Justification and Judicial Responsibility

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These Centenary Lectures are devoted to the “tension between rule and policy” in adjudication. The charge to the lecturers suggests it is “naive” to suppose that “the proper function of a court is to apply an established rule of law to the dispute before it.” This topic has been a focus of legal theory at least since Holmes delivered his famous lecture, “The Path of the Law”—nearly as long as law has been taught at the University of California. It merits our continuing study.

If one asks why it is naive to suppose that courts should decide cases by applying established rules of law, the least controversial answer would run as follows. Many cases can be decided in that way, but not all cases are so easy. Some rules are too vague for routine application, rules can conflict, and sometimes no established rule is available. Some cases are hard. But courts must decide these cases anyway. When they do so, they must go beyond the rules and find other grounds for resolving disputes. 2

I shall call this view the theory of limited law. In the present context, the theory of limited law is associated with a limited theory about the justification of judicial decisions. This is the view that judicial decisions are justified when they are required by law. I shall call this the doctrine of legalistic justification.

I consider this a “limited” theory of justification for the following reason. When applied to easy cases, it means that decisions are justified whenever they are required by law, and only then. But what should it be taken to mean when it is applied to hard cases? Should it be taken to mean that decisions in hard cases cannot be justified? I think not, for the following reason. According to the theory of limited law, hard cases are legally undecidable. But it seems implausible to assume that no judicial decision in a hard case can be justified simply because no decision is required by law. Courts are expected to justify their decisions, and this requirement does not dissolve when cases are hard.

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2. The most widely accepted presentation of this view is in H.L.A. Hart, The Concept of Law (1961), especially ch. 7.
hard. Decisions in hard cases might still be justified, on other grounds, as I shall suggest. It follows that we should take the doctrine of legalistic justification as a limited theory, applicable only to cases that can be decided on the basis of existing law and as ignoring the problem of justifying decisions in hard cases.

Now we can state a second reason for regarding as naive the idea that a court's proper function is to apply the established rules: this notion obscures the breadth of judicial responsibility. It ignores hard cases, or cases that cannot be decided by applying established rules of law.

I believe there is also a third reason for regarding as naive the idea that a court's proper function is to apply established rules: this notion obscures the moral complexity of judicial responsibility. If we believe that judicial decisions should be justified, then we cannot be satisfied with the doctrine of legalistic justification, even as limited to easy cases. It is naive to suppose that judicial decisions can be justified simply by invoking established rules. The rules themselves or their invocation also require justification.

My purpose in this Article is to challenge, sometimes in a deliberately paradoxical way, some commonplace ideas about the law. In Part I of this Article, I shall discuss the distinction between hard and easy cases and shall argue that the usual basis for thinking that hard cases are legally undecidable is incapable of supporting that conclusion. In Part II, taking the theory of limited law for granted, I shall suggest a natural way of supplementing the doctrine of legalistic justification, by sketching a general approach to justifying decisions in hard cases. I shall then suggest in Part III that the possibility of justifying judicial decisions in hard cases undermines the theory of limited law. In Part IV, I will return to easy cases and argue that the doctrine of legalistic justification is unsound. I will conclude in Part V with remarks on the difficulties that arise when notions like justification bridge morality and law.

I

Easy and Hard Cases

The theory of limited law, as I have described it, assumes that a body of law consists of a limited number of general rules. These general rules are capable of deciding some but not all cases that arise. Let us look more closely at the cases that cannot be decided simply by applying general rules.

We need two separate distinctions: (1) between easy and hard cases; and (2) between cases that are and cases that are not decidable on the basis of existing law. We need both distinctions because it has
been claimed that hard cases are at least sometimes decidable on the basis of existing law.\textsuperscript{3} The two distinctions can be drawn in such a way as to leave this an open question. In addition, we do not want our theories about law to be burdened with mistaken assumptions about logic. The latter point will become clearer in a moment.

Let us define an easy case as one in which the law is clear enough so that it can be decided in a more or less "mechanical" way, by applying relevant rules in a logically rigorous argument. A proposition of law that decides the case is then derivable by logically deductive methods from a combination of rules of law and statements of facts about the case. The simplest model for such an argument may be termed a legal syllogism, which includes as its major premise a single rule of law, as its minor premise a statement of relevant facts, and as its conclusion the dispositive proposition of law. In actual practice, arguments or derivations may be much more complex, consisting of several steps, involving several rules of law. But this is, for our purposes, a matter of detail. The important point is that such arguments be logically watertight. And this requires, in turn, that the relevant legal considerations be unambiguous—that it not be necessary to weigh or balance conflicting legal considerations, some favoring a decision one way, some favoring a decision another way. Thus, for example, the relevant rules must not conflict when they apply to the case, unless appeal can be made to an existing, decisive rule of priority that determines conclusively which of the conflicting rules is to be followed. In a similar way, the rules must not require problematic or controversial interpretation for application to the case, as that would introduce a consideration of the relative merits of alternative interpretations, the determination of which would by no means be "mechanical."\textsuperscript{4}

