Judges as moral reasoners

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Debates about judicial authority—including debates about the desirability of judicial review of legislation—sometimes turn on the question of whether judges have superior skills when it comes to addressing what are, essentially, moral issues about rights. This paper considers the possibility that the answer may be "no," not because judges are inept morally, but because the institutional setting in which they act and the role that they adopt both require them to address questions about rights in a particular legalistic way—indeed, in a way that, sometimes, makes it harder rather than easier for essential moral questions to be identified and addressed. Of course, what we want is for moral issues to be addressed, not as one would make a personal moral decision, but in the name of the whole society. Perhaps the judicial mode of addressing them satisfies that description, but there are other ways of satisfying it too—including legislative approaches, which proceed by identifying all the issues and all the opinions that might be relevant to a decision, rather than artificially limiting them in the way that courts do.

Are judges good at morality? Are they better at moral reasoning than other political decision makers? Is the quality of their moral reasoning a reason for assigning final decisions about rights to the judiciary rather than to legislatures?[1]

These are intriguing questions. The last of them is particularly important for constitutional theory. In the debate about the desirability of judicial review, it is sometimes said that courts are better at moral reasoning than legislatures are, and that this is one of the reasons we should entrust them with final authority over certain essentially moral issues of individual and minority rights.[2] To take one of the best-known proponents of this view, Ronald Dworkin has argued

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[1] Or we can put the question more modestly: Even if it is not always superior to legislative reasoning, is the quality of moral reasoning by judges a good reason for assigning them a veto over legislation that they consider encroaches on individual rights—a veto which is separate from those involved in various stages of the legislative process? I am grateful to Mitch Berman for suggesting this way of putting the question.

[2] As Leslie Green has pointed out to me, this is not the only reason adduced in favor of judicial review of legislation but it is a prominent one. Equally, it is worth noting that, to the extent that this

that the kind of reasoning that takes place in the Supreme Court of the United States "insures that the most fundamental issues of political morality will be finally set out and debated as issues of principle and not political power alone."[3] Absent the role of the courts, he implies, there is no guarantee that this will happen. He does not deny that other officials in the American system have the capacity to address moral issues; moreover, he concedes that American public officials, grappling with controversial issues like abortion and affirmative action, "are, as a group, extraordinarily sensitive to the issues of moral and political principle latent in these controversies." But, he goes on, they would not be so sensitive to principle without the legal and political culture of which judicial review is the heart.[4] To those who raise moral issues about their own or others' rights, the courts offer a forum in which, as Dworkin says, citizens are assured that these claims will be steadily and seriously considered.[5]

Now this is a quite specific claim regarding institutional competence. What is it based on? It is hard to avoid the impression that it is impressionistic. For consider the contrast between courts and legislatures, so far as this issue of moral reasoning is concerned. What seems to happen, when we argue the position in favor of the judiciary, is this. We catch a glimpse of what goes on in legislatures, and it sounds like a cacophony. We ignore Machiavelli's warning not to "consider the noises and the cries that … arise in such tumults more than the good effects that they engender."[6] We jump to the conclusion that what is going on in the legislature certainly does not resemble a responsible moral debate. Or, in a more considered version of this position, we identify some feature of the institutional structure of a legislature that, at a glance, might militate against responsible moral consideration, and we cite this as decisive. So we say, with Dworkin, for example, that "legislators are subject to pressures that judges are not, and this must count as a reason for supposing that … judges are more likely to likely to reach sound conclusions about rights,"[7] or, with Joseph Raz, that "there are ample reasons to suspect that

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line of argument is attacked in the present paper, that attack does not exhaust the case against judicial review. The familiar argument from democratic legitimacy continues to apply, even if it can be shown that judges are better than legislators at the sort of moral decision making called for in cases of rights. *See* Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1346, 1386–1395 (2006).

[3] Ronald Dworkin, A Matter of Principle 70 (Harvard Univ. Press 1985).

[4] *Id.* at 70–71. For a brief discussion of this claim, see Jeremy Waldron, Law and Disagreement 289–291 (Oxford Univ. Press 1999).

[5] Dworkin, *supra* note 3, at 32.

[6] Niccolo Machiavelli, Discourses on Livy 16 (Univ. Chicago Press 1996) (bk. I, ch. iv) ("To me it appears that those who damn the tumults between the nobles and the plebs blame those things that were the first cause of keeping Rome free, and that they consider the noises and the cries that would arise in such tumults more than the good effects that they engendered").

[7] Dworkin, *supra* note 3, at 25.

members of the legislature are moved by sectarian interests to such a degree that they are not likely even to attempt to establish what rights (some) people have."[8] And we quickly elevate that suspicion into dogma, forgetting to ask whether it is always and necessarily the case that interest distorts moral judgment.[9]

Then, on the other side, we read a few well-chosen Supreme Court opinions, and they strike us as careful analytic treatments of important issues of rights. Certainly they seem to be talking about the issues in the measured tones and with the articulate arguments that *we* (the moral philosophers) would expect to use. And so, because they seem to reason as we do when we consider moral issues in our colloquia—they reason in the careful, measured, deliberative, and analytic way that moral philosophers think moral reasoners should reason[10]—we conclude that judges are pretty good at morality. They define their terms, they separate different lines of reasoning, they pay attention to the logical force of the arguments they consider, they distinguish issues and discuss them in a certain order, they entertain objections to their own lines of reasoning and try to respond to them, and so on. They treat matters of principle as matters of principle; they do not try to reduce them to dollars and cents or to tendentious popular slogans or to the bargaining and horse-trading that characterize electoral politics. In short, judges seem to take moral issues seriously, in a way that does not seem to be true of the noisy, chaotic, self-interested, and majoritarian proceedings of our legislatures. And that is the argument: judges are evidently better at moral reasoning than legislators are, and so—in cases where moral reasoning is important—there is good reason for giving judges, not legislators, the final word. I shall call this the "Judges are Good at Morality" view, or JGM for short.

In various essays I have written about legislation and judicial review, I have tried to develop a response to JGM. In *The Dignity of Legislation*, I argued in favor of a more careful consideration of what happens in legislative chambers.[11] In

[8] Joseph Raz, *Disagreement in Politics*, 43 Am. J. Juris. 25, 46 (1998).

[9] On the latter issues, Raz has the good grace to observe that this is not always so: "Sometimes … there are reasons for thinking that those whose interests are not going to be affected by a decision are unlikely to try honestly to find out what is just in the circumstances. Sometimes one may be unable to appreciate the plight of classes of people unless one belongs to the same class oneself, and therefore rather than entrusting the decision to those not affected by it, it should be given to those who are so affected." *Id.* at 46.

[10] There is a considerable literature on ideals of moral reasoning. *See, e.g.*, John Rawls, *Outline of a Decision-Procedure for Ethics* (1951), *in* 1 John Rawls, Collected Papers (Harvard Univ. Press 1999); Kurt Baier, The Moral Point of View: A Rational Basis for Ethics (Random House 1965); R.M. Hare, Moral Thinking: Its Levels, Method, and Point (Oxford Univ. Press 1981); and T.M. Scanlon, What We Owe to Each Other (Harvard Univ. Press 1998).

