Charter Challenges: A Test Case for Theories of Law

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Abstract
The author’s primary objective is to show that versions of legal positivism, according to which legal validity sometimes depends on moral validity (Inclusive Legal Positivism), are theoretically preferable to those forms of positivism (Exclusive Legal Positivism) which deny this possibility. The author attempts to substantiate this conclusion by demonstrating that Inclusive Legal Positivism provides a better theoretical account of challenges to legal validity based on a document like the Canadian Charter of Rights and Freedoms. His secondary aim is to show that the choice between Inclusive and Exclusive Legal Positivism can have important consequences for legal practice.

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CHARTER CHALLENGES:  
A TEST CASE 
FOR THEORIES OF LAW

BY W.J. WALUCHOW

The author's primary objective is to show that versions of legal positivism, according to which legal validity sometimes depends on moral validity (Inclusive Legal Positivism), are theoretically preferable to those forms of positivism (Exclusive Legal Positivism) which deny this possibility. The author attempts to substantiate this conclusion by demonstrating that Inclusive Legal Positivism provides a better theoretical account of challenges to legal validity based on a document like the Canadian Charter of Rights and Freedoms. His secondary aim is to show that the choice between Inclusive and Exclusive Legal Positivism can have important consequences for legal practice.

I. INTRODUCTION

Does the existence of valid, positive law ever depend on moral considerations? To this question, defenders of Natural Law Theory (NLT) are thought emphatically to answer "Yes, and necessarily so. An unjust law seems to be no law at all." Defenders of Legal Positivism (LP), by contrast, are thought to answer with a resounding "No, and necessarily so. The existence of law is one thing, its merit or demerit quite another. The existence of a valid, positive law is entirely a function of its pedigree, that is, by the manner in which it becomes law."

In recent years, this conventional approach has met with serious challenge. John Finnis argues that "a theory of natural law need not have as its principal concern, either theoretical or

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pedagogical, the affirmation that 'unjust laws are not laws'.

Others suggest that LP is in no way wedded to a denial that moral standards can ever serve as criteria for determining the existence or the content of positive law. They argue that moral considerations sometimes figure in arguments purporting to establish or challenge legal validity, or in arguments intended to determine the scope, extent, or meaning of positive law. On earlier occasions, I joined the ranks of those eager to substantiate these latter suggestions regarding LP. I argued that it is consistent with LP to suggest that the identification of a standard as valid, positive law can depend on substantive moral arguments. As an example, it was urged that a legal positivist's ultimate criteria for legal validity (for instance, H.L.A. Hart's rule of recognition) might well incorporate distinctly moral tests. Were this true, then according to LP, the actual validity of a purportedly valid law might, on some occasion, be a function of its "moral merit." The simple fact of its enactment by Parliament, for example, would be insufficient to determine the standard's validity. One might further be required to decide whether it passes the appropriate moral tests. What permits us to view such tests as compatible with LP is that their existence is in no way necessary for law. Rather, their existence is contingent upon social practice. Moral tests exist as constraints on legal validity, only if, as a matter of social fact, they have the appropriate pedigree, such as being explicitly incorporated into a constitutional charter or bill of rights.

Another of my arguments was that versions of LP which recognize the possibility (indeed the frequent existence) of "pedigreed," or legally accepted, moral tests for legal validity are theoretically preferable to NLT or any version of LP which denies that possibility. In an attempt to support this claim, I pointed to challenges to legal validity made under documents like the Canadian

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3 See Herculean Positivism, ibid, at 192-96.
Charter Challenges

I suggested that these Charter challenges typically involve substantive moral arguments. It is mistaken to view such arguments as anything but attempts to demonstrate either that pedigreed criteria for legal validity have not been satisfied, and that what seems to be valid law is in fact no law at all, or that a law must be understood or interpreted in such a way that it does not infringe upon a pedigreed moral right protected by the Charter. In the former instance, morality figures in arguments purporting to establish or challenge the existence of valid law. In the latter case, it figures in arguments purporting to establish the content of valid law, the law contained within the instruments (for example, the statutes or precedents) employed for its expression. If my construal of Charter challenges is correct, then it follows that the existence and content of law does indeed sometimes depend on moral factors. It further follows that any version of LP which accepts this as a theoretical possibility is, on that account alone, superior to one which does not. In this essay, I shall refer to the first kind of LP as "Inclusive Legal Positivism" (ILP) and the second as "Exclusive Legal Positivism" (ELP). According to ILP, moral standards are included within the possible grounds a legal system might adopt for determining the existence and content of valid law. ELP, by contrast, logically excludes the adoption of such grounds.

My primary objective in the present paper is to develop further the argument that ILP is a sounder theory of law than ELP because it offers a better theoretical account of Charter challenges. A secondary objective is to show that the choice between ILP and ELP (or between one of them and some third competitor) is not an idle curiosity. The choice is an important one, not merely for traditional debates within philosophy concerning the nature of law, but ultimately for legal practice as well. It is tempting to think, contra Bentham and Hart, that traditional theories concerning the

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5 Following Raz's lead, I earlier referred to ILP as the "weak social thesis" and ELP as the "strong social thesis." I have chosen to adopt this new terminology to better convey the essential differences between the two kinds of LP, and to deny Raz the rhetorical advantage of having his theory perceived as "strong" and mine as "weak."
nature of law have little if any bearing upon the actual practice of law. Whether they espouse legal realism, legal positivism, or natural law theory, indeed whether they have anything remotely like a theory of law at all, judges will go about their business in the usual manner. For example, when faced with a seriously unfair but binding precedent, the judge adopting NLT will argue, "This is unfair and not law; therefore, I should perhaps not apply it in this case, even if it does satisfy all the legally recognized tests of validity." The judge adopting LP, on the other hand, will argue, "Though this is law because it satisfies all the legally recognized tests of validity, it may none the less be too unfair for me to apply in this case." In each instance, the same steps will probably be taken and the end result will likely be the same (the precedent is overridden instead of applied); this occurs despite the different descriptions under which those steps are taken and the end result conceived. If the two judges do differ in their solutions to the dilemma posed, it will not be because of any differences they might have concerning the respective merits of LP versus NLT.

The same will be true, it might be thought, in situations where the law is unsettled, perhaps because the meaning or implication of a statute is unclear. The judge adopting NLT will look to his moral theory for help in deciding what the law really requires in the case before him. Human law, on his view, is a vehicle for the expression and implementation of the moral law, and when for some reason it fails to express that higher law, it is incumbent upon a judge to appeal directly to the higher source. As for the judge adopting LP, she too may repair to moral theory to help solve the riddle left by positive law. There is little reason to think that her answer will necessarily be any different from the one provided by her NLT counterpart. It is likely, though, that she will conceive the process of finding that answer somewhat differently. She will view that process, not as the discovery of pre-existing, higher law, but as the discretionary creation of new law in fulfilment of her

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quasi-legislative, judicial responsibility to fill in gaps left by positive law.

