must assume, whilst undertaking review, that Parliament has a general intent for the rule of law to be obeyed. Thus Parliament’s role becomes more passive than it was perceived to be under the orthodox model. Legislative intent is asserted, but it is argued that ‘Parliament is taken to have left it to the good sense of the courts to determine the precise content of the grounds of review through the incremental method of the common law tradition’.<sup>92</sup> Nonetheless, this new breed of *ultra vires* theorist still holds that it is essential to the constitutional balance that review is somewhere grounded on legislative intent.

It must also be noted that modified *ultra vires* is set out quite specifically as a middle ground. It aims to combine the constitutional legitimacy of the orthodox doctrine whilst also taking on board the most potent of the attacks made by Oliver, Woolf, Laws, and Craig. This is the sense in which Christopher Forsyth and Mark Elliot have labelled their model a ‘reconciliation’, writing that: ‘it reconciles

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<sup>92</sup> Above n 88 at 344.

constitutional orthodoxy—in which the judiciary is in the final analysis subject to the democratic will as expressed through Parliament—with the reality that the extension of judicial review was a process in which judicial creativity and ingenuity played a prominent role’.<sup>93</sup>

### **2.2.3 Four Flashpoints between *Ultra Vires* and Common Law**

We are now ready to analyse some of the more interesting and politically charged sections of the common law-*ultra vires* debate. What follows must of necessity be only a select part of this sizeable confrontation. Thus we shall proceed to investigate the exchange by looking at four sub-debates, namely the arguments that; (1) completely abandoning *ultra vires* will inevitably challenge Parliamentary Sovereignty, (2) intent is a cornerstone of constitutional orthodoxy, (3) the grounds for review affect the courts’ ability to challenge preclusive clauses, and, (4) *ultra vires* loses its “bite” when intent is located as far away from the justification of review as it is in the amended model. These issues are important. They address the key areas in which the models have sought to distinguish themselves in terms of their competence at describing how things are, their effectiveness as justifications, and their robustness for achieving desirable results. Hence analysis of these disputed points should facilitate our evaluation of the two models in Section 2.3.

It is easy to become engrossed in the intricacies of this debate, but we should not forget a point made repeatedly by Craig, namely, ‘the central issue is how far the relevant legal rules and their application can be satisfactorily explained by reference

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<sup>93</sup> Forsyth and Elliot, ‘The Legitimacy of Judicial Review’ (2003) *Public Law* 286 at 287.

to legislative intent'.<sup>94</sup> Just as in the first chapter, we seek to follow the relationship between legislative interpretation and judicial power, looking again at its potential political impact.

*Argument (1): Rejecting ultra vires entails a challenge to Parliamentary Sovereignty*

As we have set it out, both parties in the *ultra vires*-common law debate are taken to agree with the UK's constitutional norm that Parliament is sovereign over the judiciary. In fact, some common law theorists, such as Laws and Woolf, have run arguments for judicial supremacy<sup>95</sup>—although neither judge has implemented such a position in their courtroom. Nevertheless, most advocates of the common law model believe it is fully compatible with Parliamentary Sovereignty and would strongly contest the argument that by rejecting *ultra vires* they also reject Parliamentary Sovereignty. This, though, is the claim made by their opponents. One critic has noted that the ensuing disagreement is 'at the heart of the debate concerning the theoretical underpinnings of judicial review'.<sup>96</sup> It is unsurprising that this is a focal point of debate for, given the firmly embedded nature of Parliamentary Sovereignty in the UK, a powerful argument would exist against the common law model if it entailed the violation of this principle.

Forsyth was the first to raise this issue. He gives the example of a Minister who, acting within his statutory mandate, nonetheless produces a set of vague regulations that cannot be determined with certainty. If we are asked to search outside the *ultra vires* doctrine for a justification to review this case, Forsyth concedes it may

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<sup>94</sup> Above n 89 at 66, the same point is made in above n 90 at 438.

<sup>95</sup> See above n 82 at 84-90 and above n 86 at 67-69.

<sup>96</sup> Mark Elliot, 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' (1999) 58 *Cambridge Law Journal* 129 at 136.

be found under the common law head of vagueness. Yet there still seems to be a difficulty here:

What an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly. Likewise if Parliament grants a power to a minister, that minister either acts within those powers or outside those powers. There is no grey area between authorisation and prohibition or between empowerment and the denial of power. Thus, if the making of the vague regulations is within the powers granted by a sovereign Parliament, on what basis may the courts challenge Parliament's will?<sup>97</sup>

Two important responses have been made to this question. Craig has argued that in one sense there is no question to be answered. Forsyth's challenge mistakenly 'elides the existence of limits to an agency's power with the conceptual basis for those limits'.<sup>98</sup> In reality, changing the warrant for judicial review does not automatically change the limits within which this may take place. Under *ultra vires* the reason that the regulations might be struck-out for vagueness was that Parliament is presumed to prohibit vagueness. Why then should the common law not also be presumed to prohibit vagueness? The limits for review are not changed. The real issue Craig perceives is whether Parliamentary intent need be included in justifying review. It is not the case that courts adhering to the rule of law model "challenge[s] Parliament's will". Actually, they should reach the same conclusion for the same reason as Parliament—that the rule of law prohibits vagueness.

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<sup>97</sup> Christopher Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) 55 *Cambridge Law Journal* 122 at 133-4.

<sup>98</sup> Above n 89 at 74.