[11] Jeremy Waldron, The Dignity of Legislation 34–35 (Cambridge Univ. Press 1999).

"The Core of the Case against Judicial Review," I responded to Raz's argument as well as to some others.[12] And in an earlier article, entitled "Moral Truth and Judicial Review," I tried to answer some suggestions along these lines put forward by Michael Moore in the course of an argument he was making that judicial review is easier to defend on the assumption that moral values are objective, and that there is such a thing as expertise in one's grasp of them.[13] I shall not repeat those criticisms here; for the most part, the present paper does not depend on these other issues regarding the quality of moral reasoning by various officials and institutions or the details of the political pressures they face.

Instead, I want to ask a couple of broader questions about JGM. I shall set my two questions out first and distinguish them from three other questions I will not have space to discuss in this paper. Then I will proceed to discuss questions (1) and (2) in detail.

> (1) The first question is this: *How does the judge's responsibility to apply the law affect his ability to engage in responsible and high-level moral reasoning?*

What happens to the moral character of an argument when it is permeated by reference to legal texts and doctrine? Does moral reasoning remain intact when certain moves in an argument (or certain lines of argument or certain ways of pursuing the implications of a position one has adopted) are blocked by a precedent or by the contrary implications of a statute? Is it possible to pick apart the moral element and the positive law element in judicial reasoning? Or do they merge together to constitute something that—though it may still sound articulate—is actually not moral reasoning at all?

> (2) The second question about JGM is connected to the first. It asks: *Is there an important difference between reasoning morally on one's own account as a responsible individual and reasoning morally in the name of a whole society?*

Neither judges nor legislators are deciding what to do as individuals. When they deliberate and vote in their respective institutions, they are deciding what is to be done in the name of the whole society. On abortion, for example, the judge or the legislator is not like a private citizen wrestling with the question of whether it is right or wrong to procure an abortion for herself. The judge or the legislator is participating in the establishment of a national abortion policy.[14] He has to make a decision that will stand in the name of large numbers of others in the society, including others who he knows reason from premises that

[12] Waldron, *supra* note 4, at 1376–1386.

[13] Jeremy Waldron, *Moral Truth and Judicial Review*, 43 Am. J. Juris. 75, 83–84 (1998), responding to Michael Moore, *Law as a Functional Kind*, *in* Natural Law Theory: Contemporary Essays 188, 230ff. (Robert George ed., Oxford Univ. Press 1992).

[14] Of course, under the rule of law, the judge or legislator will also be bound personally by whatever is decided.

differ from his premises to conclusions that differ from his conclusions. He may feel he has a duty to take the views of some of these others into account, and in a way that has no parallel in the case of strictly individual reasoning. One way of putting this is to say that, although it is appropriate, even necessary, for the ordinary citizen's moral reasoning to be *autonomous* (in the sense of its being incumbent upon her just to think morally for herself),[15] it may not be appropriate for the judge's or the legislator's moral reasoning to be autonomous in that sense. Thus, there will be a problem for JGM if the argument in its favor is based on an ideal of autonomous moral thought.

My questions are motivated by a conviction that the special circumstances in which judges find themselves—both as to the nature of the problems they face and the decisional environment in which they face them—may be different in important ways from the sort of environment in which moral reasoning seems most at home and the sort of problems to which moral reasoning seems most aptly responsive. If this hunch is borne out, then we ought to be very careful about any inference supporting JGM drawn from an impression that judges argue as we do when we address important moral issues in our workshops and our articles. The fact that the judicial style of reasoning in circumstance X is just like ours in circumstance Y is not a good ground for applauding the quality of judges' moral reasoning unless we are sure that X and Y are similar in the respects that call for a given style of reasoning.

The two questions that I have outlined are not the only questions one could ask about JGM. If time, space, and patience were unlimited, I might pose two or three others. I will not be able to justice to these additional questions, but it is worth briefly mentioning them because some of the concerns they embody will crop up from time to time in what follows.

> (3) One of these other questions is abstract and philosophical: *What does it mean to reason morally as opposed to reasoning in some other way?*

The distinction between moral and nonmoral reasoning has been drawn by philosophers in a variety of different ways.[16] Some of these distinctions are more relevant to our issue than others. Richard Posner has suggested that the questions posed for official decision making, with regard to what we think of as moral issues, are often not moral questions. Consider the case of assisted suicide. A moral discussion of this issue might focus on various questions about acts and omissions, and it might contrast, for example, the nature and quality

[15] *See* Neil MacCormick, Institutions of Law 249–251 (Oxford Univ. Press 2007).

[16] Consider, for example, the following discussions of the distinction in modern moral philosophy: Neil Cooper, *Morality and Importance*, *in* The Definition of Morality 91, 97 (G. Wallace & A.D.M. Walker eds., Methuen 1970); P.F. Strawson, *Social Morality and Individual Ideal*, *in* Freedom and Resentment and Other Essays 26 (Methuen 1974); Bernard Williams, Ethics and the Limits of Philosophy 174–196 (Harvard Univ. Press 1985); and Joseph Raz, The Morality of Freedom 213–216 (Oxford Univ. Press 1986).

of the intention involved in providing lethal drugs to someone who wants to die with the nature and quality of the intention involved in withholding invasive treatment. However, as a public matter, perhaps the issue of assisted suicide should be addressed in terms of outcomes and consequences. Or maybe what requires public attention is the question of whether it is possible to formulate adequate protocols and safeguards for patients and physicians. These judgements are "quintessentially legislative or administrative," not moral in character, says Posner.[17] Posner also argued that judges often have to direct their attention to institutional factors. For example, he says that in the assisted suicide case, [18] the sole issue the Supreme Court was called upon to decide was whether state laws, which already banned or limited such assistance, violated the U.S. Constitution. Now this is certainly a normative question about the allocation of institutional responsibility: *Should* this issue be taken out of the hands of state legislatures and entrusted to the federal judiciary? But that does not make it a moral question, according to Posner.[19]

Ronald Dworkin, at whom much of Posner's argument is directed, disputes this way of carving up the terrain. Normative issues of institutional allocation, he insists, are, in fact, moral issues: "They are moral judgments about how the powers of government should be distributed and exercised, and when, if at all, these powers should be limited out of respect for individual moral rights."[20] Now, Dworkin might have the better of the argument so far as the use of the term "moral" is concerned.[21] However, the question is not what we *call* the issue, but whether the issue is one for which moral reasoning, of the sort that moral philosophers idealize, is appropriate.

> (4) There is an additional question about the academic moralizing that is used implicitly as an ideal in JGM: *Is the idealization of academic moral argument appropriate for the argument we are considering, given its distinctive educational and scholarly context?*

I am assuming that my readers—the implicit "we"—are, like me, legal theorists or moral philosophers. And when I talk about the moral reasoning that

[17] Richard A. Posner, The Problematics of Moral and Legal Theory 132 (Harvard Univ. Press 1999).

[18] Washington v. Glucksberg, 521 U.S. 702 (1997).