We should resist the tempting view that philosophical reflection about the nature of law offers legal practice nothing except different descriptions of what judges do. My secondary aim, then, will be to give some credence to this claim. I shall do so by relating my investigation of the merits of ILP over ELP to current disputes in constitutional theory about the nature, justification, and proper extent of judicial review. More specifically, I will consider briefly various views regarding the interpretation of charters or bills of rights; whether, as the jargon has it, interpretation should be confined to "the four corners" of the document or whether a more liberal approach is the better course. It is obvious that much of practical importance hinges on how these particular disputes are settled. It takes little imagination to see how a court more firmly wedded to a narrow, literalist approach to constitutional adjudication might have decided *Roe v. Wade* or *R. v. Morgentaler.* It may not be so clear, however, how philosophical thought about the nature of law could have any serious bearing on how these cases were or could have been decided. But as we shall see, there are indeed important theoretical and pragmatic connections here which can have a profound bearing on practice. Depending on her theory of law, a judge may view a liberal approach to *Charter* challenges as the naked usurpation of the legislative role, or alternatively, a simple attempt to interpret and determine the scope of existing law, something judges do all the time and which requires no special justification.

II. ILP VS. ELP

The overall objective of this section is to show that ILP provides a better theoretical account of the moral argument which sometimes takes place in *Charter* challenges. Our first order of business, then, must be to substantiate the premise that moral

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argument does indeed sometimes take place in such cases. Without this premise, the argument cannot even begin to get off the ground.

It might seem obvious that Charter challenges rely on moral arguments. After all, in listing fundamental rights and freedoms, the Charter uses terminology which figures prominently in virtually all modern moral theories. The right to equality (section 15), for instance, is a paradigm moral right. So too is the right not to be deprived of liberty except in accordance with fundamental justice (section 7). But the mere use of terms which admit of moral meanings is, in itself, clearly insufficient to establish our premise. From the fact that two normative systems share a certain common vocabulary, it fails to follow that their common terms have identical referents or that they have identical or even similar meanings. This is obviously true in the case of law and morals. The interpretation given to a legal term is often quite different from the corresponding moral term. One who plea bargains a murder charge down to manslaughter may yet be morally condemned as a murderer. What is legally judged to be fair business practice may quite properly be assessed as morally unfair, and so on. So the mere use of moral terminology within the Charter is itself of little argumentative force.

Yet, perhaps it is not the terminology itself which is of importance, but rather the way the judiciary has come to approach and understand it. As should now be clear, most Canadian judges have been willing to adopt a non-legalistic, broad, purposive, or liberal approach to the Charter. In Big M Drug Mart, for instance, the then Chief Justice of the Canadian Supreme Court, Brian Dickson, had this to say concerning the proper method of Charter adjudication:

In Hunter v. Southam Inc., [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect ... The interpretation should be, as the judgement in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v.
Skapinker, [1984] S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and historical contexts.\(^8\)

According to Dickson, then, interpretations of the Charter should be generous rather than legalistic, aimed at fulfilling the interests or objects that document was meant to protect. These objects are to play a far more central role in its interpretation than is typically the case with many other types of legal standards and instruments like tax laws or administrative regulations. It is this fact, no doubt, which led one legal commentator to remark that the "Charter imposes substantive new responsibilities on the courts. It requires not only that they deal with new issues but that they reconsider traditional methods of reasoning."\(^9\) They must eschew a narrow legalistic approach to Charter adjudication in favour of a much broader one which more firmly focuses on the interests or objects that the Charter sets out to protect. Of course, these objects are often none other than those fundamental rights and freedoms of political morality to which the Charter gives legal protection.

It is reasonably clear, then, that the Supreme Court of Canada believes that the interpretation of the Charter should be governed by the objects or interests it was meant to protect. If so, then it is also reasonably clear that moral argument will often figure in Charter challenges. If one must interpret the Charter in light of its objects, and those objects are often moral rights and freedoms, then it follows that one cannot determine what the Charter means, and thus the conditions upon legal validity which it imposes, without determining the nature and extent of the rights of political morality it seeks to guarantee. Yet, one cannot do this without engaging in substantive moral argument. This argument will of course be sensitive to the linguistic, philosophic, and historical context in which the Charter is to be placed. This, however, is not an objection to the point being made here, since such sensitivity is precisely what one would expect of responsible reflection concerning moral entitlements. It would be a serious mistake to think that reasoning


about moral rights and freedoms, whether private or public, can take place independently of contextual considerations. What one is entitled to expect from government, other public institutions, and indeed from other private citizens, depends in large part upon shared understandings, expectations, historical circumstances, and so on— in short, on the linguistic, philosophic and historical context in which all moral arguments must take place.10

So, the manner in which Canadian judges approach their task of interpreting and applying the Charter seems to offer some basis for the premise that moral argument is often involved in Charter adjudication. But more support is obviously needed, if only because the evidentiary value of judicial testimony in these matters may be open to question. Consider a parallel with the philosophy of science. Many philosophers of science adopt the methodological principle that it is better to look at what scientists actually do, rather than to what they say about what they do, when looking to support or question theories about the nature of science or of scientific methodology and reasoning. One obvious reason for this principle is the simple fact that being a good scientist in no way guarantees that one is a good philosopher, no more than being a good philosopher means one can do elementary-particle physics. Richard Feynman, the celebrated physicist and Nobel prize winner, had the following to say concerning the suggestion that scientists should give more consideration to social problems, in particular, that they should

10 A current trend within modern moral philosophy stresses the essential role of local custom and practice in defining the standards of moral deliberation appropriate for use within a local community. On this view, "rationalist" attempts to discover universal, moral principles valid for all times and places are thoroughly misguided. Moral standards, are in part "local" and conventionally based. Writers who fall within this movement include B. Williams, S. Hampshire and A. Baier. For a representative sample of the thoughts of such writers, see S. Clarke & E. Simpson, eds, Anti Theory in Ethics and Moral Conservatism (Albany: SUNY, 1989). See also E. Simpson, Good Lives and Moral Education (New York: P. Lang, 1989). Recognizing the importance of context and local circumstances in moral reasoning is perfectly consistent with the belief in universal moral principles, valid for all times and places. Given different expectations, mutual understandings, and historical circumstances, principles like the principle of utility will license very different actions, laws, and institutional arrangements. The utilitarian will only insist that the validity of his or her ultimate principle is not itself determined by "local" understanding or conventional agreement. So we needn't take a stand on these controversial issues of moral theory to appreciate the Supreme Court's view that interpretation of Charter rights must be sensitive to "linguistic, philosophic and historical contexts."
be more responsible in considering the impact of science on society: "I believe that a scientist looking at non-scientific problems is just as dumb as the next guy — and when he talks about a non-scientific matter, he sounds as naive as anyone untrained in the matter."1