The second reply, that of Laws, seeks to reject the logic underlying Forsyth's argument. According to Laws, Forsyth's mistake lies in arguing that legislative permission exists by virtue of the fact that there is not a legislative prohibition. This is a *non sequitur* for it omits the 'undistributed middle'.<sup>99</sup> Whilst Parliament may have the ability to authorise anything, it does not follow from this that everything that is authorised is authorised by Parliament. Powers may exist which are neither authorised nor prohibited by the legislature.

It is insightful to our understanding of modified *ultra vires* to consider Elliot's counter-argument to Laws. Initially, it appears that he gives away some ground by qualifying Forsyth's position: he argues that what was meant by the proposition "what an all powerful Parliament does not prohibit, it must authorise either expressly or impliedly" was that once Parliament has created a power—i.e., 'occupied the field'<sup>100</sup>—any limits imposed by courts must be based upon the scope of the power laid out by the sovereign Parliament. *Prima facie* this does not appear to damage Laws' point that there will be situations where *de facto* public power exists before Parliament has "occupied the field". However, as Elliot continues it becomes clear that he believes "undistributed middle" situations do not occur in the public domain. Rather Parliament, in line with *ultra vires*, always intends the rule of law to apply and hence it 'grants to the judges a margin of freedom... to set the precise limits of administrative power'.<sup>101</sup> Thus, from his—and Forsyth's—perspective, Parliamentary intent will always be necessary for judicial review.

We seem to have reached a deadlock for the debate does not appear to settle itself either way. The point we should emphasise is that whether one perceives the

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<sup>99</sup> Lord Laws, 'Illegality: The Problem of Jurisdiction' in Christopher Forsyth (ed.) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000) 78.

<sup>100</sup> Above n 95 at 138.

<sup>101</sup> *Ibid* 143.

judiciary to be interpreting the law or using discretion is again crucially important here: modified *ultra vires* theorists argue that Parliament intends the rule of law to apply and judges carry out this intent by interpreting statute where applicable, developing the common law when necessary. Against this, common law advocates reverse the causality behind the judicio-Parliamentary relationship. Hence Craig: ‘we maintain that unless the all powerful Parliament *has clearly authorised action which is inconsistent with the judicially created controls* then such controls should be operative and the relevant action should be prohibited’.<sup>102</sup> This approach holds that legislative intent is of no concern to the judiciary until Parliament begins to legislate in the relevant areas. Given that an assessment of this debate depends on one’s preconceptions about how the judiciary acts, it must be concluded that dropping *ultra vires* will not inevitably challenge Parliamentary Sovereignty.

*Argument (2): Intent is a cornerstone of constitutional orthodoxy*

The *ultra vires* theorist may at this point change tack and try to make what seems a less controversial claim. Reading Elliot closely it becomes clear that his version of *ultra vires* is based on the premiss that a break from constitutional orthodoxy has occurred if no reference is made to Parliamentary intent when cases relating to statutory bodies are reviewed. While Elliot accepts that ‘the whole of judicial review rests on one foundation, *vis.* the rule of law’,<sup>103</sup> he also believes that statute imposes special constraints on the judiciary. As he writes: ‘In relation to statutory power, the operation of the sovereignty principle raises special considerations which require the rule of law to be vindicated *presumptively* in order to

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<sup>102</sup> Above n 90 at 439.

<sup>103</sup> Above n 95 at 155.

ensure that judicial review can be reconciled with constitutional principle'.<sup>104</sup> In short, it is held that review should be justified by direct relation to the rule of law in non-statutory cases. The same is not true in statutory cases. In these cases the medium of Parliamentary intent is required. To omit reference to the legislature's will in such situations is to challenge Parliamentary Sovereignty—a cornerstone of constitutional orthodoxy.

In many respects this is a similar argument to that laid down as *Argument 1*. However, it makes a separate claim to constitutional orthodoxy which merits some investigation. The claim made is a historical one and common law theorists do not accept that the origins of review are to be found in judicial interpretation of Parliamentary intent. As Craig notes: 'If [Elliot] is right then courts and commentators have been guilty of constitutional heresy for three hundred and fifty years'.<sup>105</sup> It is worth briefly investigating evidence that the courts have not always taken intent to be crucial throughout the history of judicial review.

Craig presents us with the landmark rulings of three historically significant judges; Lord Coke in *Bagg's case* (1615), Lord Mansfield in *R. v. Barker* (1762), and Lord Holt in *Groenvelt v. Burwell* (1700).<sup>106</sup> These paradigms of the pre-nineteenth century basis for review are grounded in the common law and make no attempt to justify themselves through recourse to Parliamentary intent. For example, James Bagg, a burgess of Plymouth, was disenfranchised for making abusive comments about the Mayor and other burgesses. When this case came to court, it was held by Coke that abusive comments were insufficient ground for disenfranchisement of a freehold office. Subsequently, the ruling led to novel obligations being imposed for the first time on public officials who were normally outside the system of law enforcement.

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<sup>104</sup> Ibid.

<sup>105</sup> Above n 90 at 443.

<sup>106</sup> See above n 89 at 79-89.