If we define easy cases in this way, then hard cases will be those that cannot be decided in a more or less "mechanical" way, by applying relevant rules in logically rigorous arguments. The question then arises whether any such cases are legally decidable. This question is forced on us by the fact that some theorists suggest a negative answer,\textsuperscript{5} while recent theoretical work suggests the contrary.\textsuperscript{6}

\textsuperscript{3} This seems to be one thesis of R. Dworkin, Taking Rights Seriously (rev. ed. 1978), especially chapters 2 through 4. (Note that Dworkin does not argue that all hard cases are legally decidable.) For brevity, I shall hereafter say "legally decidable" instead of "decidable on the basis of existing law." It is important to remember that "legally decidable" means this, and does not mean "is capable of being decided, somehow, in a court of law."\textsuperscript{4} See N. MacCormick, Legal Reasoning and Legal Theory ch. 2 (1978).

\textsuperscript{5} See, e.g., H.L.A. Hart, supra note 2, ch. 7.

\textsuperscript{6} See, e.g., R. Dworkin, supra note 3, chs. 4 & 13; N. MacCormick, supra note 4; Dworkin, No Right Answer?, 53 N.Y.U. L. REV. 1 (1978) (revised and expanded from Dworkin, No Right Answer?, in Law, Morality, and Society 58 (P. Hacker & J. Raz eds. 1977)).
A legally undecidable case presumably is one for which the law provides insufficient guidance for decision—it provides insufficient reason for deciding it one way rather than another. A commonplace reason for thinking that no hard cases are legally decidable appears to be an assumption that there cannot be a uniquely right answer to a legal question when there are significant legal arguments on both sides of the question and no existing hard-and-fast rule determines which arguments are decisive. In the context of the theory of limited law, this amounts to the idea that there is no legal fact of the matter, and a dispositive proposition of law cannot be true, unless the latter can be derived in a logically rigorous, watertight manner from the applicable rules of law. Thus, one hears it said that a particular dispute is legally unresolvable—that there is no existing right answer to the question that it poses—when there is no way of proving one answer to the exclusion of all others, so that all reasonable people, or at least lawyers, are obliged to agree. On this view, proof yields certainty; all else is mere persuasion. Law must be created and cannot be discovered in hard cases.

But it is unclear why we should assume that. To see this, consider a generalized version of the idea, one that is not limited to law. One might formulate the generalized notion as follows: a proposition cannot be true, and thus there is no fact corresponding to it, unless the proposition can be deduced in a logically watertight manner from established premises. The more limited legal notion cannot derive support from this more general idea, because the latter seems indefensible. For one thing, it seems self-defeating, since there is no reason to believe it can be derived in a logically watertight manner from established premises. In any event, it seems to involve an impoverished conception of both logic and the world.

Logic does not permit us to dismiss nondeductive arguments or their conclusions. Not all sound arguments are logically watertight; some arguments that succeed in justifying propositions do not "prove" them, to the logical exclusion of alternatives, but simply provide sufficient reason for believing them. Outside the law, nondeductive arguments are commonplace, unavoidable, and indispensable. We use them in our everyday affairs, in disciplined scholarship, and in the hardest of the "hard" sciences. Such arguments show their conclusions to be most probably true. If the premises of valid deductive arguments are true, their conclusions are proved true. Not so for nondeductive arguments: the truth of their premises does not guarantee that their conclusions are true. But this does not mean that the conclusions cannot be true, that there are no corresponding facts.

It is not merely that many propositions outside the law are never
conclusively proved. The point is, rather, that many are not susceptible of conclusive proof. Almost all of the significant conclusions that we draw outside the law are justifiable, if at all, only nondeductively, on grounds that do not rigorously entail the conclusions, and often in the face of conflicting evidence. Under the impoverished conception that logic includes only deductive reasoning, logic would be practically useless. For without the nondeductive methods that we use outside the law, we could never expand our knowledge of the world beyond very limited "hard data," and we could not collect very much of that. We could have no scholarship, science, or engineering.

So the general form of the assumption that lies behind the notion that hard cases are legally undecidable cannot be sustained. And it is not clear why the law should be regarded as an exception to the general rule.

Let us continue to address this question as a matter of logic, without presupposing any theory of law. Hard cases do not arise within a legal vacuum. Reasonable, respectable legal arguments often are available on both sides of such legal issues, which is just what makes them "hard." This availability of legal arguments on both sides means that the relevant point of law can be decided, if at all, only by nondeductive arguments which take conflicting considerations into account. Despite this, logic seems to tell us that there may still be sufficient reason for deciding a hard case one way rather than another. There can be sufficient reason for deciding one way, even when disagreement persists after a decision has been made. Reasonable disagreement does not exclude right answers outside the law, so we cannot assume that it excludes right answers in hard legal cases.