[19] *See also* Jeremy Waldron, *Ego-Bloated Hovel (Reviewing Richard A. Posner's* The Problematics of Moral and Legal Theory*)*, 94 Nw. U. L. Rev. 597, 603–608 (2000).

[20] Ronald Dworkin, *Darwin's New Bulldog*, 111 Harvard L. Rev. 1718, 1730n (1998).

[21] Posner, *supra* note 17, at 131–132, concedes that a very broad use of "moral" would locate all these institutional questions in the realm of morality and moral reasoning: "In favoring resolution of the issue by the democratic process, I may seem to be smuggling into the analysis a moral theory about the goodness of self-government. I would be if moral theory equaled social theory, so that every claim about the political or judicial process was necessarily a moral claim. But such a confusing equation should be avoided …. It is a moral point only if morality is a synonym for sound policy."

we do, I have in mind the way we argue in our colloquia and in our published papers about what we take to be important moral issues. But is this actually the ideal form of moral reasoning? One point to remember is that it is "academic"—moral reasoning conducted without the prospect that any actual momentous decision will emerge. Another point is that this sort of reasoning is conducted as it is in order to elucidate, for the purposes of study, education, and discussion, certain interesting features of the considerations that arise in moral life. Such presentation may well be artificial compared to actual moral reasoning by individuals or groups when the stakes are high, when decisions really matter, and when pedagogy is not the issue. I do not mean to criticize academic moral philosophy. But the aims of that discipline are obviously not the same as the aims of actual moral reasoning.[22] I will not pursue this further, but we should bear it in mind in everything that follows.[23]

One last question that might have been worth pursuing, and which certainly bears on some of the things that I do want to discuss, is the question of group decision and collegiality.

> (5) *Does it make a difference that judges and legislators often reason in groups, rather than as individual decision makers?*

The point of this question is obvious in the case of legislators. No legislator can decide anything for or in the name of his society by himself; he does so as a member of a legislative body comprising hundreds of other individuals. Ensuring that individual legislators think and speak responsibly about the issues on which they have to vote is, no doubt, one way of enhancing the moral quality of legislative outcomes. However, it is not unimaginable that high-quality outcomes might emerge by way of something like an invisible-hand mechanism from the deliberation, deal making, and voting behavior of hundreds of individual legislators, each of whom may be orienting himself to something other than the overarching moral issue. If this is so, then it may be a mistake to assess the quality of an institution's decision making by attending only to the quality of individual members' deliberative inputs.

Might the same be true of courts? Some have argued that courts function better when individual justices show a pragmatic willingness to bend their principles (both interpretive and substantive) and to reach compromises or deals with other justices to secure at least some of the outcomes they think best.[24] If this is correct, then it may be unwise to assess the institutional competence of

[22] *Cf.* Posner, *supra* note 17, at 80, on the low likelihood that those trained in the methods of moral philosophy will be capable of making sound moral decisions when it matters.

[23] *See* Martha Nussbaum, *Finely Aware and Richly Responsible*, *in* Love's Knowledge: Essays on Philosophy and Literature 148 (Oxford Univ. Press 1990), for a contrast of this kind.

[24] *See* Jeffrey Rosen, The Supreme Court: The Personalities and Rivalries That Defined America (Henry Holt 2007), reviewed in Jeremy Waldron, *Temperamental Justice*, 54 N.Y. Rev. Books 15 (May 10, 2007).

courts to handle moral issues simply by comparing what individual judges do with what individual moralists or moral philosophers do. Courts are collegial institutions, and it might be the moral competence of the court that should be the focus of our interest, not the moral competence of its individual members.

Taken together, these five questions indicate how much room there is for further consideration before we draw too many conclusions concerning the desirability of certain constitutional arrangements (such as strong judicial review) from the fact that judges sometimes sound like moral philosophers. Even apart from the constitutional issue, even apart from JGM, I think questions (1) through (5) are worth exploring just to make ourselves more articulate about what is otherwise a simplistic dichotomy between law and morality. But in the rest of the paper I shall focus on the first two of these questions only, leaving the other three for exploration elsewhere.

> (1) *How does the judge's responsibility to apply the law affect his ability to engage in responsible and high-level moral reasoning?*

Some people think judges should not be reasoning morally at all. They think judges should just find the law and apply it to the cases that come before them, in a way that is independent of their own values and principles. Their responsibility to the law means that their assignment is to discover the results of *other* people's moral reasoning—the moral reasoning of the framers of the Constitution or the moral reasoning of legislators or the moral reasoning of earlier generations of judges—and to apply those results to the cases that come before them. On this account, the fact that judges would be as good or better at moral reasoning than, say, legislators are is neither here nor there. Moral reasoning is simply not what is required of them in the political or constitutional division of labor.

Most sophisticated jurists no longer accept this simple division of labor, in which judges never reason morally but simply discover and apply the results of others' moral reasoning. Many believe that even if judges have a responsibility to find and apply the law, they also, sometimes, have to engage in moral reasoning as an inescapable part of their role. So there is room for JGM to apply, at least as long as the moral part of a judge's role is substantial. I shall explore this line of argument first. But, even if this line of argument is sustained, there is a second version of question (1) to consider. Very few of those who think that judges have an inescapable responsibility, sometimes, to engage in moral reasoning would deny that it is *also* important for them to find and apply existing law. So what does the latter responsibility do to the former? The judge's responsibility to find and apply the law may affect the application of JGM, for it is possible that the judge's law-applying responsibilities might interfere with and distort—rather than merely run parallel to—his responsibilities as a moral reasoner (such as they are)

Let us begin with the first line of argument. Maybe what we want to say is that judges have two kinds of task to perform: (*a*) they must be alert to and

familiar with existing legal sources and able to interpret and apply those materials to the cases that come before them; and (*b*) they must be capable of engaging in moral reasoning about some or all of the issues posed in these cases. Maybe the two tasks can be kept separate so that the judge engages a different quality of reasoning at different times of the day or in different paragraphs of the opinions he writes. Legal positivists have sometimes encouraged this picture. They suggest that the judge operates as a law detector most of the time, though occasionally, when he runs out of law or when the law is indeterminate, he switches to a different role—that of a legislator—and begins making the moral judgments that responsible law-making requires.[25] The descriptive implausibility of this picture is well-known and, indeed, is conceded by its most distinguished proponent.[26] It is, nevertheless, attractive to many philosophers of law.

The idea of a dual assignment for judges is attractive also on other grounds. Some have suggested that judges often have to switch between applying rules and applying standards, and that the latter task involves moral reasoning in a way that the former task does not.[27] Versions of what is known as "inclusive positivism"[28] observe that sometimes the law the judge is supposed to apply actually instructs him to engage in moral reasoning—the Eighth Amendment to the U.S. Constitution instructs him to make judgements about the excessiveness of bail and the cruelty of punishments—and when he is given these instructions to reason morally he has no choice but to obey.[29] Some might even say that it is impossible to apply the law, at least in any halfway complicated case, without doing some sort of moral calculation—for example, that interpretation X of a statute would lead to an *absurd* result whereas interpretation Y would not, or that the issue settled in precedent A is *relevantly like* the issue posed for decision in case B. "Absurdity" and "relevant similarity" are not the most sophisticated moral predicates, but they involve an element of normative judgment that is not itself dictated by what the existing law says.