Yet Coke did not justify the ruling by legislative intent. In fact the absence of legislative intent is the common factor in the above cases and is suggestive that intent was not essential for constitutional orthodoxy in review of statutory agency before the nineteenth century. Craig summarises this position thus: 'For Coke, Holt, and Mansfield the central idea was the capacity of the common law to control governmental and non-governmental power. If Parliament desired to limit such controls, so be it. The courts would then pay heed to such dictates, provided that they were sufficiently clear and unequivocal'.<sup>107</sup>

Jeffrey Jowell also appears to offer broad support for the common law understanding of constitutional orthodoxy:

Whether courts are themselves creations of statutes or possess inherent powers, the essence of their function is to adjudicate on the lawfulness of official action (at least outside of legislation). That function involves the courts forming their own view of the matter in this area of their competence. For the courts to decide these questions on the basis of an assessment of how the legislature would have decided the matter had it been a judge in its own cause amounts to an exercise in divination and is ultimately an abdication of judicial responsibility.<sup>108</sup>

It seems highly questionable whether Parliamentary intent really is a cornerstone of constitutional orthodoxy as Elliot claims. Early review cases demonstrated that courts did not seem to be acting on legislative intent and, if we believe Jowell, it is not desirable that they should have settled cases by recourse to intent. This is not to

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<sup>107</sup> Above n 90 at 443.

<sup>108</sup> Jeffrey Jowell, 'Of Vires and Vacuums: The Constitutional Context of Judicial Review' (1999) *Public Law* 448 at 459.

exclude Parliamentary intent from review entirely—Argument (3) is about precisely what courts should do when a troublesome, but clear and direct, intent is present. What has been questioned is whether indirect intent is essential to constitutional orthodoxy from a historical and normative perspective.

*Argument (3): The grounds for review affect the courts' ability to challenge preclusive clauses*

Even if the place of general Parliamentary intent in the review process is controversial there is consensus that particular legislative intentions must be followed when they are made explicit. Preclusive, or “ouster”, clauses are one example of specific Parliamentary intent. These tend to take the form of legislative prohibitions on judicial review of a ministerial or executive discretion. Such clauses set the interests of sovereign Parliament above judicial decision even if they damage the rule of law. However, during the celebrated UK case, *Anisminic*, the courts found a way around this problem.<sup>109</sup> They held that an ouster clause which protected a legal nullity could be bypassed. For example, an indeterminately worded piece of legislation that generated an executive power should be considered a legal nullity because of its vagueness and therefore would not be protected from judicial intervention by a preclusive clause. This decision was able to be justified by *ultra vires*; it did not challenge Parliamentary Sovereignty because it was aimed at upholding the rule of law, that is, Parliament’s indirect intention.

An argument has since arisen that discarding *ultra vires* would weaken the ability of the courts to challenge preclusive clauses. This has developed into a third

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<sup>109</sup> *Anisminic Ltd v. Foreign Compensation Commission* [1967] AC 147.

flashpoint in the *ultra vires*-common law debate. Advocates of *ultra vires* are keen to suggest that discarding the doctrine will ‘eviscerate’ judicial review.<sup>110</sup> One case in particular that occurred in South Africa, *Staatspresident en andere v. United Democratic Front en’n ander*, suggests that review might well be weakened if justified by the common law.<sup>111</sup>

The facts of the case were that during several states of emergency in the 1980s the State President used the Public Safety Act of 1953 to inhibit certain individual freedoms for the public good. A particularly interesting measure was a restriction of the freedom of the press which stopped any reporting, photographing, and even journalistic presence at scenes of “unrest”. The opposition UDF party believed these enactments were illegal and sought to challenge them on the grounds that “unrest” was too vague a term—and the regulations should therefore be voided. Chief Justice Rabie dismissed their case on the basis of an ouster clause in the 1953 Act which stated that ‘no court shall be competent to enquire into or give judgement on the validity of any... proclamation’ made ‘under section 3’ of the Act.<sup>112</sup>

It must be conceded that the above restrictions granted too much power to the South African government. From a normative standpoint it clearly seems desirable that these controls be set aside. However, they were not. The reason Forsyth adduces for this is Rabie’s rejection of the *ultra vires* reasoning as formalistic, coupled with his acceptance of the common law basis for review. Now given that Rabie had discarded *ultra vires* he had also lost the ability to reason in the same way as in *Anisminic*. So Forsyth argues that Rabie’s decision was settled. It was an ‘inevitable consequence’<sup>113</sup> of the departure from *ultra vires*. The argument could not be used

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<sup>110</sup> Above n 96 at 131.

<sup>111</sup> Our account here follows Ibid 129-132 closely.

<sup>112</sup> Chief Justice Rabie, cited in Ibid 130.

<sup>113</sup> Ibid 131.

that Parliament surely did not intent to grant the State President the power to make vague enactments. Furthermore, since the courts were unable to declare the regulations *ultra vires* they had to treat them as *intra vires*, but this was exactly the sphere in which the preclusive clause had to be effective. Consequently, whilst many political reasons could be advanced for Rabie to have ruled differently, Forsyth believes there was a paucity of legal warrant for an alternative ruling and concludes, ‘I have yet to hear a cogent legal argument showing where the logic of the *UDF* reasoning is flawed’.<sup>114</sup>

In truth it does not seem necessary to refute the logic of the reasoning in *UDF* to undermine Forsyth’s claim. We need only show that other legitimate options were available to Rabie which could have generated an equally logical but more desirable verdict. Should such alternatives exist, then the claim that the potency of judicial review is damaged by rejecting *ultra vires* would be tarnished. Craig thinks Rabie certainly could have decided differently on common law grounds. The court should have emphasised the common law constitutional principle that ‘the inherent power of the court should not be taken to be wholly excluded from review’ and it should have held that ‘a clause which purported to do this would therefore be restrictively construed so as to apply only to decisions which were not vitiated by errors of the kind which could be challengeable under standard heads of review’.<sup>115</sup> Using this reasoning the *UDF* case could have been settled in a similar way to *Anisminic*, but on common law grounds.