If we still think that hard cases are undecidable, that is because we assume a conception of the law that makes it less determinate, and with more gaps, than the rest of the world. I shall not discuss that sort of theory now. My point is simply that such a conception of law is not forced upon us by logic or general metaphysics. Most questions outside the law that have right answers are "hard."

If we do not wish to saddle legal theory with indefensible logical or metaphysical presuppositions, therefore, we should not assume that all hard cases are legally undecidable. H.L.A. Hart appears to endorse this point when he discusses hard cases. He writes:

It is of crucial importance that cases for decision do not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice; and they may be formulated in
general terms as principles, policies, and standards. In some cases only one such consideration may be relevant, and it may determine decision as unambiguously as a determinate legal rule. But in many cases this is not so, and judges marshal in support of their decisions a plurality of such considerations which they regard as jointly sufficient to support their decision, although each separately would not be. Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them. The same considerations (and the same need for weighing them when they conflict) enter into the use of precedents when courts must choose between alternative rules which can be extracted from them, or when courts consider whether a present case sufficiently resembles a past case in relevant respects.7

Hart’s point in this passage is that judicial decision in a hard case need not be considered arbitrary just because it cannot be justified conclusively, by deduction from uniquely applicable rules of law. Hart then goes on to consider two views of such cases. One claims that “there is always a decision which is uniquely correct,” which a court is dutybound to seek. Hart rejects this, saying it “seems difficult to substantiate.”9 He adopts the opposite view, that there is not always a right answer. But Hart does not claim that all hard cases are undecidable. He claims that this is true of some hard cases, but he implies that there are uniquely correct decisions in other hard cases, even though the decisions must be justified by balancing conflicting considerations.10

But I need not labor the point further. On any version of the theory of limited law, some cases cannot be decided by existing law. It is assumed that the established rules of law sometimes run out, and that when they do judges have “discretion” and must exercise “choice” between legally open alternative decisions. For simplicity’s sake, I shall ignore these variations on the theory of limited law and shall refer to cases that are supposed to be legally undecidable as hard cases.

II

Justifications in Hard Cases

Judicial responsibility does not end with easy cases. Courts must decide hard cases too. But how should they do so?

The theories with which we began offer no assistance. According

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8. Id.
9. Id.
10. Id. This appears to be a departure from Hart’s position in The Concept of Law, supra note 2, ch. 7. See infra notes 11-12 and accompanying text.
to the theory of limited law, hard cases cannot be decided on the basis of existing law. The doctrine of legalistic justification provides no guidance for deciding hard cases. If hard cases are to be decided in a systematic, principled manner, these theories will require supplementation.

For reasons to emerge in Part III, I shall here ignore recent theories of adjudication for hard cases which seek guidance for decisions from existing law. I shall assume, along with the theory of limited law, that the law itself provides no guidance for deciding hard cases. On that assumption, I shall suggest how one might most naturally supplement the theories with which we began, by means of a normative theory that requires judges to reach beyond the rules to considerations that lie outside the law. The details of the theory are not important for our purposes, only the general outline, so I shall suggest a general approach with possible variations. The important point to remember is that one who constructs such a theory assumes it is to guide decisions in cases that are not legally decidable because the law's resources have run out. The theory cannot be constrained by limits set by existing law.

Hart suggests the general approach in a passage from The Concept of Law.¹¹ He observes that in deciding hard cases, judges are called upon to "display characteristic judicial virtues . . . impartiality and neutrality in surveying the alternatives; consideration for the interest of all who will be affected; and a concern to deploy some acceptable general principle as a reasoned basis for decision."¹²

I shall understand Hart's approach in the following way. A court is expected to justify its decision, even in hard cases. Not just anything a court might think up as a way of deciding a case will do. For not just anything is capable of justifying a decision. A decision will be binding on the parties before the court, as well as others who will be subject to its implications, and a satisfactory justification will be constrained by that fact. If legal resources have been exhausted and cases remain to be decided, then courts cannot decide them on their legally recognized merits. The only standards that are capable of determining the merits of such cases are principles or policies that provide a fair basis for adjudicating disputes, either because they themselves are sound or because there are good and sufficient reasons for taking such principles or policies as standards for determining what should or must be done.

Let me suggest what I mean with some examples. Normative "economic analysis" tells us, in effect, that it is right and proper for a court to decide a case by considerations of "economic efficiency." This

¹². Id. at 200.
can be accepted as a basis for deciding hard cases whenever there are
good and sufficient reasons for supposing that the promotion of eco-
monic efficiency is a fair method of adjudicating disputes.

Another suggestion often made is that courts should be guided by
standards that represent the values or overall preferences of the com-
unity. This may be based on the theory that our system confers
authority on prevailing values or preferences through legislation by
popularly elected representatives and, indirectly, through the judicial
process. When the rules that are supposed to reflect these values or
preferences are inadequate to decide cases that arise, then the courts
should apply such values or preferences directly.