One way or another, then, judges may have to make significant moral decisions, even though they also have a duty to find and apply the law. So the argument for JGM might proceed in the following way. If they were to wrestle with constitutional issues legislators and judges both might have to engage in moral

[25] H. L. A. Hart, The Concept of Law 135 (rev. ed., Oxford Univ. Press 1994).

[26] *Id.* at 274 ("It is true that when particular statutes or precedents prove indeterminate, or when the explicit law is silent, judges do not just push away their law books and start to legislate without further guidance from the law… ").

[27] *See* Emily Sherwin, *Rule-Oriented Realism*, 103 Michigan L. Rev. 1578, 1591 (2005).

[28] *See* W. J. Waluchow, Inclusive Legal Positivism 81–82 (Oxford Univ. Press 1994).

[29] *See* Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (Harvard Univ. Press 1996).

reasoning—legislators much of the time and judges at least some of the time. Moral judgments might be called for on both sides of the institutional divide. Moreover, we hope that legislators will engage in responsible moral reasoning when moral reasoning is required of them. But for cases where the moral reasoning they have engaged in yields conclusions that are at odds with the results of the reasoning that the courts have engaged in, we have to settle on some rule of institutional finality. So the issue concerning the judicial review of legislation presumably is this: the final say on legislation concerning rights should be assigned to whichever institution is better at doing the moral reasoning that thinking about rights often entails. If judges are better at this part of their task than legislators, then judges should keep this as an element in their mission and have the last word on it, even though they also have this other mission of finding and applying the law. That is the argument for JGM.[30]

I believe that all this rests on too simple a picture of adjudication. It separates out one part of the judicial task—moral reasoning, as in the application of constitutional standards—and it considers how good judges are in discharging that part of their assignment. But what if the two parts of the judicial task cannot be separated so clearly? What if they are thoroughly mixed up with each other?

I put it that way because I want to resist a common view which holds that the more pervasive the role of moral reasoning in the judge's overall task, the greater the importance of evaluating the judge's performance by the standards and ideals for moral reasoning we develop in moral philosophy. I think the truth may be exactly the opposite: the more the judge's moral reasoning pervades and is pervaded by his other responsibilities (in particular, his responsibility to find and apply the law), the less relevant to the assessment of his overall performance are the philosophical ideals we develop for moral reasoning in its pure form.[31]

So—think about some sophisticated alternatives to the simple dual-task theory of judicial functioning that we have been using so far. Suppose, as I said before, that finding, interpreting, and applying the law always has a moral element to it, since we choose among eligible interpretations those that show the law in a good light, subject always, of course, to more or less determinate constraints of precedent. Suppose, however, that this is not done in two discrete operations, but that one's instinct for choosing the better interpretation

[30] We might add that anyone who wrestles with a constitutional issue—not just judges—ought to pay attention to constitutional law in these cases, not just to the moral issues. Since judges are incomparably better than legislators at *this* part of the task, this is an additional reason for assigning the final say to judges: not only are they are better at doing whatever moral reasoning these cases require, they are also better at doing the legal reasoning that these cases require.

[31] *Cf.* Michael S. Moore, *Do We Have an Unwritten Constitution?* 63 So. Calif. L. Rev. 107, 112 (1989) ("The value judgments made in the application of statutes are restricted by the existence of an authoritative text, a restriction not found in ordinary moral reasoning").

pervades one's interpretive approach and is, in turn, pervaded by other aspects of it. (After all, what is the better interpretation is not just what would strike a morally informed layman as better but also what would strike the legally informed sensibility as better.) Or suppose that the judgments of *relevant similarity,* which we have to make in applying precedents, do not just determine which past case is in point but pervade our understanding of what it is to apply and accept as authoritative the holding of that case. Suppose, also, that we work always within the terms of a legal heritage of discerning analogies and disanalogies; that determining their relevance is not just a moral determination; and that the elements of judgment involved in this never represent a pure exercise of moral reasoning.

If anything like this is true, then what we have, overall, is not pervasive moral reasoning by the standards of moral theory, and not even partial moral reasoning that might be separated and sealed off from whatever nonmoral reasoning is going on. What we have is a mélange of reasoning—across the board—which, in its richness and texture, differs considerably from pure moral reasoning as well as from the pure version of black-letter legal reasoning that certain naïve positivists might imagine.

What I have just described is a version of Ronald Dworkin's theory of legal reasoning.[32] Dworkin believes that moral reasoning is involved at almost every stage of legal reasoning. Some commentators try to render his theory of interpretation as though it involved two distinct kinds or stages of judgment: when we are choosing between possible interpretations of a text or a doctrine, we make (*a*) judgments about *fit* (which are technical legal judgments of a familiar kind) and we make (*b*) judgments about *moral appeal;* and (according to Dworkin, or so these commentators say) we engage in the latter only to break ties that exist with regard to the former. Dworkin may have encouraged this misreading in the way that he expounded his theory in *Law's Empire*.[33] But I think he has made it clear that this distinction of types of judgment is expository only and is not supposed to represent the independent styles of reasoning in which judges engage.[34]

For us, the significant consequence is this. The undeniable fact that there are important moral elements involved in legal reasoning does not entitle us to judge legal reasoning by the standards of ordinary moral reasoning. Superficially, legal reasoning may resemble our ideal of moral reasoning in some of its structural features—defining terms, distinguishing separate lines of reasoning, addressing issues in a certain order, entertaining and responding to objections, and so forth. Substantially, though, it will be quite different. Basic premises will be set sometimes by referring to fundamental values, sometimes

[32] Elucidated most clearly in Ronald Dworkin, Law's Empire (Harvard Univ. Press 1986).

[33] *Id.* at 238–258.

[34] *See id.* at 256.

by referring to texts. Sometimes lines of argument will be followed through, sometimes stopped in their tracks by contrary precedents. The sensibility that informs judgment at every stage will be a hybrid of moral and legal sensibility, quite unfamiliar to moral philosophers. What appear to be moral considerations will vary in their strength depending as much on the use that has been made of them in the past as on their inherent normativity. By the standards that philosophers lay down for moral reasoning, this will seem all very exasperating—technical, at best, and flawed and heteronomous, at worst. But, by its own standards, it is quite appropriate.[35] Since the thesis we are considering—JGM, as I called it—uses purely moral standards to judge the quality of judges' reasoning, it is not clear that its conclusions are reliable.

I want to pause now and consider two objections to the line I have been following. One objection says that moral reasoning is actually more like legal reasoning than I have suggested. In particular—it may be said—the method of reflective equilibrium, recommended by John Rawls and others as a way of addressing moral issues, is very much like legal reasoning in the way it constrains and sometimes even interrupts lines of theoretical argumentation with considered judgments taken for the time being as given.[36] In my view, this is not an appropriate analogy. What the moral philosophers call reflective equilibrium is compatible with the autonomy and integrity of what I have been calling pure moral argument because each person who engages in reflective equilibrium thinks of herself as free to give up any particular considered judgment or to modify any particular abstract formulation of principle. In law, however, we are not free in that way either to drop inconvenient lines of precedent or modify propositions embodied in authoritative texts. The constraints upon the two kinds of argument—reflective equilibrium and legal reasoning—are quite different.