Perhaps Feynman's point, made only partly in jest, can be generalized to other non-scientific questions, such as the proper philosophical characterization of science and scientific reasoning. If so, then we must accept the theoretical possibility that scientists generally misconceive what it is they are up to when they set out to construct scientific hypotheses and theories. They may think, for instance, that they are discovering objective, theory-independent facts, when in reality their so-called objective facts are thoroughly theory laden. They may think that they are ascertaining the nature of a material reality which, in the words of David Hume, "would exist though we and every sensible creature were absent or annihilated,"12 when in actual fact there is no such reality at all, and Berkeley was right when he exclaimed, "esse est percipi."13 If such instances of widespread misconception are possible within science, then why not in law? Is it not possible that Canadian judges simply misconceive the fundamental nature of the enterprise in which they are engaged? If so, then they may all think that they are sometimes engaged in substantive moral argument in Charter challenges when in fact they are not, just as they may think that in hard cases, their decisions are discretionary, when in fact they are attempts to enforce pre-existing legal rights.14

In answer to this radically sceptical objection to reliance on judicial testimony, the following may well suffice. While we must

1 R.P. Feynman, "What Do You Care What Other People Think?" -- Further Adventures of a Curious Character (New York: W.W. Norton, 1988) at 240.


13 G. Berkeley, A Treatise Concerning the Principles of Human Knowledge (Indianapolis: Hackett, 1982) at 24, s. 3.

14 According to R. Dworkin, judicial decisions attempt typically to enforce existing legal rights, despite judicial rhetoric about the need for judicial legislation within the "gaps" or "interstices" of law. See R. Dworkin, Law's Empire (Cambridge, Mass: Belknap Press, 1986) at 359-63 [hereinafter Law's Empire].
accept the theoretical possibility that Canadian courts are generally confused about what it is they are about in Charter cases, the burden of proof is surely on one who wishes seriously to urge this possibility as a sufficient reason to dismiss judicial characterizations of judicial practice. If those who participate in legal adjudication believe their practice requires X, then barring any good reason to the contrary, we philosophers who seek to provide theoretical accounts of the law, are surely justified in accepting that the practice really does require X. Yet the purely theoretical possibility of widespread misconception is clearly not reason enough; we should not be Cartesian sceptics in such cases, sceptics for whom the mere logical possibility of error precludes acceptance of the obvious.

Assume, however, that I am wrong about this and that the way the judges view what they do has absolutely no probative force whatsoever because they could be wrong — just as most everyone was at one time wrong in thinking that the Earth is flat. If this is true, then our only avenue for determining whether the judges are right in thinking that moral argument does sometimes figure prominently in Charter cases is to look ourselves at what they actually do, how they actually decide Charter cases. Fortunately, this task poses little difficulty. A careful reading of virtually any Charter challenge reveals that moral argument does play a vital role. I shall conclude my defence of the premise that moral argument plays a role in Charter adjudication by briefly examining one such case, Andrews v. Law Society of B.C.\textsuperscript{15}

This appeal was heard before the B.C. Court of Appeal and raised the issue of whether a requirement of Canadian citizenship as a prerequisite to the practice of law was in violation of section 15 of the Charter. Section 15 falls under the title "Equality Rights" and reads as follows:

\begin{quote}
15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in
\end{quote}

\textsuperscript{15} Andrews v. Law Society of B.C., [1986] 4 W.W.R. 242 (B.C.C.A.) [hereinafter Andrews]. The Court of Appeal's decision was later upheld (3 to 2) by the Supreme Court of Canada. See Law Society of B.C. v. Andrews, [1989] 56 D.L.R. (4th) 1. Though there are some important differences between the reasoning of the two Courts, they do not affect the argument of this paper and will be ignored. I will concentrate exclusively on the elegant judgment of McLachlin J.A. (as she then was).
particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 makes it unconstitutional for any law or other legal instrument to discriminate against persons, unless such discrimination can be justified under section 1 of the Charter.\textsuperscript{16} Section 1 states that:

1. The\textit{ Canadian Charter of Rights and Freedoms} guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The question whether section 1 could be used to override section 15 was crucial to the case. The major issue before the Court was whether the citizenship requirement imposed by the Law Society of British Columbia amounted to discrimination. This question led to another more basic issue of both moral and philosophical importance: how does one define discrimination for purposes of interpreting section 15? It is in answering this latter question that we see the first signs of substantive moral argument. Three basic answers were proposed. First, there was the definition proposed by the Law Society which had been accepted by the trial judge.

D1: \( \text{L is discriminatory if and only if "it draws an irrational or irrelevant distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect of imposing on certain of them, a penalty, disadvantage or indignity, or denying them an advantage."} \textsuperscript{17} \)

The key here is the notion of rationality; a law is discriminatory only if there is no rational basis for it. It might be highly objectionable in many other ways, but so long as any distinction it draws is rational in light of what the law sets out to do, then the law is not

\textsuperscript{16} For reasons of simplicity, and because it in no way affects the arguments of this paper, we shall ignore the possibility of a section 33 override. The latter empowers Parliament or the legislature of a province to "expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included within section 2 or sections 7 to 15 of [the Charter]." Section 33 also provides that a declaration made under its terms "shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration" and that re-enactment is possible.

\textsuperscript{17} Andrews, supra, note 15 at 246.
discriminatory. This is a fairly weak definition in the sense that it employs means-end rationality as its criterion for discrimination. Regardless of the ends sought, or the effect upon people of the means used in realizing those ends, a law is not discriminatory so long as it really does work effectively towards its ends. The result, as the B.C. Court well realized, is that many laws which ruthlessly but effectively help to realize morally objectionable ends, or which serve to victimize innocent parties, will be judged non-discriminatory. As a consequence, the Court rejected D1. This definition is surely not what "equality" and "freedom from discrimination" mean.

A second definition was proposed by Andrews:

D2: L is discriminatory if it draws any adverse distinction on the basis of a personal characteristic or category.

The Court was equally unhappy with this definition. Were it to be adopted, a vast number of existing laws, which necessarily draw adverse distinctions among people based on personal characteristics, would be deemed discriminatory and thus in violation of section 15. This consequence in itself was sufficient reason, in the Court's mind, for thinking that D2 is unacceptable, though it went on to list several other reasons why the definition had to be rejected.18

A third possibility was accepted by the Appeal Court and used as their basis for finding in favour of the appellant:

D3: L is discriminatory if it draws any unreasonable or unfair distinctions, distinctions which are unduly prejudicial.19

There are some important observations to be made regarding D3. In the view of the Court, the test under D3 must be objective, that is, based on whether the law is in fact discriminatory, not on whether the lawmakers, or those who might have acted under its authority, sincerely believed that it was discriminatory. Were the test subjective, then perhaps one would be required to establish only non-moral, empirical facts about what people's moral beliefs actually are or were. But an objective test clearly means that the Court must itself determine whether L, in actual fact, does draw

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18 Ibid. at 249.