It is important to distinguish this way of justifying the appeal to
prevailing values or preferences from the skeptical notion that moral
and political principles are fundamentally arbitrary, so that prevailing
values or preferences acquire authority by default. The distinction is
important in the present context, because we are seeking standards that
are capable of justifying decisions. The skeptical position denies, in
effect, that decisions can be justified, because it rejects the possibility of
anything that we might reasonably call justification. Justification can
be built only upon a nonarbitrary foundation. It can appeal to prevail-
ing values or preferences only if they are regarded as sound or if on
other grounds it is fair to use them as a basis for settling disputes.

For this reason, we cannot be satisfied with the suggestion, some-
times made, that a judge must decide hard cases by appealing to her
own personal values, her own sense of right and justice. If we believe
that judicial decisions can be justified in any cases, then we are com-
mmitted to the more general proposition that genuine justification is
sometimes possible. This is presupposed by the doctrine of legalistic
justification, which assumes that there are good and sufficient reasons
for applying and enforcing the established rules of law—reasons that
must be capable of justifying what we do to people in the process. The
considerations that may be capable of justifying such a practice cannot
amount to the merely personal values of a judge.

We should settle for no less in hard cases. A court must appeal to
principles or policies that are capable of determining how such cases
should be decided. These principles or policies must be regarded as
more than merely the personal values of the judge. Of course, a judge
is obliged to reach a conclusion about what those principles or policies
are, so that she can apply them. But she would not be appealing to
them merely as her own personal values. She would be making a judg-
ment concerning the principles or policies that are capable of justifying
decisions.

Consider another approach. If we conceive of what courts do
when they decide hard cases as "legislating," then we might think of them as under an obligation to decide such cases in the way a legislature should. We might imagine, in other words, that a theory of adjudication for legally undecidable cases would be based on a theory of legislation.\textsuperscript{13}

It is unclear what such a theory would be like when transferred to the judicial setting. For there is no generally accepted theory of legislation that we expect responsible legislators to implement. I mean, we have no generally accepted theory which says that legislators should follow certain predetermined, substantive political principles.

This fact seems to reflect not merely persisting disagreement about political principles, but the widely accepted idea that legislators are supposed to represent the concerns of their constituents. On this view, the political \textit{process} is supposed to determine the direction of legislation.

It is unclear how such a view of legislation could apply to courts. For judges have no constituents in the relevant sense, and they are not supposed to be subjected in the normal course of their activities to political pressures. This approach to deciding hard cases therefore does not seem promising. But if a substantive theory of legislation could be defended, it would provide principles or policies that could, on this approach, be implemanted by the courts to decide hard cases.

As our final example, we should take note of the idea that an adequate understanding of the peculiar role of the courts entails that courts should appeal directly to moral principles, or should decide hard cases by the use of a distinctively moral mode of adjudication, such as a consideration of the rights and obligations of the parties that are independent of the law. It may be tempting to dismiss this idea as an indefensible claim about "natural law," but we should not permit ourselves the indulgence of that kind of skepticism. Claims about moral principles are no more suspect than any other claims about the principles or policies that can be used to justify the practice of subjecting individuals to judicial decision. For claims about moral principles concern, at bottom, sound criticism and adequate justifications.

I can summarize this discussion in the following way. The theory of limited law implies that, if decisions in hard cases are to be justified, they cannot be justified on the basis of existing law. The doctrine of legalistic justification assumes that decisions in easy cases can be justified. Someone who accepts these theories has no reason to reject the idea that decisions in hard cases might be justified on grounds drawn from outside the law. For present purposes, it makes no difference.

\textsuperscript{13} This approach is discussed by R. DWORKIN, \textit{supra} note 3, ch. 4.
what those grounds might be. It only seems reasonable to insist that
the grounds provide a fair basis for resolving disputes.

However hard cases should be decided, we must suppose further
that the principles or policies to which courts should appeal may well
be capable of justifying a decision one way rather than another. In
other words, there may well be right answers in some legally undecid-
able cases. This holds even though the considerations that courts
should take into account can conflict. For, as we have already seen,
from the fact that considerations conflict we cannot validly infer that
they do not justify one decision to the exclusion of the alternatives.

Hart makes a similar point in the following passage, from which I
have already quoted:

Judicial decision, especially on matters of high constitutional import,
often involves a choice between moral values, and not merely the appli-
cation of some single outstanding moral principle; for it is folly to be-
lieve that where the meaning of the law is in doubt, morality always has
a clear answer to offer. At this point judges may again make a choice
which is neither arbitrary nor mechanical; and here often display char-
acteristic judicial virtues, the special appropriateness of which to legal
decision explains why some feel reluctant to call such judicial activity
'legislative.' These virtues are: impartiality and neutrality in surveying
the alternatives; consideration for the interest of all who will be af-
fected; and a concern to deploy some acceptable general principle as a
reasoned basis for decision. No doubt because a plurality of such prin-
ciples is always possible it cannot be demonstrated that a decision is
uniquely correct: but it may be made acceptable as the reasoned prod-
uct of informed impartial choice. In all this we have the 'weighing' and
'balancing' characteristic of the effort to do justice between competing
interests.\textsuperscript{14}

Read with the right sort of emphasis, this passage fits the approach to
hard cases that I have suggested to supplement the theory of limited
law. In deciding hard cases, courts may have to reach beyond the law,
but they are expected to do so responsibly, to use a mode of moral
adjudication. And, just as there may be a right answer in law even
when the meaning of the law is unclear, so a right answer may be pro-
vided by extralegal standards even when they conflict. We cannot as-
sume the contrary.