The other objection is more subtle. It says that although moral argument in the legal case does have to entangle itself with deference to texts and precedents, those latter elements also have standing as moral considerations. After all, even when they are finding and applying clear law—clear statutes, the clear provisions of a constitution, or clear precedents obviously on point—judges are not machines. They do these things for reasons: there are reasons they regard themselves as bound by statutes or by constitutional texts; and there are reasons for their deference to precedent. In the final analysis, these are *moral* reasons—reasons of concern for established expectations, reasons of deference to democratic institutions, and reasons associated with integrity and

[35] See also the excellent account in John Finnis, *Natural Law And Legal Reasoning*, *in* Natural Law Theory, *supra* note 13, 134, at 141-142, where Finnis associates the technicality, the distinctiveness, and the peculiar elusiveness of legal reasoning with the distinct moral task that law has to perform in a pluralistic society.

[36] Rawls, *Outline*, *supra* note 10; and John Rawls, A Theory of Justice 48–51 (Harvard Univ. Press 1971).

the moral value of treating like cases alike. So—according to this objection—judges never really leave moral reasoning behind in *anything* they do, not even in the most technical and legalistic reasoning with which they entangle the more recognizably moral elements of their argumentation. For engaging in that sort of entangled reasoning is also one of the things that morality requires (of persons in their situation).[37]

I have a lot of sympathy for this objection, and I suspect that it is right in roughly the way that Dworkin's complaint about Posner was right (in the context of our brief discussion of question 3).[38] There is certainly a sense of "moral" in which reasons of deference and reasons of integrity are as much moral reasons as the reasons of institutional allocation that we considered in that discussion. On the other hand, they are such importantly complicated moral reasons as to create—in a sense—a normative world of their own, and their distinctiveness may render any operational comparison with our familiar ideals of moral reasoning inapposite.

I have pursued a complex line of argument. Let us pause to see where we stand. I considered two views of legal reasoning. One view is that legal reasoning divides into two types: (*a*) finding, applying, and interpreting the law; and (*b*) moral reasoning. Type (*b*) is particularly important when we are determining whether individual and minority rights are being properly protected. JGM holds that because judges are better than legislators at type (*b*) reasoning (as well as type [*a*] reasoning) they should have the final say on issues about rights.

The other view is that (*a*) and (*b*) cannot be separated. They are mixed up together, and they pervade one another. This means that although moral elements are involved in all adjudication, they are mingled in a way that makes legal reasoning quite unrecognizable by the standards of moral reasoning. I think this is the better view of what law and legal reasoning is like. Now, suppose we hang onto the proposition that it is very important for moral issues concerning individual and minority rights to be addressed directly *as* moral issues. Then we may well *not* think that courts are the proper institutional forums in which final and fundamental decisions about these matters are to be made. We need judicial reasoning about rights, of course, and courts are indispensable; however, this may not be the case for the fundamental moral phase. Perhaps that is better conducted in a setting where it will *not* be compromised by the doctrines, precedents, texts, and interpretations with which legal reasoning is necessarily preoccupied and which inevitably and quite properly compromise all such moral reasoning as courts are able to engage in. That, at least, is a possibility. And to the extent that it is a possibility, it may argue

[37] Thus Dworkin, for example, regards the duty of integrity as one important part of morality, not as something separate from morality. *See* DWORKIN, *supra* note 32, at 164–178.

[38] *See supra* text accompanying notes 17–21.

against JGM. On certain fundamental issues of rights, we may have reason to prefer the lower-quality but unadulterated moral reasoning of legislators to the higher quality but legalistically contaminated moral reasoning of judges.

The second view of judicial reasoning seems more plausible, and it does not appear to favor JGM. However, the argument is not over yet. To see how JGM might still be revived—and then to see that those hopes must be dashed as well—we need to turn to question (2).

> Question 2: *Is there an important difference between reasoning morally on one's own account and reasoning morally in the name of a whole society?*

The image of moral reasoning that we use in philosophy is one that places a considerable premium on autonomy—on each reasoner thinking matters through for himself and taking personal responsibility for the upshot of his actions.[39] Is this the way we expect judges and legislators to reason? Does it not make a difference that public officials, like judges and legislators, operate not just on their own account but in the name of a whole society of millions of individuals?

One view might be that this adds an extra burden of responsibility on the decision maker: it makes it all the more important that moral reasoning be conducted well and responsibly. But it might make another kind of difference as well. It may mean that the officials in question have a responsibility to take seriously the views of others in a way that would not apply to individuals making moral decisions on their own account.

In my initial formulation of this question,[40] I used the example of abortion, and I contrasted the reasoning of a public official with the reasoning of a private person—somebody, for example, contemplating the termination of her own pregnancy. I suggested that inasmuch as decision making of the latter kind is very much decision making for oneself, we should not idealize that intensely personal decision making into a model for public reasoning on abortion. But maybe this is a misleading contrast. Perhaps a more appropriate analogy is between the decision of a public official on abortion and the decision of an ordinary citizen contemplating how to vote on the issue (either directly in a referendum or indirectly to the extent that it affects which candidate to vote for). I actually think the reasoning that graces our moral philosophy seminar rooms is more like an idealization of the moral reasoning appropriate for the individual voter than an idealization of the anguished personal decision. The individual voter tries conscientiously to figure out the rights and wrongs of this matter, the values and principles that are involved, and the balancing or trade-offs (if balancing and trade-offs are appropriate) in a reasonably detached way. And it may be that, at its best—and leaving aside the issues discussed under question (1)—moral reasoning by judges more closely resembles an idealization

[39] *See* MacCormick, *supra* note 15, at 249–251.

[40] *See supra* text accompanying note 14 .

of *that* than legislators' reasoning does; and maybe that can be the basis of our argument for JGM.

But it will be a conclusive argument only so long as we think that the conscientious individual voter is the appropriate model for us to idealize, so far as the deliberative responsibilities of judges are concerned. It may not be. The voter has a particular assignment. She has to figure out a view of her own to take on the issue, a view that will be embodied in her vote and counted along with the views expressed by millions of other citizens. Though she should, no doubt, pay attention to the views expressed by her fellow citizens to see what there is to be learned from them, she owes nothing in the way of fidelity to those other views. She has a duty of loyalty to the workings of the democratic system but, at the same time, she has autonomous responsibility for her own input.[41] The responsibilities of the judge and the legislator, by contrast, are not autonomous in this way. They have the assignment, at least in part, of figuring what to do about the fact that *others* have arrived at and expressed various views on this issue. A legislator, for example, has some sort of duty to all his constituents, perhaps some sort of duty to the citizenry as whole; his duty is not owed just to those who think as he does. And it is certainly the case that the judge has a duty to the views of others, at least to the extent that those views are embodied in the law (constitution, statute, or precedent) that he is required to find and apply. He has a duty of fidelity to existing law and to established sources of law, even when the existing law is not to his liking and even when some of the existing sources of law are not what he thinks of as morally competent.[42]

I suspect some legal theorists disagree with this. There is a line of thought associated with Robert Cover's argument in *Justice Accused*, which suggests that it is precisely conscientious individual moral reasoning that we do want from our judges, and that something goes wrong when that is suppressed by or subordinated to a formalistic obligation to apply positive law. Cover told the story of nineteenth-century American judges who applied the Fugitive Slave Clause of the Constitution and the Fugitive Slave Acts according to their terms rather than following through on their own personal convictions that slavery was morally abhorrent. "As a citizen and as a man," said one such judge, "I may admit the injustice and immorality of slavery… . But as a jurist, I must look at that standard of morality, which the law prescribes."[43] When I teach this chapter of Cover's book, many of my students condemn the judges who

[41] Notice that this remains the case even if we accept that the voter should be addressing what Rousseau would term issues of the general good. *See* Jean-Jacques Rousseau, The Social Contract 153 (Penguin Books 1968) (bk IV, ch. 2).