19 Ibid. at 250-52.
unreasonable or unfair distinctions. This determination cannot be made independent of moral deliberation:

The question to be answered under S.15 should be whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and its effect on persons adversely affected. I include the word "fair" as well as "reasonable" to emphasize that the test is not one of pure rationality [as with D1] but one connoting the treatment of persons in ways which are not unduly prejudicial to them. This test must be objective, and the discrimination must be proved on the balance of probabilities ... The ultimate question is whether a fair-minded person, weighing the purposes of legislation against its effects on the individuals adversely affected, and giving due weight to the right of the Legislature to pass laws for the good of all, would conclude that the legislative means adopted are unreasonable or unfair.20

Plainly, this test for discrimination requires moral deliberation. Indeed, the parallel between the test proposed — what a fair-minded person would conclude — and what is required by "ideal observer theories" of morality is striking.21 The Court is clear in its view that the test is neither subjective, nor based on pure means-end rationality. On the contrary, it is objective, and based on what is fair and reasonable.

Upon adopting D3 as the criterion of discrimination, the Court went on to apply it to the Andrews situation. They ruled that the Law Society's citizenship requirement was indeed discriminatory, and thus in violation of section 15, because it was neither fair nor reasonable for someone in Andrews' position to be denied a licence to practice law. The Court rejected the Society's contention that lawyers, because they are involved in the processes or structures of government, should be citizens, and not merely residents, of Canada:

While lawyers clearly play an important role in our society, it cannot be contended that the practice of law involves performing a state or government function. In this

20 Ibid. at 252-53.

21 Ideal observer theories vary, but generally they make a claim similar to the following: "If we want to know whether something is morally right, the question is: 'Would it be permitted by the moral code which an omnipercipient, disinterested, dispassionate [or benevolent] but otherwise normal person would most strongly tend to support as the moral code for a society in which he expected to live?'" See R.B. Brandt, A Theory of the Good and the Right (Oxford: Oxford University Press, 1979). The theory appears to have originated in Adam Smith's The Theory of the Moral Sentiments (Oxford: Clarendon Press, 1976).
In addition, the Court ruled that authority and the persuasive precedent of other jurisdictions support the unreasonableness of the citizenship requirement:

The fact is that citizenship was not seen as essential to the practice of law in this province prior to 1971. It is still not viewed as such in most jurisdictions; only two other provinces require lawyers to be citizens. In the tradition of the British Commonwealth, citizenship has never been a requirement for the right to practise law. These facts belie the contention that citizenship is vitally and integrally connected with the lawyer's role in society.23

After putting all these moral, philosophic, and historical factors together, the Court was prepared to rule that discrimination—unfair and unreasonable adverse treatment on the basis of a personal characteristic—had indeed occurred and that section 15 had therefore been infringed.

Of course, the violation of a Charter right does not in itself entail that the offending measure is unconstitutional and therefore invalid. It may yet be justified under section 1, which validates infringements under certain conditions. The question therefore arose whether a citizenship requirement, acknowledged to be unfair and therefore discriminatory, could nonetheless be justified in a free and democratic society. A second question arose too, which had to be answered first: How does one go about answering the first question? What standards, if any, apply? Fortunately an answer to this second question had already been provided in authoritative precedent. In Regina v. Oakes,24 the Supreme Court of Canada had enunciated several principles to govern the application of section 1. These may be summarized as follows:

1. The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and

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22 Andrews, supra, note 15 at 257.

23 Ibid at 258.

democratic society rests upon the party seeking to uphold the limitation [in this instance, the Law Society].

2. The presumption is that Charter rights are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria justifying their being limited.

3. The standard of proof under section 1 is [as it is under section 15] the preponderance of probabilities.

4. It must be proven that the objectives to be served by the measures limiting a Charter right are sufficiently important to warrant overriding a constitutionally protected right or freedom. At a minimum, the objectives must be shown to relate to societal concerns which are pressing and substantial in a free and democratic society.

5. It must be shown that the means chosen — the offending provisions — are reasonable and demonstrably justified. This, the B.C. Court noted, involves three components:

   i. The measures must be fair and not arbitrary — they must be carefully designed to achieve the objective in question and rationally connected to it.
   ii. The means should impair the right as little as possible.
   iii. There must be proportionality between the effects of the limiting measure and the objective — the more severe the prejudicial effects of a measure, the more important the objective must be [the "proportionality test"].

Having set out the appropriate standards to be applied, the Court went on to argue that section 1 could not be utilized to justify the Law Society's discriminatory citizenship requirement. The apparent objectives of the requirement could not be said to relate, in any reasonably clear way, to societal concerns which are pressing and substantial. The effects of the means chosen were not proportional to the importance of the objectives sought, and were in fact not rationally related to them: citizenship is in no way a
necessary condition of being a good lawyer. The appeal was therefore granted. The citizenship requirement was invalid owing to its unconstitutionality.

Judging from the above analysis, it is apparent that answering the questions posed by section 1 will often require appeal to pure means-end rationality of the sort discussed above in relation to D1. In addition, it will invariably require a certain amount of historical investigation into the political morality of other democratic jurisdictions. But as with section 15, it is also clear that section 1 sometimes demands a degree of moral deliberation. One simply cannot determine whether a measure is fair without contemplating moral premises. One cannot determine proportionality without considering the moral and political importance of the various objectives and concerns which find support in the Charter and in the offending measures. One cannot determine whether a limit can be demonstrably justified in a free and democratic society without engaging in substantive arguments of political morality. As Peter Hogg notes,

"The phrase "demonstrably justified" calls for normative judgment by the court as to the legitimacy and necessity in a free and democratic society of the impugned restriction on liberty and that judgment cannot depend wholly upon what has seemed acceptable to legislative bodies in Canada and elsewhere. For good or ill, the Charter clearly contemplates that the majoritarian judgment of a legislative body, or even many legislative bodies, be subject to review on Charter grounds by the courts."

Surely what is required in all these instances is not the kind of reasoning which strives to be neutral with respect to, or totally detached from, concerns of political morality. What is required is normative, moral judgment which tackles the tricky issues involved whenever one is called upon to strike a reasonable balance between competing moral and political interests. Section 1, then, requires a significant measure of moral reasoning.