This raises a question about *Anisminic*. Should it really be held up as a paradigm of *ultra vires* reasoning? We may believe the right result was reached and clearly it was reached by applying *ultra vires*. However, Parliamentary intent could

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<sup>114</sup> Christopher Forsyth, ‘Heat and Light: A Plea for Reconciliation’ in Christopher Forsyth (ed.) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000) 406.

<sup>115</sup> Above n 89 at 72-73.

have been interpreted in a different way—for surely if an ouster clause has been passed which explicitly prohibits review then the legislature’s intention was quite transparently for review to be prohibited? Indeed, this feels like a more honest reading of the legislature’s intent. It suggests that *Anisminic* should really be understood to have been an instance of judicial discretion whereby modified *ultra vires* was adopted instead of the more obvious orthodox model. Hence *ultra vires* did not make *Anisminic* a foregone conclusion anymore than it would have made *UDF* a foregone conclusion, if used in that case.

It has been argued that *UDF* and *Anisminic* do not unambiguously support the conclusion that grounding judicial review on common law reduces its effectiveness to reach desirable conclusions in ouster clause cases. Rather it has been argued that the common law model should be able to bring about similar decisions to modified *ultra vires*. Furthermore, it should be noted that adopting *ultra vires* reasoning does not guarantee the most desirable verdict is reached any more than by using the logic of the common law model: It will still be judicial discretion which decides whether intent is applied directly, indirectly, or not at all.

*Argument (4): Ultra vires loses its “bite” when intent is located as far away from the justification for review as it is in the amended model*

So far we have considered three arguments that seek to show either; (A) *ultra vires* should be not abandoned, or, what amounts to the same that, (B) the common law model ought not to be adopted. The final argument we shall consider is an attack on *ultra vires* in its modified form. It suggests that the doctrine becomes less cogent when it is made to rely on indirect Parliamentary intent as the justification for review.

To recall arguments made in 2.2.1, the problem that orthodox *ultra vires* encountered was that it no longer accurately described the scope of review. It had begun to look unrealistic. The solution proposed by the amended model was that Parliamentary intent should be seen as being general; it was conceded that the courts set the limits of review, but argued that they nevertheless recognised they were actualising Parliament's will that the rule of law should always be guaranteed by the review process. However, although the amended doctrine stands insulated from the defects associated with its orthodox predecessor, it seems to face a new problem. As Craig points out, 'the malleability of the doctrine allows it to be formally stretched', yet, 'the more contrived the search for the legitimation of legislative intent, the more strained and implausible does the whole *ultra vires* doctrine become'.<sup>116</sup>

This type of argument feels particularly difficult for the *ultra vires* theorist to answer. Underpinning this viewpoint is a serious concern about the value of the modified doctrine. The worry is that having discarded direct intent, which could determine the content of review, we are merely left with an indirect intention for the rule of law to be followed which does very little argumentative work and allows significant scope for discretion. Indeed, it is quite clear that indirect intent cannot tell us anything about the substance of review because it quite openly concedes this task to the courts. This leaves us to question what it is that we save by modifying, rather than abandoning, the *ultra vires* doctrine.

Remembering our previous exploration of modified *ultra vires*, the most significant claims it makes for its superiority are that it upholds Parliamentary Sovereignty and, by inference, it adheres to constitutional orthodoxy. It is at these familiar junctures that we must discover any value to *ultra vires*. Nicholas Bamforth

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<sup>116</sup> Above n 89 at 69.

would agree with this assessment. He notes that ‘defenders of ultra vires often characterise the protection of sovereignty—or at least, preservation of the appearance of deference to Parliament—as the normative goal or goals of their theory’.<sup>117</sup> This might perhaps be a good enough reason to allow modified *ultra vires* to be used as the justification for judicial review. Yet Bamforth supports the conclusion we have already hinted at, namely, that *ultra vires* is no more useful than the common law model is as a support for Parliamentary Sovereignty.

Bamforth reasons as follows<sup>118</sup>: where Parliamentary Sovereignty exists this is due to its acceptance by the courts, not simply because Parliament wills it to be so. This is because statute cannot establish Parliament as the supreme power; it is rather a political fact and one ensured by the judiciary. So although justifying review by *ultra vires* aims to keep the judiciary within Parliamentary intent, there would be nothing the legislature could do if courts chose to move beyond intent. Hence Bamforth: ‘on the one hand, the ultra vires principle maintains that the courts should ultimately defer to parliamentary sovereignty; yet on the other, sovereignty lies in the keeping of the courts and can be overthrown by them—unhindered by ultra vires—should a “revolutionary” situation manifest itself’.<sup>119</sup> The doctrine of *ultra vires* provides no additional protection to the principle of Parliamentary Sovereignty than would the common law model. This has been demonstrated by a recent case. The ruling of *Factortame (No. 2)*, in which Parliamentary legislation was held by the courts to be inferior to that of the European Union for as long as the UK still remained a member state, concretely demonstrates the ability of the courts to determine what the law is.<sup>120</sup>

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<sup>117</sup> Nicholas Bamforth, ‘Sovereignty Re-examined: The Courts, Parliament, and Statutes’ in Christopher Forsyth (ed.) *Judicial Review and the Constitution* (Oxford, Hart Publishing, 2000) 115.