III

DECISIONS MADE ACCORDING TO LAW

Now I would like to trace out a surprising consequence of the ap-
proach to hard cases that I have suggested to supplement the theory of
limited law with which we began. I would like to suggest that we should regard the decisions made in accordance with that approach as made according to law, despite the fact that courts in making them are supposed to reach beyond established rules. This is just the opposite of what the theory of limited law seems to tell us.

My argument is this. The judicial duty to decide cases responsibly does not end with easy cases, and a theory of hard cases tells judges what they must do to decide cases responsibly when they run out of legal rules. Though the relevant principles and policies are assumed to be drawn from outside the law, a theory of hard cases implies that courts are dutybound to appeal to them. If courts are dutybound to appeal to them, then those principles or policies are, for present purposes, indistinguishable from established rules of law. That is, they are the standards that must be used to guide decisions in hard cases. And if they determine how some hard cases must be decided, then it would be a breach of judicial duty to decide those cases differently. Since those decisions are required by a judge’s performance of her judicial function, they might as well be considered as made according to law—indeed, as required by law.

To make this conclusion less paradoxical, I will use a distinction that any understanding of the law requires: the distinction between what is strictly implicit in established rules of law and what is required or allowed by law. These are not, and cannot be, identical. The application of any general rule to a particular case depends not just on the rule but also on the facts of the case, and the facts of particular cases are not given by the rule. If laws can be said to have implications for particular cases, then what the law requires and allows in them depends on considerations that are not given by the law.

Suppose that Barbara has suffered a loss resulting from Alice’s doing an act of type $X$. Suppose further that the only relevant rule of law says that anyone who inflicts a loss upon another person by doing an act of type $X$ is required to compensate the other for that loss. In light of the facts, it makes good sense to say that the law requires Alice to compensate Barbara, at least if Barbara seeks compensation. If a court faced with adequate evidence for Barbara’s claim decides in her favor, it does not simply pronounce what is given by the applicable rule. It applies the rule to the case, which requires consideration of the facts. So what is required or allowed by law in particular cases depends on considerations beyond the applicable rules.

We might generalize this point in the following way: What the law requires and allows is a function not just of legal rules, but also of considerations without which decisions cannot soundly be made. These considerations are relevant to a judicial decision, so that a court must take them
into account and weigh them in the balance in a judicially appropriate way. Their neglect would be a judicial error. (Call this Principle A.)

Now let us take a more difficult case. Suppose that a law requires a fair hearing before certain benefits can be denied, but that it does not explain what counts as a fair procedure. Suppose further (perhaps unrealistically, but to simplify matters greatly) that no established rules provide criteria for fair hearings in such cases. A court that is required to apply this law, in order to determine whether benefits were refused without a fair hearing, may be dealing with a hard case. If no hearing has been held, despite its being requested in the required manner, then the law has been violated. That seems easy. But the law can be violated even if a hearing has been held, if the hearing was unfair. The law assumes that a distinction can be drawn between fair and unfair hearings, that such a distinction is not arbitrary, and that some hearings are fair and others are unfair. To decide a case concerning the fairness of a hearing, a court may have to reach beyond established rules of law in order to settle a moral issue. It must settle upon criteria for fair hearings.

If there is a right answer to the legal question that is posed, it will depend on there being a right answer to the moral question: what distinguishes a fair from an unfair hearing. We cannot assume that this question has no right answer. If it has one, then the legal question may well have a right answer too. If there is a right answer to the legal question, a court must find it by first solving the moral problem. In doing this, however, the court will be doing precisely what is required of it by the law. It will be deciding according to law, and for this reason its decision can be regarded as required by law.

Now consider the decisions covered by a general theory of hard cases. Such a theory will tell us what standards courts must invoke when the resources of the law have been exhausted. A court that appeals to those standards will be doing no more than its judicial duty; a court that fails to do so will be doing less. If those standards point to a specific decision in a case, then a court cannot discharge its judicial responsibility, on this theory, unless it renders judgment accordingly. If the theory requires courts to use certain moral standards, for example, and there is only one morally acceptable way of deciding a given case, then according to that theory judicial duty requires that a court reach that decision. If the theory requires that courts invoke considerations of economic efficiency, for example, and these lead to a unique resolution of the case, then judicial duty, on this theory, requires a court to reach that decision.