[42] See also the comments on the judge's duty of fairness to existing political sentiments in Dworkin, *supra* note 32, at 249.

[43] Jackson v. Bullock, 12 Conn. 39 (1837), Bissell J. dissenting—cited by Robert Cover, Justice Accused: Antislavery and The Judicial Process 120 (Yale Univ. Press 1975).

took this line. They regard the subordination of personal conscience as an evil; they see the judges as reasoning in bad faith; they are outraged that the judges are hiding behind black-letter law to avoid the difficult choices that morality dictates; and they see this as a prime example of the way legal practice and the rule of law tend to suppress the better moral angels of our nature. A number of scholarly commentators take this line, too, claiming that it would have been better if Cover's judges had just reasoned morally rather than distracting themselves with constitutional clauses and statutes.[44] But I think this is a clear case of result-driven jurisprudence. I suspect that the view that judges ought to reason autonomously, rather than follow the legal texts and precedents which appear to bind them, is most persuasive to a modern commentator when the judge's conscience, if indulged, would point to a conclusion that the commentator regards as morally congenial. When it is a case of a judge indulging personal moral convictions that the commentator disagrees with—a pro-life judge refusing to apply *Roe v. Wade*, for example, or a racist judge standing on his own conscientious views about the importance of separating the races—enthusiasm for this sort of autonomous moral reasoning tends to evaporate.

Anyway, one can concede that judges ought not to close down their own consciences altogether, in cases like this, but *still* insist that it ought to make a difference to the way one exercises one's conscience whether one is taking a moral stand purely on one's own account—like Henry David Thoreau, for example[45]—or whether one is acting in and for a group, which comprises a great many others with a diversity of views on the matter at hand. It cannot be that these circumstances make no difference. We must be sure, then, when we judge the way a given official grapples with such a problem, that we do not apply to the one set of circumstances standards or ideals for moral reasoning that are best suited for the other.[46]

[44] *See, e.g.*, Rudolph J. Gerber, *On Dispensing Injustice*, 43 Ariz. L. Rev. 135, 168 (2001); and Benjamin Zipursky, *Conflicts of Integrity*, 72 Fordham L. Rev. 395, 397 (2003).

[45] *See* Henry David Thoreau, *Civil Disobedience*, *in* Walden and Civil Disobedience 383 (Penguin Books 1983).

[46] Incidentally, Cover himself did not condemn out of hand the slavery judges whose evasions he described. He did say that "[t]he judicial conscience is an artful dodger" and that "[b]efore it will concede that a case is one that presents a moral dilemma, it will hide in the nooks and crannies of the professional ethics, run to the cave of role limits, [and] seek the shelter of separation of powers" (Cover, *supra* note 43, at 201). But Cover's main criticism of the judges he described was that they were insufficiently inventive, legally, less resourceful than they could have been in the ways of the law, neglectful of various sources of law that might have taken them in another direction, not that they failed to switch from legal reasoning to individual moral reasoning. Cover also acknowledged the complexity of the judges' position, including its moral complexity, denying that deference to existing statutes and constitutional provisions is a formalistic or amoral position. There were, he argued, good moral reasons that a responsible moral agent would have to grasp as to why it might be inappropriate for a judge to follow his own conscience in these matters. (This last point is analogous to the argument considered earlier about the moral reasons behind following precedent and deferring to other bodies' enactments; *see supra* text accompanying note 37).

Now the point that I have just made might seem to undermine the case I made against JGM at the end of our discussion of the first question. There I said that the judge's reasoning looks hopelessly heteronomous by the standards of moral reasoning. But now we are suggesting that maybe autonomous moral reasoning is inappropriate for the judge and that heteronomous reasoning—reasoning that defers, in some fashion, to what others think on the matter—is exactly what is called for on the part of a public official.

To put it another way: it might seem that the mixed moral/legal reasoning described at the end of the previous section is exactly what we do want for reasoning that is being done in the name of a whole society. True, it may seem like an affront to the autonomy of moral reason when a judge proceeds from a given text rather than from fundamental moral axioms, or when he dresses up a legal doctrine in the garb of moral principle, or when he stops a perfectly good moral argument in its tracks with some contrary precedent, or when he deflects the force of a moral consideration by some move that makes sense in law but little sense in ethics. That may seem to compromise the integrity of moral argument.

But if we look at this mixture of moral and legal reasoning in another light, we can see it as the judge's participating in the elaborate construction of a moral argument for, and in the name of, a very large group—his whole society. Instead of following his own moral lights in a single-minded manner, he tries to reconcile what he is disposed to do about the problem that comes before him with what others have done in society's name with problems more or less analogous. Moreover, he does that not just with regard to the bottom line but with regard to every stage and component of his moral reasoning, so that, all the way through, one is conscious that it is not just *he* who is disposing morally of this case. To use a phrase of Dworkin's, the judge does not see it as his task "to plant the flag of his [own moral] convictions over as large a domain of power or rules as possible."[47] The litigants who come before him should not expect him to reason about their problem as though from a moral tabula rasa; they come to him for society's disposition of their problem. They should welcome, therefore, the introduction into his reasoning of elements of earlier social decisions by other judges and other officials and not regard that as an affront to the autonomy of morality or justice. Not that the judge simply plunks down a bunch of texts and precedents. He weaves them into an argument that he gives in his own voice and for which he takes responsibility. But he offers his argument not in the spirit of "Here's what I would do, morally, if I ruled the world" but, rather, "Here's the best way I can see of disposing properly of this case in a way that keeps faith with how other people in this society have been treated in similar circumstances." Judges are very good at doing this sort of thing. Legislators are not, not that they often try.

[47] Dworkin, *supra* note 32, at 211.

So—once again—it would seem we have reached a position congenial to JGM. Judges do show themselves to be better at moral reasoning, if by moral reasoning we mean reasoning morally in this manner of keeping faith with the existing commitments of the society.

Before we get too excited about this, however, we need to ask whether the mode of reasoning, just described, is the *only* way of reasoning in the name of a whole society. Of course it is not. Everyone agrees that some morally important issues should be settled by legislation. (Most think that the legislature should have, at least, a first stab at even the issues about which they think courts should have the final say.) Patently, legislatures do not reason as courts do, and most of us would say they should not attempt to imitate courts.[48] The ideal for legislative reasoning is quite different.