If the arguments of the preceding sections are sound, we seem entitled to accept the premise that Charter cases sometimes involve moral argument. Even if one totally discounts the evidentiary value of the judges' own reflections about their reasoning on the Charter, we have ample evidence of how they actually carry out that task —

in what they do as opposed to what they say they do. Our examination of *Andrews* illustrates that moral reasoning does occur, as it does in many other cases as well, cases like *Morgentaler* and *Oakes*. Indeed, if the analysis of *Andrews* is correct, then application of sections 15 and 1 will almost invariably be guided, in part, by moral considerations.

So moral deliberation does figure in *Charter* cases. Our next step must be to show that it figures in the right way. That is, if our findings are to provide support for choosing ILP over ELP, it must be established that the moral standards employed in *Charter* cases sometimes function as tests for the existence and content of valid law. Without this additional premise, we have no basis for preferring ILP to ELP.

Once again, it seems *prima facie* obvious that moral standards do serve the role ILP admits but ELP conceives as impossible. In *Morgentaler*, for instance, we have what functioned for over twenty years as valid law being declared to have been unconstitutional and thus of no force or effect. The ground for this declaration was violation of section 7 of the *Charter* which recognizes a right to life, liberty, and security of the person — a right which cannot be denied except in accordance with the principles of fundamental justice. As the courts made plain, "fundamental justice" is to be understood as including substantive, not merely procedural, justice. And whatever one’s view about the need for moral reasoning in determining the nature of procedural justice, it is clear that that need is present when substantive justice is at issue. To determine the requirements of substantive justice (one of the interests or objects of section 7, in terms of which that section is to be understood), one must engage in moral reflection. If so, we seem to have legal rights, whose content depends upon moral considerations, being used to demonstrate the invalidity of a statutory instrument (section 251 of the *Criminal Code of Canada*). This, of course, is a possibility well recognized by ILP.

But it is not a possibility recognized by ELP. If we accept that theory, the above account, which will be called the "Inclusive Account" (IA) just has to be wrong. If the existence and content

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26 R.S.C 1985, c. C-46 [hereinafter the *Criminal Code*].
of a legal right can never in any way be a function of moral considerations, then we are inexorably led to the following conclusions. When the Supreme Court of Canada considered whether the proper interpretation of section 7 of the Charter rendered it in conflict with section 251 of the Criminal Code, they could not conceivably have been trying to determine the existence or content of valid law. Similarly, when the B.C. Court of Appeal considered whether section 15 must be understood in such a way that it was unjustifiably infringed by the Law Society's citizenship requirement, they could not conceivably have been determining the existence or content of valid law. They could not have been attempting to understand and apply legal tests for legal validity, because, for example, the crucial test of discrimination, (and hence violation of section 15) is whether people are being treated unreasonably or unfairly — and this test, as we have seen, is, at least sometimes, partly a moral one.

Yet if the courts were not attempting to determine the existence and content of valid law in these cases, what were they doing? Let us focus on Andrews once again. What could the B.C. Court of Appeal have been doing when it addressed the question whether the citizenship requirement was invalid because it violated section 15, and that section 15 was violated because the requirement was unfair to Andrews? There would seem to be only one possibility according to ELP. If the Court was not attempting to determine the existence and content of valid law, then it must have been attempting to determine the existence and content of something other than law, and applying that something else, in some way or other, to undermine the validity of the citizenship requirement. In applying its fairness test, the Court must have been relying on non-legal, moral standards, not to determine that the citizenship requirement was invalid owing to its conflict with superior law, but to make it invalid by declaring it to be so.27

27 Later we will consider another alternative which seems open to ELP. The Court did not make the citizenship requirement invalid by its decision. Rather, the court determined that it already was invalid, owing to its conflict with extra-legal moral standards. As we shall see, however, this option is one that is not really open to the defender of ELP. He or she pursues it at the risk of surrendering to ILP.
Charter Challenges

It is important to be clear how exactly the Charter is to be conceived on this alternative account, which will be referred to as the "Exclusive Account" (EA). According to EA, section 15 does not itself constitute or contain a legal criterion for validity. Rather, it makes reference to an extra-legal, moral criterion to which judges are required or at liberty to appeal in Charter challenges. Section 15 directs them to step outside of law and to seek guidance from an external source of non-pedigreed norms, namely, the norms of political morality. A useful parallel is perhaps to be found in foreign law. Courts are sometimes required to make reference to, and indeed to apply, the law of foreign legal systems in deciding cases. According to EA, the Charter requires (or permits?) much the same. It requires (or permits?) Canadian judges to make reference to and apply the standards of what amounts to a different kind of foreign system. And just as we would not accept that foreign law becomes part of our legal system just because our judges are required sometimes to apply it in their decisions, we should not think that standards of political morality are thereby incorporated into Canadian law as legal tests for legal validity, just because our judges must (or may) sometimes (as in Andrews) make reference to them when deciding Charter cases.

On EA, then, the Court in Andrews did not, when it based its decision on the unfairness of the citizenship requirement, enforce an existing legal right (to equality) against a measure (the citizenship requirement) which would be valid were it not for the conflict with section 15. On the contrary, it exercised its duty (or liberty), imposed (or granted) by section 15 to make unconstitutional what otherwise would have and had been perfectly valid law. The Court did not discover a legal conflict. It discovered a conflict between law and political morality, and by its decision settled the conflict in favour of the latter. Of course, it is consistent with EA to claim that the Court's decision, though it was based on the enforcement of a moral right, created a new legal right. The effect of the decision in Andrews would have been to grant a new legal right to lawyers not to be subject to a citizenship requirement. The Court's decision, as an authoritative act with the appropriate pedigree, was quite capable

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of creating such a legal right — just as decisions of Parliament, which are themselves often based on moral reasons, are quite obviously capable of creating new legal rights.

This, then, is the alternative account of Charter adjudication to which ELP seems to lead. Our next step must be to consider whether the account is an acceptable one. There are several reasons for thinking it is not.

First, EA is simply counter-intuitive. It seems quite at odds with our ordinary understanding of a constitutional document like the Charter. The latter is commonly conceived as a measure which creates fundamental legal rights Canadians possess against governments and government agencies. It flouts that understanding to suggest that the Charter does not in fact serve this role at all, but instead only makes reference to non-legal, moral rights upon the basis of which judges are empowered to create new legal rights by invalidating what would otherwise be valid legal measures. Insofar as it is part of the fundamental law of Canada, the Canadian Charter of Rights and Freedoms is quite naturally viewed as itself creating legal rights. And pointing out the fact that moral deliberation is sometimes required for determining the content of these legal rights does not in any way disturb that natural understanding.