If the preceding arguments are correct, then we should regard the decision as made according to law. This follows from the principle that
I formulated (Principle A). For the decision is made on the basis of considerations that are supposed to guide the decision, neglect of which would constitute judicial error.

If one wishes to deny this result, then one must hold that a sound theory of hard cases is impossible. One must hold either that courts are not required to decide hard cases, or that decisions in such cases do not need to be justified, or that they cannot ever be justified. And it is difficult to see how any of these points could be defended. Courts are required to decide hard cases, they are expected to justify their decisions, and we have no reason to suppose that nothing could ever justify a particular decision in a hard case.15

IV
HARDER EASY CASES

But that is only half of the paradox I want to offer. Let us return to easy cases for the other half. I will argue here that while decisions in easy cases may be “legally justified,” there is another sense in which they may be unjustified.

Let us begin with an example. I choose Daniels v. R. White & Sons, Ltd.16 for two reasons. First, it is an English case, and our examination of it may therefore be subject to less interference from assumptions that we may be prone to make about United States law. Second, it has been subjected to the scrutiny of a legal theorist17 and shown to satisfy our test for easy cases: so far as one can tell, the decision in it can be supported by a logically tight argument resting on established rules of law.

The case is this. Mr. Daniels bought a bottle of R. White’s lemonade from Mrs. Tarbard at her pub. At home, he shared the contents of the bottle with his wife. Because the lemonade contained carbolic acid, Mr. and Mrs. Daniels became ill. They subsequently sued the manufacturer of the lemonade, R. White & Sons, and the owner of the pub, Mrs. Tarbard, for damages. The court found in favor of the manufacturer, because the Daniels had not proved the manufacturer had breached his duty to take reasonable care; but it found in favor of Mr. Daniels against Mrs. Tarbard, because she had sold him goods that were “not of merchantable quality” under the Sale of Goods Act.

Given the state of English law at the time of the Daniels decision,

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15. If the conclusion of Part III appears paradoxical, that is because we can draw a distinction between decisions that are required by law and decisions that are justified. The latter must be morally defensible, but the former need not be morally defensible. So, from the fact that a decision is justified, we cannot infer that it is required by law. I urge the reader to keep this point in mind when considering the argument of Part IV. For there I claim the converse, and on similar grounds: from the fact that a decision is required by law we cannot infer that it is justified.


17. See N. MacCORMICK, supra note 4, at 19-37.
it may well have been an “easy” case. The decision may have been deducible from established rules of law, as MacCormick claims. But, as the judge remarked in rendering his decision, it was “rather hard on Mrs. Tarbard, who is a perfectly innocent person in the matter.” One might well agree that Mrs. Tarbard was not to blame for the injury suffered by Mr. Daniels, and that she should not have been made liable at law for his loss. So, while the case might be logically easy, it might also be morally hard. Of course, one might wonder whether the judge’s decision was sound—whether, in fact, he should have read the relevant statutes and guiding cases differently. But that should make no difference for our purposes. If the Daniels case should have been treated as logically hard, because the law was in fact more complex than the judge had assumed, one could certainly conjure up similar cases that are morally hard but logically easy.

I do not mean to suggest that a decision against Mrs. Tarbard could not conceivably be justified. That depends in part on whether laws imposing “strict” civil liability can ever be justified. It is arguable that strict liability can sometimes be justified, and I do not mean to preclude that possibility here. It also depends on whether Mrs. Tarbard had legal recourse against the manufacturer to recover her loss.

What I mean is that the following sort of case seems quite possible: a decision is required by law though it cannot be justified directly on its merits. If a decision cannot be justified directly on its merits, then if it can be justified at all it must be justified in some less direct way. But, I shall now argue, we cannot assume that such a decision is justifiable at all. In other words, a decision might be required by law but be unjustifiable. Let us now consider why.

It is a commonplace, which I take for granted, that established rules of law sometimes have unfortunate or regrettable implications. A given rule might be as good as the most farsighted legislation can devise, and yet its unavoidable generality might result in undesirable applications. And established rules are not always just or wise, so rules themselves cannot always be justified directly on their merits. So a decision might be required by law even though neither it nor the rule that requires it can be justified directly on its merits.

It is usually assumed that following established rules in at least some such cases nevertheless can be justified. This means that if such a decision can be justified, then following the rule must be justified and deviation from it unjustified, not because of the rule’s merits but be-

18. Id.
20. I would like to acknowledge the contribution of Hon-Lam Li for this point.
cause of factors that are extrinsic to the rule, such as aspects of its history or other circumstances. Some of the reasons that are given for following such rules are familiar enough, and we need only mention them briefly here. It might be held, for example, that a given rule is part of a larger system of law that merits and requires our respect, extending to compliance with imperfect rules within the system. It might be held that the system is by and large just and that this creates an obligation to respect all of its specific rules. It might be held that a specific rule is the product of a legislative process that is by and large fair and that this gives rise to or reinforces such an obligation.