<sup>118</sup> See Ibid 117-129.

<sup>119</sup> Ibid 123.

<sup>120</sup> *Factortame Ltd and others v. Secretary of State for Transport* [1990] AC 85.

The judiciary had effectively overruled Parliament and bound it to its European obligations.

Examples like *Factortame (No. 2)* are rare, yet when they do occur they show that the review courts are not mere puppets of legislative intent. Hence, they give occasional glimpses of the true mechanics of the constitutional order. The implication for modified *ultra vires* is that it is difficult to see what advantages it has over the common law model. *Ultra vires* always wants us to find Parliamentary intent behind judicial discretion, but it cannot give us a sufficient reason to want to construct this intent. It does not provide any additional security for the principle of Parliamentary Sovereignty or constitutional orthodoxy since, when judges choose, they can overrule it. If the argument presented here is correct, the only benefit to be gained by adopting a modified *ultra vires* justification for judicial review is that, whatever the reality, it maintains the appearance that review is based on legislative intent. However this is not greatly persuasive and, as we shall argue below in Section 2.3, it should not be accepted from a political perspective.

### **2.3 The Re-emergence of Intent, Interpretation, and Formalism**

Before evaluating the two justifications for review a brief recap of the last section is in order. We began by showing that the orthodox *ultra vires* doctrine, which justified review on the basis that a power had acted beyond its statutory mandate, had become untenable. It could not account for all cases of judicial review and seemed unable to cope with the dynamism of that practice. We then laid down two competing models of review. The first, the common law model, was advocated by those who had

criticised the orthodox doctrine. It argued that review was justified by common law principles that were being continually developed by the judiciary. Against this, those wishing to defend *ultra vires* made a substantial alteration to their model. They continued to argue that Parliamentary intent was the central justification for review in statutory cases, but only in the sense that Parliament always intends the rule of law to be adhered to. Therefore they could concede that the judiciary does have an important creative role in determining the rule of law and expanding the scope of review in non-statutory areas.

We then looked at four key points of contention between the two competing models. It was claimed against the common law model that: it did not respect Parliamentary Sovereignty; it went against constitutional orthodoxy; and it weakened the ability of review to challenge preclusive clauses. On each of these points we have shown that a strong counter-argument is available to the common law theorist: we noted that Parliamentary Sovereignty would only be damaged by the common law thesis if every review act were intended explicitly or implicitly by the legislature. It is up for question whether this is indeed the case. Surely it is just as plausible that the judiciary acts autonomously as it reviews cases, unless there is specific legislative intent “in play” when it must then defer to the legislature. Nor did constitutional orthodoxy appear to lend much support to *ultra vires*. Contemporary orthodoxy has certainly supported the role of legislative intent in judicial review, but this has not historically been the case—and theoretical reasons were given for why intent should not be central to constitutional orthodoxy. We then showed that *ultra vires* does not guarantee a better verdict than common law theory when trying to defeat ouster clauses. Rather, appeal to the implied intent of the legislature seems only an appeal to

common law principles which themselves could have just as effectively been put forward.

The final argument was that by moving from direct intent to indirect intent we end up placing a concept with very little persuasive value at the centre of our justification for review. We have already noted that this is a strong argument against modified *ultra vires*. In fact, it is argued in the remainder of this section that this claim is decisive in the debate.

As we have seen above, the attempt to show *ultra vires* is politically more desirable than common law arguments has not fulfilled its promise. It has not been proven from the perspective of Parliamentary Sovereignty, constitutional orthodoxy, or effectiveness against ouster clauses—all of which are politically significant—that *ultra vires* generates a better outcome than common law. However, it can be argued that placing indirect intent at the heart of the justification for judicial review does have a negative political consequence. Our criticism should by now be all too familiar. It is that while *ultra vires* presents us with a judiciary that is busily carrying out the will of sovereign Parliament, the reality of the situation may be somewhat different. How we perceive the judiciary makes a difference to its power, particularly if it is acting quasi-autonomously.

Just as it mattered whether hard cases were decided by interpreting the law or by judges using their discretion, so too it matters whether cases are reviewed because of some constructed legislative will or because of common law principles and judicial creativity.

The reason we should be concerned is political. In fact, it is very similar to the problem we identified in Chapter One. Transparency is itself an essential check on the powers of officials and institutions. This is clearly true in the case of the judiciary.

When it is publicly believed that judicial decisions are largely the will of a sovereign elected body they thereby gain substantial legitimacy. Judicial decisions are much less likely to be publicly scrutinised when they claim this pedigree than if they cannot aspire to it. Hence judicial decisions are made much more powerful and authoritative by drawing on legislative intent. However, if judicial decisions are discretionary in review, as they can be in hard cases, then the judiciary is once again drawing on authority it should not have. Its decisions will appear to be the products of democratically passed legislation even when in reality they are the retroactive decision of a small number of unelected officials, learned though they may be.