Legislative reasoning is a way of reasoning in the name of a whole society about important moral issues when it is appropriate that such reasoning *not* be constrained by existing texts, doctrines, or precedents. Legislators address the issues afresh, as though for the first time (even though these may be issues that have come before them several times). Of course, it is important for them to figure out how the decision they come up with will fit with adjacent law on other issues.[49] Still, that is different from a court's obligation to reconcile its decision with previous decisions on the same and similar issues. Mostly legislatures are in a position to reason about moral issues directly, on the merits. Members of the legislature speak directly to the issues involved, in a way that is mostly undistracted by legal doctrine or precedents.

In a number of other writings I have made a comparison between the sort of reasoning that was used to address the issue of abortion in the United Kingdom in the mid-1960s, where the issue was assigned to Parliament for final decision, and the sort of reasoning that was used to address the same issue a few years later in the United States, where the federal courts have, for the time being, the final say on this contentious moral question.[50] The contrast is stark and instructive, and I have used it elsewhere as an argument against JGM. Here, however, I want to use it as a way of illustrating the distinction between these two types of reasoning in the name of a whole society.

The second-reading debate in the House of Commons debates in Britain on the Medical Termination of Pregnancy Bill in 1966 is as fine an example of a political institution grappling, freshly and directly, with moral issues as you

[48] *See* Mark Tushnet, Taking the Constitution Away from the Courts 63 (Princeton Univ. Press 1999) (arguing that we should not criticize legislators for failing to reason as judges do, for reasoning like judges may not be a smart way to address the issues at stake).

[49] *See* John Stuart Mill, Considerations on Representative Government 109 (Prometheus Books 1991); and Dworkin, *supra* note 32 at 217–219 (on the principle of legislative integrity).

[50] *See* Waldron, *supra* note 2, at 1383–1385; and Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373, 390–391(2003).

could hope to find. It is a sustained debate—about one hundred pages in *Hansard*[51]—and it involved pro-life Labour people and pro-choice Labour people, pro-life Conservatives and pro-choice Conservatives, talking through and focusing on all of the questions that need to be addressed when abortion is being debated. They debated the questions passionately but also thoroughly and honorably, with attention to the rights, principles, and pragmatic issues on both sides. In the United States Supreme Court's fifty-page opinion in *Roe v. Wade*, by contrast, there are but a couple of paragraphs dealing with the moral importance of reproductive rights in relation to privacy, and the few paragraphs addressed to the other moral issue at stake—the rights status of the fetus—are mostly taken up with showing the diversity of opinions on the issue.[52] A lot of the fifty pages is either a review of case law and doctrine or a review of the history of the issue. If the argument I made in the first part of this section is correct, it is not fair to castigate the Court for this lopsided balance between legalistic argument and pure moral argument. That is probably how judges ought to proceed in moral argument when they are arguing in the name of a whole society. On the other hand, the British legislative proceedings capture an alternative mode of moral reasoning, and that, too, is moral reasoning in the name of a whole society.

Now how can that be? If the moral issues are being addressed by legislators directly rather than through the filters of legal text, doctrine, and precedent, how can it be said that the legislature is arguing in the name of the whole society? After all, a contribution by a given legislator will sound like an ordinary individual grappling autonomously with a moral issue. It will sound like the individual voter we considered earlier. (That was, indeed, more or less what happened in the House of Commons; each legislator defended his or her own moral view on abortion and the issues surrounding it.) The crucial thing, however, is that—first—in the legislature there are scores of such individuals participating in the debate and hundreds who are entitled to; and—second—that a given line of moral reasoning does not yield its practical conclusion directly but, rather, is oriented toward a process of voting, in which the views of each representative are given equal weight. Lines of moral reasoning are presented but in a way that gives them an opportunity to test their persuasiveness and their support in a setting in which they are arrayed against rival lines of reasoning, a setting in which, hopefully, all major lines of reasoning are arrayed. Then representatives of the whole society, elected on a basis that treats all individuals in the society as equals, vote as equals on the whole measure and on its parts. The majority view prevails. And that is how legislative institutions reason morally in the name of the whole society.

[51] 732 Parl. Deb., H.C. (5th ser.) (1966) 1067–1166.

[52] Roe v. Wade, 410 U.S. 113 (1973). For the paragraphs on privacy and the importance of reproductive rights are, see *id.* at 153–155; for the paragraphs arguing in moral terms about the alleged rights or personality of the fetus, see at *id.* at 159–160.

Of course, the proceedings of any actual legislature may look a great deal more ramshackle than this. My point is that, even at the level of ideals (for judging those ramshackle proceedings), we now have not one but two ideals of moral reasoning on important issues in the name of a whole society, a legislative ideal and a judicial ideal. Which ideal is appropriate when we are judging the way courts make final decisions about individual rights? Maybe the legislative ideal is more appropriate than the judicial ideal; perhaps the judicial ideal works best in other judicial contexts, where final decisions on major moral questions are not the issue. If the legislative ideal is the one we should use in this context to determine whether JGM is true, then we must consider the following possibility: even though an actual legislature may operate rather crudely compared with the legislative ideal, it may be closer to that ideal than a court operating well by the standards of the judicial ideal.

When is it appropriate to use one or the other as the ideal by which we judge an institution's moral reasoning? We can answer this in terms of different institutions, or we can answer it in terms of different kinds of decisions. I have called them legislative and judicial ideals; however, that does not necessarily mean that courts should always be judged by the judicial ideal as a matter of definition.

Presumably, decision making should be judged by the one ideal or the other, depending on whether what is called for is a fresh decision on the merits or a decision reconciled with existing texts and precedents. If a fresh judgment on the merits is called for, then what we should look for is good moral reasoning on the legislative model; and if courts cannot offer that, then, perhaps, we ought to assign the task of moral reasoning to an institution that can. On the other hand, if an essentially legalistic decision is called for, then it will not be appropriate for the decision to be taken by an institution accustomed to reasoning as legislatures do. What we need is judicial reasoning of a familiar type, and it is well known that legislators do not have the competence to reason in this way.

So—finally—we come back to the issue of individual rights. If what is called for on issues of rights is moral reasoning in the name of a whole society, should we use the legislative model of moral reasoning or the judicial model of moral reasoning?

The case for using the judicial model in most societies is that these issues are already supposed to be covered by the provisions of a written constitution (a bill of rights), and so they should be treated as legal issues and reasoned about in the way that courts are best at reasoning. We should deal with these matters by way of reference to texts and precedents embodying what our society has already committed itself to in this area. Such reasoning will still be quasi moral in character. But it will not be moral in the sense of taking a fresh look at the subject; it will be moral in trying to reconcile, in a morally sensitive way, what we think about the subject now with what has been thought about it in this society in the past. Such reasoning, with all its legalisms, texts, case

analysis, and so on, may not look much like moral reasoning, but, as we have seen, we should not judge it by the standards of individual moral reasoning, and we should not judge it by the standards of reasoning legislatively in the name of a whole society.