Of course, it is also part of our common understanding that standards of political morality such as one finds in the Charter are subject to various kinds of indeterminacy. In cases where indeterminacy figures, judges are thought to play a leading role in shaping the contours of the political morality expressed in the Charter. They do so, as they do in any other area of law where indeterminacy is encountered, by exercising their discretion. The Charter's regions of indeterminacy are perhaps greater than in many other areas of law where more closely textured terms are used, terms like "vehicle," "radio telegraph," and "assault." But terms like "equality," "discrimination," and "liberty" are not so open textured as to admit of no determinate meaning whatsoever. If so, then to the extent that the Charter provisions employing such terms do admit of determinate meaning, they do create fundamental legal rights Canadians possess against government and government agencies.

To view Charter rights as analogous to foreign law, then, comes close to an absurdity. Another factor weighing against EA is the language chosen by Parliament to characterize the Charter. Unlike
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its predecessor, the *Canadian Bill of Rights*, the *Charter* is a constitutional document. As such it has a special force, clearly described in section 52 (1) of the *Constitution Act, 1982*:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Taken literally, this provision flatly contradicts *EA*, and we have yet to see any good reason not to construe it literally. Section 52 does not say that upon judicial declaration that a legal measure is inconsistent with a (foreign) right referred to (but not granted by) the *Charter*, the measure shall from that moment on be of no force and effect. Rather, it says that any measure which is in conflict with a *Charter* provision is, to the extent of the inconsistency, of no force or effect. Of course, inconsistencies do not begin to exist only when judges declare that they exist. On the contrary, judges rule that the inconsistencies exist only because they believe that the legal conflicts already do exist by virtue of the *Charter* and its various provisions. Those provisions include, of course, sections 7 and 15.

Any legal measure, such as section 251 or the Law Society's citizenship requirement, which is inconsistent with either of these provisions is, independently of a judge's decision in a *Charter* challenge, of no force and effect. Yet as we have seen, the contents of sections 15 and 7 are partly determined by considerations of political morality. It seems to follow from the plain language of the *Charter*, then, that some moral standards are a part of Canada's accepted conditions for legal validity, something Canadian judges seem to recognize in their decisions.

However, there are further reasons for rejecting *EA*. For example, it does not easily explain certain features of *Charter* challenges. At the very least, any explanation it suggests is less consonant with these features than *IA*, which adopts the view that judges are indeed attempting to determine the existence and content of valid law when they hear *Charter* challenges, despite their partial reliance on moral standards. One such feature is that the legal system treats a measure declared invalid as though it were invalid at the time that the actions giving rise to litigation occurred.

Consider *Morgentaler* for example: when section 251 was finally struck down, the obvious fact that Morgentaler had violated section
251 was no longer an acceptable basis for prosecution. All legal action against Morgentaler consequently ceased. The main reason, of course, is that in declaring section 251 unconstitutional, the Court ruled that section 251 had been of no force or effect when the acknowledged violations occurred. The effect of the Court's decision was the recognition that Morgentaler had been within his legal rights. He had not in fact performed actions which were illegal at the time. Were EA accepted, on the other hand, illegal acts would indeed have occurred. It was, by this reasoning, only upon declaration of invalidity by the Court that section 251 became invalid. Prior to that time the legislation had force and effect, and actions in violation of it would have indeed been illegal, criminal acts. But if so, would not prosecution still have been in order? And if not, what is the explanation?

With IA, of course, we have a ready and obvious explanation. The Court discovered a conflict in law between section 251 and a more authoritative legal provision. It discovered that section 7 was in conflict with section 251 and that the latter therefore had been of no force and effect at the time Morgentaler and his colleagues were procuring abortions. In short, the Court discovered that Morgentaler had at all times been acting within his legal rights. The legal obligations purportedly imposed by section 251 did not in fact exist when they acted.

EA offers no ready explanation for why prosecution is so clearly out of order. There was no recognition by the Court that its declaration had retroactive effect, that it was declaring to have been invalid what was in fact valid at the time, nor was there any acknowledgement that this highly unusual step — for which a very special type of justification would surely have been in order — was the reason why prosecution would have to cease. Furthermore, there was no sense that the legal system was granting Morgentaler and his colleagues a favour by no longer prosecuting them for their previous crimes. On the contrary, it was now clear that prosecution was, and always had been (subsequent to the enactment of the Charter), ruled out legally, owing to the fact that the criminal law of abortion had been of no force and effect.

A second, related source of difficulty for EA lies in section 24 (1) which reads as follows:
Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Charter infringement, then, is recognized as a viable ground for legal remedy. If EA is accurate, however, it is not at all obvious why such a remedy should be forthcoming following a successful Charter challenge. And the reason is simple: no legal rights would have been violated. Any legal rights as might exist would come into being only with the court’s decision. Barring retroactivity, which again seems not at all to have been contemplated, activities pursued under the authority of a law later rendered invalid by a court would have been quite legal prior to that decision. But if so, then why should a remedy be forthcoming? The offending party violated no one’s legal rights! He may have violated a moral right, but surely it is not the task of the judiciary to enforce non-legal moral rights against perfectly valid legal rights.

On the other hand, if, as IA insists, the Charter does create legal rights which exist antecedently to, and independently of, judicial decisions in cases like Andrews, then remedies seem quite appropriate. If the B.C. Court was correct in its interpretation of section 15, Andrews’ legal rights had been violated by the Law Society. He should, therefore, have been entitled to an appropriate legal remedy.

Putting all these points together, we seem to have a fairly strong case for rejecting EA in favour of IA. It provides a much more coherent account of Charter cases. According to IA, the Charter creates legal rights whose content is partly dependent on moral considerations, and judges in cases like Andrews and Morgentaler are required to determine what these rights are and to apply them against less authoritative, offending measures. Insofar as ILP, but not ELP, is consistent with IA, we seem to have an important argument in its favour.

But perhaps I have been uncharitable in characterizing the account to which ELP seems committed. Perhaps the defender of ELP can offer a modified account, according to which the moral standards to which the Courts appeal in cases like Andrews and Morgentaler are indeed foreign to the legal system, but nevertheless serve, in virtue of their recognition within the Charter, as criteria for legal validity. If so, then to the extent that legal measures (for
example, section 251 of the *Criminal Code* or the Law Society's citizenship requirement) are in conflict with these foreign standards, they are legally invalid; this can be so even before the court declares that there is a conflict in a *Charter* case.

Were this modified exclusive account (MEA) adopted, the defenders of ELP would face fewer of the difficulties discussed above. Indeed, their account would be virtually identical to IA, except for the fact that the latter does not view the standards to which appeal must be made in determining the content of *Charter* provisions as equivalent to foreign law. In their view, the standards of fairness to which appeal must be made in determining violations of section 15 are part of the content of that section, and therefore part of the law. So unlike the proponents of IA, the defenders of MEA would still want to maintain that invalidity is based on conflicts with foreign standards. But their account would share all the other desirable features of IA. It would be consonant with the language used in section 52 (1) of the *Charter*, and with the various other features of *Charter* challenges examined above. For instance, it too would have a ready explanation for why legal remedies seem an appropriate response in some successful *Charter* challenges.