Returning to *ultra vires* we can now suggest that it does matter what form the justification of review takes. It matters if for no other reason than that it determines the level of scrutiny and criticism that can be levelled at review decisions. Yet, with the malleability of indirect Parliamentary intent, there appears to be plenty of space for discretion within review cases. It seems quite unhelpful to label as legislative intent decisions which are really only judicial discretion. Hence the admissions of some of the jurists who favour *ultra vires* seem quite surprising. Wade, for example, recognises that there is ‘a high degree of artificiality’ to *ultra vires* and further admits that the courts ‘can make the doctrine almost anything they wish by finding implied limitations in Acts of Parliament’<sup>121</sup>. Likewise Forsyth has noted that there is ‘a measure of artificiality about the modified doctrine’ and has written elsewhere that jurists must: ‘appreciate the subtlety of the constitutional order in which myth but not deceit plays so important a role and where form and function are often different’.<sup>122</sup>

The repeated thesis of this dissertation has been that we should not “appreciate” judicial and constitutional “myth”, but it is precisely this that we should

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<sup>121</sup> Above n 79 at 43.

<sup>122</sup> Above n 113 at 408.

do away with. Opacity is not politically justifiable in a modern society. Thus, if *ultra vires* is just an example of formalism, as Wade and Forsyth seem close to conceding, then we surely do not need it. Eminent judges such as Woolf and Laws believe review will not be weakened without it, nor have we found theoretical grounds to suggest *ultra vires* is especially useful to review. Again it is argued that we should risk seeing the judiciary in its truest light. If this places additional scrutiny on its decisions then this is so much the better for its transparency and accountability. It is therefore held that we should reject *ultra vires* reasoning in favour of the more intellectually honest common law model.

## Chapter Summary

The arguments and conclusions of this chapter have supported the thesis we developed by looking at hard cases. We have shown that the second function of the judiciary, that of procedural review, also has a political significance. Furthermore, we have seen that in recent years a debate surrounding the justification, form, and content of review has polarised opinion on this element of the judiciary's function, just as a similar disagreement had over the judge's role in hard cases. By looking closely at four politically important sub-debates between the *ultra vires* and common law models of judicial review we have shown that an appeal to "implied intent" is the difference between the two justifications. Ultimately, we argued that the only real purpose of intent in modified *ultra vires* was that it secured a mythical form which covers up the constitutional mechanics beneath. However, this came at the cost of having to interpret legislative will constructively and, as we argued in Chapter One, this comes with negative political spin-offs. Stretching intent in this way permits

unrecognised judicial discretion that ultimately allows more power to the judiciary than it ought to have. By continuing to reject transparency in review, as in hard cases, much of the potential for the public to criticise poor judicial decisions is lost. Nor should we feel at home with our constitution until it is capable of being honest about the balance of powers it upholds.

## **Conclusion: Reason, Transparency and Judicial Decision**

*Our age is the age of criticism, to which everything must be subjected... reason accords [sincere respect] only to that which has stood the test of a free and public examination—Immanuel Kant, 2003: ix.*

This dissertation set out to discover what the role of the judiciary was and how this function was legitimised. In our introduction we argued for the relevance and importance of this investigation. It was maintained that how judges make and justify their decisions matters because the state invests them with substantial power, backing their verdicts with coercive force. We argued that justification was of particular political significance. It was this communication that would determine whether citizens believed state power had been used legitimately and that judges had acted properly in any specific case. We finally showed that justification was made either by appealing to reason or democracy, i.e., the democratically passed law. This provided the framework within which we could analyse and evaluate judicial decision making.

Chapter One focussed on hard cases. It was demonstrated that while textbook cases could be solved by simple reference to the law, attempting to do this in more complex cases led to judicial formalism. At the other extreme it has been suggested that judges decide hard cases on the basis of what they thought was intuitively right turning then towards the law to lend support to their pre-made decisions. We suggested that both these views were too radical: the first had a strong democratic appeal but placed such a heavy emphasis on reading the law literally that it seemed descriptively and normatively unhelpful in hard cases. The second approach could have explained how judges make difficult decisions, but it appeared overly simplistic

and cynical in its implication that judges used existing law to justify decisions they had already made. It seemed not only descriptively weak but also unlikely to be beneficial in legitimising the legal reasoning behind hard cases.

We found in the works of Hart and Dworkin two plausible ways of understanding judicial decision making. When hard cases arose, Hart argued that judges would make discretionary decisions where the law had run out. By contrast, Dworkin believed that the law did not run out, but was constructed by judges from their interpretations of what fitted best with existing law and what was normatively desirable. For Dworkin adjudication was about interpreting the law. He criticised Hart's model on the grounds that it was inaccurate. As mentioned, the law never ran out, it was there to be discovered, which was evidenced by judicial disagreement in hard cases over what the law is. Furthermore, Dworkin charged the discretion model with advocating an anti-democratic and retroactive solution to the problem of hard cases. We joined the debate here in Hart's defence.

We accepted Dworkin's criticism that decisions made by judicial discretion could be seen as retroactive and undemocratic. This is a fair point. However, we strongly rejected the suggestion that interpretation was the key to a better and descriptively more accurate account of judicial decision making. It was not held to be persuasive as a more realistic account because Dworkin's criticisms of Hart did not seem to stick: we were asked to believe that the law is a seamless web without space for strong discretion because every judge could give a unique right answer to each legal question. We argued that the seamless web of law felt intuitively wrong and certainly less plausible than admitting the law could be indeterminate in some situations. It was further suggested that much of the support Dworkin's model of decision making gained from the judiciary could be explained by the appearance of

continuity his model lent to their decisions. Likewise, Dworkin's attempt to eliminate discretion was argued to be unsuccessful. It relied on a distinction between weak and strong discretion which seemed misleading rather than helpful. We finally addressed the point that judges have genuine disagreements about what the law is in hard cases and that this appears to speak against them using discretion. Our reply was that these disagreements arose in particular instances of the hard case where there was a collision between laws and/or principles. Disagreement arose because judges used their discretion to prioritise opposing laws—theoretical disagreements were not about what the law is, but about what it should be.