Arguments like these can be bolstered by considering the situation from the standpoint of the judge, who is usually thought to have a special obligation of fidelity to law. In what we might regard as the “normal” case, such an obligation rests on the judge’s voluntary undertaking to apply the law as she finds it, and it correlates with a public trust that she shall so conduct herself in office.

This aspect of the situation helps to explain how judges can be bound to apply imperfect laws even when they have unfortunate or morally regrettable implications for particular cases. Analogous consequences can result from a judge promising fidelity to law. A promise changes one’s options, so that one may be bound to do something that would not otherwise be a sound or justifiable choice under the circumstances. The judicial obligation of fidelity to law seems like that.

But it would be a mistake to place great weight on the judicial obligation of fidelity to law, for two related reasons. First, there are limits on when promises can be considered binding. One might promise to cooperate in a gang rape, but I see no reason to suppose that such a promise generates a genuine obligation. Such a promise appears to be void ab initio. Similarly, one might promise to be bound by the decisions that are made by the majority of a group to which one belongs; but if a majority decides to commit a gang rape, I see no reason to suppose that one’s promise binds one to cooperate. Open-ended promises have somewhat limited applications. In a parallel way, an enlisted soldier’s oath to follow the commands of his superior officers cannot bind him to follow orders to murder innocent civilians or to engage in acts of genocide. Obligations have their limits, and the judicial obligation of fidelity to law is presumably no exception.

Second, one should not approach the justification of a judicial decision as if it were a problem of personal judgment. Judicial decision is not a game played by judges, nor is justification part of such a game. Judicial decisions have a significant impact on important interests of those who come before the courts, as well as other persons, and justification must take this into account. Moreover, at least some of the par-
ties who come before a court do not do so voluntarily, and they cannot be assumed to accept established rules of law as providing a fair basis for deciding disputes in which they find themselves entangled. These considerations imply that justification cannot rest on arbitrary foundations.

I conclude that a decision may be required by law even if it is not justifiable. One cannot justify decisions in logically easy cases merely by invoking rules of law. For it is possible that neither the rules nor the decisions they require can be justified on their merits. And the considerations that might nevertheless justify following the law are not always satisfied. A theory of justification, even for logically easy cases, must be a normative theory. And no plausible normative theory will entail that all decisions that are required by law can be justified.

V

Bridging Morality and Law

The conclusion of Part IV contradicts the doctrine of legalistic justification, which regards judicial decisions as justified when they are required by law. This Part distinguishes legalistic from normative conceptions of justification and argues that judicial decisions require the latter sort of justification.

We can see how I have come to the conclusion that a normative theory of justification is necessary. The theory of limited law implies that some cases cannot be decided by reference to existing law, and the doctrine of legalistic justification provides no guidance for deciding them. Since these cases must be decided anyway, I assumed that we would prefer the decisions to be justified. But justification for those decisions cannot be legalistic. If decisions in these cases can be justified, then the decisions must be morally defensible. Justifications for those decisions must be morally adequate. This does not imply that a theory of justification for hard cases requires direct appeal to moral principles. As I have suggested, one might argue that considerations of economic efficiency, community values, or legislative policies are fair bases for adjudicating disputes in hard cases. I have taken no position on the soundness of such claims. The point is that whatever standards we appeal to must be capable of justifying the decisions.

In discussing hard cases within the framework provided by the theory of limited law, we had no choice but to conceive of the justification of hard cases in that way. But matters are different when cases can be decided by established rules of law. For then we seem to have a choice between two different conceptions of justification. The theory of limited law assumes that a decision can be justified completely by reference to established rules of law. We might call this notion of justifica-
tion "legalistic." It conceives of justification as something internal to a legal system, without regard to the merit of the decision, the merit of the rules that are applied, or the merit of the system as a whole. According to this conception, the justification of decisions in easy cases can rest on perfectly arbitrary foundations.

That is not the way I understood justification when I last discussed easy cases. For then I assumed that the justification of a decision in an easy case, no less than in a hard case, could not rest on arbitrary foundations. The justification might make essential reference to more or less arbitrary rules, but it would then have to show that following those rules could be justified on grounds that are not arbitrary, and that failing to follow them could not be justified.

A ready response to this might go as follows: "All that this shows is that we can distinguish two familiar notions of justification. There is moral justification and legal justification, and the two are somewhat independent. That should come as no surprise. Purely legal justification cannot be assumed to carry any moral force, just as law cannot be assumed to be morally defensible." This response suggests that a familiar terminological distinction is sufficient to deal with my argument that decisions may be required by law though they are not justified. It suggests that decisions required by law are legally justifiable, though they may not be morally justifiable, and that I have been looking for the wrong sort of justification in easy cases.