Attractive as it may be, MEA is clearly a position which the defender of ELP cannot accept. And the reason should now be fairly obvious. It is true, on this account, that the content of a *Charter* provision is not a function of moral reflection. But the same cannot be said for the validity of measures such as the Law Society's citizenship requirement or section 251 of the *Criminal Code*. Whether the moral standards in terms of which the validity of these measures is partly to be established are foreign or not, the fact remains that, on MEA, legal validity is determined in part by moral standards whose understanding requires moral deliberation. If MEA is advanced by the defenders of ELP, they will be forced to admit that the conditions for legal validity accepted within the Canadian legal system include moral conditions. They will be forced to concede, for example, that a condition for the validity of any legal measure within Canada is that it does not unfairly discriminate against individuals in a way which cannot be justified in a free and democratic society. But if this is so, then the existing conditions for valid Canadian laws include moral conditions, a possibility the
defenders of ELP is most anxious to deny. Whether those moral conditions are foreign or not seems really beside the point.

So the defenders of ELP appear truly committed to the original account of EA. But we have seen ample reason to reject it in favour of IA. If so, then we are entitled to conclude that ELP provides a much better theoretical account of Charter adjudication than ELP. On that account, then, it is a superior theory of law.

III. Does It All Really Matter?

At the outset of this paper, I suggested that the choice of a philosophical theory concerning the nature of law can have a significant effect upon legal practice. I stated that such a choice does not simply yield different descriptions of what it is that judges do, regardless of their theory of law, or whether they in fact have a theory at all. In what follows, I shall draw upon the discussion in section II above and attempt to substantiate these claims.

As noted earlier, a perennial dispute within constitutional theory concerns the proper approach to judicial review and the interpretation of constitutional documents. This dispute has raged for decades in the United States, at least since Marbury v. Madison,29 when the American Supreme Court definitively ruled that it did indeed have the perogative to strike down legislation which offended the Bill of Rights. As we saw above, section 52 (1) of the Canadian Charter of Rights and Freedoms undeniably grants a similar right to Canadian judges. The only real question, in the United States and Canada, is how this perogative is to be exercised. What exactly is it that judges are empowered to do when utilizing a constitutional instrument to invalidate other less authoritative legal measures? In short, what approach must judges take in interpreting a charter or bill of rights?

The answers which have been given to this question are, of course, numerous and varied, but they all seem to fall roughly within one of three categories: (a) those who think that judges should be faithful to the text of the constitution; (b) those who believe that

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29 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
the proper object of deference is the intent of the original framers; and (c) those who claim that judges should view the constitution as a "living tree" and interpret it in ways which express an ever-changing and developing political morality.\textsuperscript{30} Position (a) has been variously described as the "literalist," "strict constructionist," or "textualist" theory, and it appears to have been this view to which Chief Justice Brian Dickson was expressing his opposition in \textit{Big M Drug Mart} and \textit{Hunter v. Southam Inc.}\textsuperscript{31} Position (b) is often referred to as the "intentionalist," "originalist," or "original intent" approach. It has found support in the United States from such legal figures as Robert Bork and William Rehnquist.\textsuperscript{32} It has also been roundly criticized by many legal philosophers as being at best misguided, at worst incoherent.\textsuperscript{33}

Despite their differences, (a) and (b), the literalist and originalist theories, are both frequently viewed as requiring judicial restraint in the interpretation and application of constitutions. Each is thought to require political and moral neutrality on the part of judges, something which is thought essential to the fulfilment of the judicial role within liberal democracies. Anything less than this amounts to the naked usurpation of the legislative function, a function properly fulfilled by elected political representatives. On each of these views, constitutional interpretation is essentially a


value-neutral activity, requiring nothing more than factual inquiry, either into the meaning of words, as governed by linguistic conventions, or the historical intentions of a (possibly long dead) group of founders.

Position (c), by contrast, is commonly conceived to require a more activist, liberal approach. Calling this approach "liberal" can be somewhat misleading, however, if only because a liberal approach to the interpretation of constitutions is often associated with a commitment to political liberalism. Yet as is plain from the history of the American Supreme Court in the early part of this century, that association amounts to a confusion. The American Court was notorious for employing a liberal approach to interpretation of the American Bill of Rights in an attempt to undermine the liberal policies of the Roosevelt administration. Peter Hogg puts the point nicely:

In the United States, where the legacy of slavery and the persistence of systematic racial discrimination dominates political discourse, the fact that activist judicial review has since 1954 made an important contribution to the elimination of racial discrimination has persuaded many liberals to embrace judicial activism. Before 1937, when progressive social and economic legislation was threatened by activist judicial review, liberals advocated judicial restraint.\footnote{Hogg, supra, note 25 at 99, n. 92. An example of a "liberal" approach to the Bill of Rights which led to the suppression of "liberal" legislation is \textit{Lochner v. New York}, 198 U.S. 45 (1905), where the U.S. Supreme Court struck down a state law forbidding employment in a bakery for more than 60 hours per week or 10 hours per day. The Court held that this statute deprived the employer of his liberty of contract without "due process of law," a violation of the fourteenth amendment. For further discussion of the misleading nature of the distinction between liberal and conservative judges, see \textit{Law's Empire}, supra, note 14 at 358-59.}

In any event, position (c) is commonly thought to require that judges take an active part in ensuring that the constitution is consonant with current trends in political morality. The metaphor commonly used in Canada is the "living tree." According to the defenders of this approach, reference to political morality is essential to determining what the constitution really means within a contemporary context. To use Dworkin's terminology, the constitution defines the concepts in terms of which questions of fundamental legal rights are to be argued; it is up to each generation to provide, in view of its historical, moral, legal, and political circumstances, the best (or at least its own) conception of
those concepts. Each generation must, that is, provide the best theoretical account or interpretation of concepts such as liberty, justice, and equality. Judges take a leading role in reaching such understandings.

According to the critics of (c), on the other hand, the latter permits active meddling in the legislative process by unelected judges. It allows judges to subvert the real constitution to be discovered, not in political morality, but within the "four corners" of the document, or alternatively, by recourse to the intentions of the framers. It permits judges unjustifiably to pursue their own, possibly idiosyncratic, visions of political morality at the expense of the law enshrined in a constitution properly adopted by appropriate political means.

In very rough outline, then, these are the three basic approaches which have been taken in recent debates concerning constitutional adjudication and judicial review. Each is believed by its defenders to represent the only way to show fidelity to the constitution. One might reasonably wonder how the choice among these three general approaches could in any way be connected to the choice between ILP or ELP. But the connections, both theoretical and practical, are not difficult to see.