The above is a defence of the descriptive accuracy of judicial discretion in the hard case situation. Having established here the existence of a limited sphere of judicial law making, it was possible to advance a strong normative argument against interpretation in judicial decision making. If judges are using discretion to decide complex cases, as we have argued they are, then they are doing more than simply interpreting the law. They are making law. An appeal to democracy is now illegitimate. Judges should not say that they are following the law, nor that they are interpreting it—for this also is too strong an appeal to democracy. The problem is that it is only in very rare cases that the judiciary makes the legitimate appeal to reason. When the law is indeterminate judges should be open about this and should justify their decisions on the policy, or other, grounds that have informed their choice. A proper amount of scrutiny is thereby permitted to judicial decisions ensuring judicial power is used reasonably. This was the core [Rawlsian/Kantian-spirited] thesis of the dissertation.

Chapter Two examined judicial review in the UK. We showed that the review function was politically significant. Whereas hard cases might be seen as judicial law

making backed up by the coercive force of the state, review appears different—but still significant—because it is concerned with protecting individuals from abuses of power. The difference, though, is only apparent. After all, when deciding if a body has acted beyond its permitted power, judges will be making a decision either to curtail or to permit the enforcement of a political power. In review, as ever, judges act as mediators between state power and the individual. This is why we held that the way review was legitimised was as important as the justification for decision making in hard cases.

We argued that the orthodox justification of review, *ultra vires*, was increasingly less able to explain how the practice of review had developed in recent years. Orthodox *ultra vires* allowed judicial review to draw its legitimacy directly from an appeal to democracy, claiming that review was justified by Parliamentary Sovereignty. Yet, the idea that a case was eligible for review if a body had acted outside of its statutory power had begun to lose its descriptive force by the 1990s, because the limits it imposed had been exceeded by the judiciary: new heads of review had been laid down and non-statutory bodies had been successfully subjected to judicial review. We therefore concentrated on two responses to the demise in credibility of this model.

Common law theorists argued that judicial review was grounded in common law principles. Judges—and not Parliamentary intent—were responsible for the scope and verdicts of review cases. By contrast the defenders of *ultra vires* modified their original model, arguing that judicial review was actually legitimised by indirect Parliamentary intent. What mattered was that judges were upholding the rule of law and that this was the underlying intent of the legislature. So, *ultra vires* jurists maintained that the judiciary were following indirect legislative intent even though

judges themselves determined the scope and outcome of review cases. To investigate the debate from a better analytical perspective we chose to evaluate it at four sites of key importance. These were; the ability of the models to uphold Parliamentary Sovereignty; their fit with constitutional orthodoxy; their effectiveness to deliver desirable outcomes in ouster clause cases; and, more generally, the relative persuasiveness of two the models.

We challenged the claim made by modified *ultra vires* that the common law model would inevitably trespass into the sovereignty of Parliament. We showed that this would only be the case from one perspective. The live question was whether an over-arching Parliamentary intent underpins the legal system or whether, as we thought more likely, situations could exist where no legislative intent would be obvious to the judiciary. On the second issue of constitutional orthodoxy, we sought to show that this was a historically fluid concept. Although *ultra vires* has dominated contemporary justificational orthodoxy this did not give normative support to the model. Regarding the third focal point of debate, we argued that an appeal to Parliamentary intent should make little difference to the courts' ability to bypass ouster clauses. The reason for this is tied to the fourth issue about the relative persuasiveness of both models. In truth the models share much common ground and this is why Forsyth has pointed out the similarity of this debate to 'the clash between the Big-endians and the Little-endians'.<sup>123</sup> The reason we reject this metaphor and suggest that modified *ultra vires* is unpersuasive is the same: there is a differentiating feature between common law theory and modified *ultra vires*. It is that the latter bases the whole justification for review on indirect legislative intent which is unwritten and left for the judiciary to construct. Therefore, far from setting limits on what cases can

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<sup>123</sup> Above n 113 at 396.

be subject to review, intent now acts as a blank cheque, permitting judicial license because of its malleability and allowing review an indefinite scope because of its generality.

Hence, our thesis on the second judicial function was that we should accept the more honest common law approach and discard those doctrines which would try to hide judicial creativity behind legislative intent. *Ultra vires* suffers from the same ailment we identified with interpretation of the law in hard cases; both try to legitimise judicial decisions by appeal to democracy when such an appeal cannot truthfully be made. As before, this deceit allows judges more freedom than they should have. Furthermore, the presence of formalism in review cases not only increases the discretionary power of the judge to make his decision, it directly influences the constitutional power of the judiciary. Judges thereby have greater influence than they should over other branches of the state.

The above has summarised the crucial arguments and main thesis of this dissertation. It is now worth briefly setting out how our thesis would alter the role of the judiciary. The clear implication of our work is that from a normative and political perspective judicial decisions should be debunked of their mysticism and formalism. There should be no “fig-leaves”, “fairytales” or “Aladdin’s caves” in the justification of judicial decision making. We have argued it is desirable that judges legitimise their decisions by labelling them interpretations of legislative intent less frequently (if ever). However, it should be made clear that perspective is critically important to the issue of whether greater transparency in judicial decision making is politically desirable. We have concentrated on legitimising the role of the judiciary to those who might be affected by its decisions. If, by contrast, we had approached the same issue from the viewpoint of the judge, we might have placed a greater weight on arguments which

emphasised the stability and continuity a little formalism could bring to decision making.