The case for using the legislative model, on the other hand, rejects the premise that important issues of individual and minority rights are already covered, in the appropriate sense, by the provisions of, say, our bill of rights. They may be covered in the formal sense that some of what is in the bill of rights can be made to seem relevant to the issues that they pose—as, for example, the First, Fourth, and Fourteenth Amendments to the U.S. Constitution can be made to seem relevant to the issue of abortion. But the text holds out no hope of truly settling the matter, either because the issue was not contemplated in its drafting or because the Bill of Rights was actually drafted in a way that was intended to finesse major disagreements about rights in the community.

The questions about rights, which are the subject matter of the controversy regarding judicial review, are, in my view, mostly not issues of interpretation in a narrow legalistic sense. They may present themselves in the first instance as issues of interpretation; however, everyone knows that they also raise unresolved questions of considerable practical moment for the political community. Elsewhere I have referred to these as "watershed" issues of rights.[53] They are major issues of political philosophy with significant ramifications for the lives of many people. Moreover, I assume that they are not peculiar to the society in which they arise; they do not arise just because we happen to be saddled with this or that scrap of unclear text or this or that indeterminate line of doctrine. They define the major choices that any modern society must face, choices that are the focal points of moral and political disagreements in many societies. Examples spring quickly to mind: abortion is one; also affirmative action; the legitimacy of government redistribution or interference in the marketplace; the rights of criminal suspects; the precise meaning of religious toleration; minority cultural rights; the regulation of speech and spending in electoral campaigns; and so on.

In the United States, it is indisputable both that the provisions of the Bill of Rights have a bearing on how each of these issues is to be resolved and that the provisions of the Bill of Rights do not themselves come anywhere near to determining a resolution of the issue in a way that is beyond reasonable dispute. No doubt, if judicial review is established in the society, then resourceful lawyers will argue about these watershed issues using both the text and the "gravitational force" of the text of the Bill of Rights.[54] In fact, lawyers will have a field day. Each side to each of the disagreements will say that its position can be read

[53] Jeremy Waldron, *Judicial Power and Popular Sovereignty*, *in* Marbury Versus Madison: Documents and Commentary 181, 195 (Mark Graber & Michael Perhac eds., CQ Press 2002).

[54] For "gravitational force," see Ronald Dworkin, Taking Rights Seriously 111 (rev. ed., Duckworth 1977).

into the bland commitments of the Bill of Rights, if only those texts are read generously (or narrowly) enough. Neither will be prepared to acknowledge what, I think, is obvious: that the bland rhetoric of the Bill of Rights was designed either without reference to, or deliberately in order to finesse, the real and reasonable disagreements inevitable among a free and opinionated people. Instead of encouraging us to confront these disagreements directly, emphasis on judicial review is likely to lead to these watershed issues' being framed as questions of the interpretation of those bland and noncommittal formulations. Whether that is a desirable context in which to deliberate about the moral issues that they pose is exactly what we are considering.

My own view is that it is important for some or all of these watershed issues about individual rights to be debated, from time to time, freshly, on their merits, and in a way that is relatively uncontaminated by interpretive disputes regarding the Bill of Rights. For these, as I have said, are not primarily interpretive questions; they are well-known major choices that all liberal societies face. Those who make decisions on these matters need to confront all the issues of value and principle that they raise, whether those values or principles are privileged by the abstract formulations of a bill of rights or not. We identify certain areas for decision as issues of rights because of the importance of what is actually—not textually—at stake; and it is not appropriate to have that sense of importance skewed by particular formulations, such as "substantive due process" in the case of abortion, for example, or "cruel and unusual" in the case of questions about capital punishment. To figure out the issues of rights that are implicated, here, we need to be open to arguments of all sorts. Just because the issues involved are arguably issues of rights, our ultimate decisions about them should not be at the mercy of theories of interpretation or the labored concoction of analogies. The issues are too important for that.

I believe, then, that a case can be made along these lines for ensuring that a place is reserved in the processes of public decision making for deliberation and decision on these issues in way that is oriented toward and judged by the standards of what I have called the legislative model of official reasoning in the name of a whole society. I believe, too, that the point of insisting on this would be lost if that process of deliberation and decision were subject to a subsequent veto whose deployment was the upshot of a deliberative process oriented toward the judicial ideal. But opinions may differ on this last point. Conceivably, there might be some sense to subjecting a decision process of the kind I have called legislative to the possibility of a last-minute veto exercised on the basis that judicial-style reasoning might show that the outcome of the former process fails the test of some abstract provision already laid down. If we decide a watershed issue one way, after full and fresh consideration of the merits, there may be some virtue in being alerted that that solution is incompatible with commitments we have already laid down for our community.

Such a conclusion, while not dispositive from the point of view of the legislative-style process, may serve as a useful warning to the effect that the

legislative process might have missed something important. I suspect that there is a place for some sort of alert mechanism along these lines, say, in the context of a system of weak judicial review—with declarations of incompatibility—along the lines of those provided for under the United Kingdom's Human Rights Act.[55] But it will be much harder, I think, to make a case for strong judicial review on this basis—that is, for a strong and final veto exercised pursuant to judicial-style reasoning upon the output of a full and fresh legislative-style consideration of an issue of rights on the merits. Needless to say, such a practice of strong judicial review would also face criticism on other grounds—such as grounds of democratic legitimacy—which, as I said at the outset, are not considered in this paper at all.[56]

I said a little while ago that legislative-style reasoning is not the same as reasoning by a legislature and judicial-style reasoning is not the same as reasoning by a court. It is not inconceivable that courts might use the model of moral reasoning I have called legislative—addressing issues freshly and directly on their moral merits, undistracted by legalisms—and that they might turn out to be better at it than legislatures are. However, there are reasons for doubting this. For one thing, courts have little experience of this sort of moral reasoning, and their own (justified) qualms about the legitimacy of their engaging in it are likely to distort the way they conduct themselves.[57] For another thing, courts consist of too few members to ensure that all points of view are aired in the way I associated with the legislative model. Finally, some of the presuppositions of this model—such as representation and the connection between political equality, testing the extent of a view's support, and eventual decision by majority voting—make little sense when applied to courts.[58]

What I hope to have established is this: if we pay proper attention to the sort of moral deliberation that is appropriate for those deciding in the name of a whole society on outstanding watershed issues of individual and minority rights, the case that can be made for assigning those issues to courts is by no means compelling. At any rate, the thesis we have called JGM has been shown to be a nonstarter; I mean the thesis that judges are better at deciding these issues because, individually, they reason more as we do in our philosophy seminars than do legislators.

[55] I acknowledge this in Waldron, *supra* note 2, at 1370.

[56] *See supra* note 2.

[57] *See* Waldron, *supra* note 2, at 1381.

[58] I do not mean that courts are unfamiliar with majority decision making. They use it all the time. But their use of it makes little sense and is not motivated in the way that its use in the legislature is. In the legislature we accord equality to the representatives and allow the use of a decision mechanism specifically oriented to their equality because of the connection, through elections and representation, to the ultimate political equality of individual citizens. No such connection makes sense in the case of judges. For a fuller discussion of this, see Waldron, *supra* note 2, at 1391–1393.