Let us begin with an uncontroversial assumption: judges generally prefer to view and present themselves as always applying the law. Whether, on their own theories of adjudication they think this appropriate, or whether they are mainly concerned with how their activities will be viewed by the general public, judges do prefer to conceive and characterize what they do as involving nothing but


36 One of the principal aims of Brink, supra, note 33 at 26-29 is to establish similar connections between legal philosophy and constitutional theory. Although there is much in this article with which I would take issue, the general themes pursued are similar to those advanced here.
the application of pre-existing law. They are uncomfortable thinking of themselves as doing anything else.

Consider the following remarks by Lord Radcliffe, concerning the law-making activities of judges:

I do not believe that it was ever an important discovery that judges are in some sense lawmakers. It is much more important to analyze the relative truth of an idea so far reaching; because unless the analysis is strict and its limitations observed, there is a real danger in its elaboration. We cannot run the risk of finding the archetypal image of the judge confused with the very different image of the legislator.\(^{37}\)

Consider also, the following advice offered by Lord Radcliffe a few pages earlier:

[Judges will serve the public interest better if they keep quiet about their legislative function. No doubt they will discreetly contribute to change in the law, because, as I have said, they cannot do otherwise, even if they would. But the judge who shows his hand, who advertises what he is about, may indeed show that his is a strong spirit unfettered by the past, though I doubt very much whether he is not doing more harm to general confidence in the law as a constant, safe in the hands of judges, than he is doing good to the law's credit as a set of rules nicely attuned to the sentiment of the day.\(^{38}\)]

It is unlikely that many judges share Lord Radcliffe's desire to perpetuate this version of the "noble lie." But his Lordship's comments do illustrate the obvious concern most judges have to be viewed, principally, as upholders of the law that is.\(^{39}\)

We may take as given, then, that judges prefer to apply, and to be seen as applying, pre-existing law. We may also take for granted that most people within western democracies share this preference with the judges. Most are uncomfortable with the suggestion that judges may be up to something other than law application, hence Lord Radcliffe's concern. People are generally

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\(^{38}\) Ibid. at 11.

\(^{39}\) There are, of course, notable exceptions to this generalization. An obvious example is Lord Denning. On Denning's propensity to "seek justice despite the law," see P. Robson & P. Watchman, eds, *Justice, Lord Denning and the Constitution* (Westmead: Gower, 1981) and my review in (1982) Can. Phil. Rev. 2. That Denning is so roundly condemned by most English judges supports the view that judges are uncomfortable with anything which threatens Radcliffe's "archetypal image."
willing to accept the odd hard case in which judges act as quasi-legislators. Everyone readily embraces the idea of judges sometimes being called upon to perform extra-judicial functions, say in federal inquiries like the Warren and Dubin Commissions. But when they are acting as judges, concerning themselves with legal rights, their business, most think, is with the law, not politics or morality.

If the existence of these preferences, and the beliefs upon which they are based, can be taken for granted, then it is clear that the choice between ILP and ELP really is a significant one for legal practice. According to the latter, any reference to political morality cannot be a reference to pre-existing law. It follows that when judges interpret a document like the Charter in terms of its interests or objects, they step beyond the application of law. When the B.C. Court of Appeal struck down the citizenship requirement on grounds of its unfairness, they were not performing the role which most think appropriate for judges. If ELP were accepted as accurately reflecting the nature of law, then the tendency would be for judges to retreat from arguments of political morality in Charter challenges. And if political morality is excluded entirely, we seem left with things like "literal meaning," "framers' intent," and so on. But these are the considerations which are associated with positions (a) and (b) above, views which, within today's political climate, are used to argue for judicial restraint.

If, by contrast, a judge is thought in a case like Andrews to be discovering the existence or content of pre-existing, valid law, then such a retreat is far less likely. She and others will view her decision, not as one which encroaches upon forbidden territory, but as one which is required by the normal judicial duty to discover and apply the law that is. There will be nothing suspicious here requiring

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40 The Warren Commission, headed by Warren J., investigated the events surrounding the assassination of President John Kennedy. Dubin C.J.O., oversaw an inquiry into the events surrounding the disqualification from the Seoul Summer Olympics of Canadian sprinter Ben Johnson.

41 Members of the so-called "Critical Legal Studies Movement" are concerned, of course, to challenge this archetypal image as a sham. They also see it as representing a pernicious ideology masking the various contradictory and manipulative political forces at work in the law. See A. Hutchinson & P. Monahan, eds, The Rule of Law: Ideal or Ideology (Toronto: Carswell, 1987).
any special justification. There will be no danger that the archetypal image of the judge will be confused with the very different image of judge as legislator, politician, or moral reformer.

So it is reasonably clear that the choice between ILP and ELF can indeed be important for legal practice. If judges are generally reluctant to step beyond the law in rendering their decisions, and if they conceive, or believe that others conceive, the law in such a way that its discovery requires no recourse to arguments of political morality, then they will be led quite naturally to positions (a) or (b). They will shy away from an "activist" approach to the interpretation of the Charter, and will instead fashion their arguments in terms of "framers' intent," "literal meaning," and so on. In short, ELF leads quite naturally to judicial restraint, or to forced attempts to give the appearance of judicial restraint. If, on the other hand, judges conceive, or believe that others conceive, the law in such a way that its discovery does sometimes require moral reflection, then they will much more easily be led to some version of position (c). They will not see a danger that their activism will develop into, or be viewed as, the naked usurpation of the legislative role.

If the above is essentially correct, then we have reason to believe that philosophical reflection concerning the nature of law is indeed a very important activity for those engaged in, or who reflect upon, legal practice. I should like to end, however, with one cautionary note. The fact that the acceptance of ELF, given the archetypal image of judge as law-applier, leads naturally to theories of judicial restraint is in no way a valid argument for or against it as a philosophical theory. The practical implications of a philosophical theory's acceptance (or rejection) has no probative force at all when it comes to considering its truth or adequacy. It has no more force than the fact that acceptance of the Copernican theory had profound, and perhaps somewhat undesirable, social effects. Copernicanism certainly shook the established order and the confidence Europeans had in the Catholic faith. Yet these facts in no way argued against the scientific adequacy or truth or what Copernicus had set out to prove. The same is true in philosophy. The theoretical adequacy or truth of a philosophical theory is not influenced by the practical effects of its acceptance or rejection.
The fact that acceptance of ELF would probably lead causally to judicial restraint is neither an argument for or against it.42

My aim in section III, then, has not been to provide a further argument against ELF. It has been to argue for the value of legal philosophy, to lend credence to the proposition that discovering the truth about the nature of law really can matter. But if the truth proves uncomfortable or otherwise undesirable, our move should not be to abandon or subvert it, but to adapt ourselves and our thinking so as to live better with its consequences.