It is evident that an appeal to democracy makes for an easy justification of judicial decision. After all, the notion of “legislative intent” will almost always be flexible enough to justify an interpretation of the law. So, it could be claimed that appeal to democracy provides a politically useful blanket behind which the judiciary can get on with their task of making the best possible decisions. This is a fair point, but we believe it does not win the argument. Ultimately, it leaves us to weigh the values of perceived consistency and stability in judicial decision making against laying out a true, reasoned and clear picture of how such decisions are reached. It is our belief that the latter are more fundamental values and that they do in fact support the former.

We believe our approach of trying to legitimate judicial decisions to those who might be subject to them deserves the primacy we have afforded it. On this basis it is held that our thesis is normatively important. We should be constantly mindful of Dicey’s thought that, ‘from the moment Parliament has uttered its will as lawgiver, that will becomes subject to the interpretation put upon it by the judges of the land’<sup>124</sup>, and we should seek for such “interpretation” to be demystified for it is unlikely to be neutral and value free.

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<sup>124</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, Macmillan and Co. Ltd, 1902) 357.

## **An Endnote on Further Research**

This dissertation was originally planned to be four chapters long. There are three topics in particular that have not been addressed in this work: judicial bias, John Rawls' justification of political decisions via public reason, and role of the legislature. For the sake of completeness it is worth mentioning these omissions below and clarifying how they would fit with the themes and thesis of this work. One short paragraph has been given to each.

**Judicial Bias**—the capacity of the judiciary to make fair and impartial decisions has not been explored in depth in the body of this work. Yet it is of more than periphery importance. At the least it feels like a propensity towards bias in the judiciary would raise the stakes of our argument for transparency. To those demanding a rational and publicly justifiable decision making process, increased transparency would be a way of counteracting the potential for biased decisions to be made. On the other hand bias can also be used to justify formalism. If some level of bias is believed to be inherent in decision making, then recourse to interpretation of legislative intent gains real currency as a way of creating stability by masking the nature of the imperfect system it hides.<sup>125</sup> Either way the link between the legitimising of judicial decision and bias warrants further exploration.

**Rawlsian Reasonableness**—we alluded to a Rawlsian “spirit” that was at the heart of our investigation and the thesis derived from it (see page 73). A central concern of Rawls' work, *Political Liberalism*<sup>126</sup>, was to construct and justify a way of

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<sup>125</sup> There are some good studies of judicial bias in the UK: J.A.G. Griffith, *The Politics of the Judiciary* (London, Fontana Press, 1991) and Sir David Williams' article, 'Bias; the Judges and the Separation of Powers' (2000) *Public Law* pp. 45-60 provide good starting points for investigating this area.

<sup>126</sup> John Rawls, *Political Liberalism* (New York, Columbia University Press, 2005). See also Rawls' article, 'The Idea of Public Reason Revisited' in Samuel Freedman (ed.) *Collected Papers: John Rawls* (London, Harvard University Press, 1997).

making political decisions—i.e. decisions backed by the coercive power of the state—given the fact of a pluralist society. The significant tool used by Rawls to achieve this was justification by public reasoning. To some extent we have assumed the success of his work in the above, for we have argued precisely that it is only when appeal to legislative intent is removed from judicial decisions that these will be properly legitimised. Judges will be forced to set out their reasoning honestly. However, if, as has been argued by Jeremy Waldron<sup>127</sup>, pluralist society faces a problem of ‘impossibility’, appeal to democracy rather than reason may in fact be a realistic approach. It would be interesting both to develop our thesis within an explicitly Rawlsian framework and to investigate how it would be affected by some of the issues that have been raised about Rawls’ project.

*The Role of the Legislature*—it should finally be noted that our focus has been on a heavily theorised area; judicial decision making. This is not bad *per se*, but the narrowness of our focus has led to this dissertation lacking some of the context to be gained by investigating the role of the legislature. For example, Jeremy Waldron has argued not only that aspirational models of legislation have been underdeveloped, but that the legislature is allowed to be portrayed worse than the courts and this has a constitutional impact: ‘We paint legislation up in... lurid shades in order to lend credibility to the idea of judicial review... and to silence what would otherwise be our embarrassment about the democratic or “counter-majoritarian” difficulties that judicial review is sometimes thought to involve’.<sup>128</sup> Arguments like this are missed by focussing narrowly, as we have, on the judiciary. Hence the thesis of this essay would

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<sup>127</sup> See Jeremy Waldron, ‘Toleration and Reasonableness’ in Catriona McKinnon and Dario Castiglione (eds.) *The Culture of Toleration in Diverse Societies: Reasonable Tolerance* (New York: Manchester University Press, 2003).

<sup>128</sup> Jeremy Waldron, *The Dignity of Legislation* (Cambridge, CUP, 1999) 2.

undoubtedly be affected by further research that took a more holistic approach to other components of the state.

We have no space to explore these ideas in more detail. They must remain projects for another time. They do, however, suggest ways in which the framework and thesis of this piece could be developed, fine-tuned or even presented in a different light.

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