There are two problems with this response. First, if we wish to have a comprehensive theory of adjudication that contains general standards for the justification of judicial decisions, then we should prefer a theory that uses just one conception of justification for both hard and easy cases. This is impossible if we adopt the proposal just made, that is, if we simply combine a normative theory of justification for hard cases with the doctrine of legalistic justification for easy cases. This looks appealing only if we ignore the recalcitrant fact that legalistic justifications can rest on perfectly arbitrary foundations. They fail to explain why we are justified in dealing with people as the law prescribes.

Second, the problem we face in considering justification is just part of a much larger problem that concerns the ambiguity of central concepts bridging morality and law. These are concepts we frequently use and may not be able to dispense with, such as duty and right, obligation and responsibility.

Take the parallel and related case of obligation. Legal theorists commonly assume, in effect, that whatever is required by law amounts to a "legal obligation." But the concept of obligation has connections with other normative concepts. For example, conduct that is contrary
to obligation is *wrong*, in the absence of some overriding and countervailing considerations. This seems to imply that conduct contrary to "legal obligation" is wrong, in the absence of some overriding and countervailing considerations.

But we have no right to assume that: from the fact that a law requires me to act in a certain way, we cannot validly infer that my failing to do so is in the least respect wrong. It all depends. It depends on whether the rule can be justified or, failing that, on whether I am under an obligation to obey the law. And here it is clear that the relevant notions of justification and obligation are *not* legalistic. One cannot justify a rule of law merely by showing that it is the law. Nor can one show that I am under an obligation to obey the law merely by showing that a legal demand is made on me, for the question at issue is whether the demand merits respect.

In order to accommodate these points, we must qualify our judgments accordingly. We cannot infer from a "legal obligation" that contrary conduct is wrong, but only that such conduct is "legally wrong," or in other words *unlawful*. It is entirely an open question whether so-called "legally wrong" conduct is in any nontechnical sense *wrong*.

And the trouble with this terminology is that it tends to confuse the issues. There is ample evidence of this happening throughout the literature of jurisprudence.\(^\text{21}\) For example, consider the following sort of case. Suppose a system enforces severely discriminatory laws against blacks. As a way of ensuring the stability of the system, the law provides that a white may claim damages from any black who publicly challenges the white's racial superiority. Let us suppose, further, that such a case has arisen, in which there is ample evidence, admissible in law, to support a white man's claim for damages. The decision that is required by law vindicates the white man's claim and requires the black man to pay him compensation for the constructive injury. If we follow the doctrine of legalistic justification in describing this case, then we are obliged to say that this decision is justified, though we must mean that it is only "legally justified." We would say that the white man has a right (though we must now call it a "legal right") to payment of damages from the black man. We would say that the black man is under an obligation not to challenge publicly the white man's racial superiority (though we must now call this a "legal obligation"), as well as an obligation (a "legal obligation") to pay the damages as ordered.

Now I see no reason to *assume* that such a law or the decisions it requires merit any respect at all. Perhaps someone might argue that

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under very special circumstances such a law merits some respect; but I see no reason to assume that this is always the case. Quite the contrary: it seems more reasonable to assume, if anything, that such a law and the decisions it requires deserve absolutely no respect at all. If so, it may be prudent for a black man to obey it, but he is under no obligation to do so.

In saying this, I do not mean merely that he could be justified in disobeying the law, for this is compatible with the claim that there is an obligation to obey the law—one that happens in this instance to be overridden. I mean that there may well be no presumption at all that he should obey. Legal theorists are accustomed to assume the contrary, even in such a case, but I see no reason for doing so. To the extent that law imposes burdens, it requires justification. This law imposes a burden that seems unjustifiable. As far as I can see, the onus lies upon those who wish to argue that the black man is under a general obligation to obey the law, one that applies in this case, despite the invidiously discriminatory treatment and indignities to which the system subjects him. Because entire legal systems can be corrupt in such a way, there can be no universal presumption favoring obedience to law. Such a presumption, or in other words a general obligation to obey the law, might be defended for some legal systems, but we cannot assume that it exists for the one in question. For that matter, we cannot assume, in theory, that it exists for our own. That claim stands in need of justification.

This lack of a universal presumption favoring obedience to law seems to be denied by Professor Dworkin, who appears to hold that all legal obligations have some moral force. Though his theory of legal justification rests on the explicit assumption that the system to which it applies is "sufficiently just to be taken as settled for reasons of fairness," he seems averse to finding any legal systems in which "legal rights" and "obligations" lack moral force. He specifically mentions systems such as those found in what he calls "despotic countries, Nazi Germany and at present South Africa." He regards the laws of those systems as generating not merely "legal rights" and "obligations" but rights and obligations that are capable of conflicting with independent moral rights and obligations, and so must merit some minimal respect. I see no ground for this view of legal requirements and entitlements in general, and I suggest that Dworkin's assumption may be influenced by the convention of calling legal requirements "obligations" and legal entitlements "rights."

22. R. DWORKIN, supra note 3, at 106.
23. Id. at 326.
24. See Postema, Bentham and Dworkin on Positivism and Adjudication, 5 Soc. Theory &
One finds a similar phenomenon on the other side of the jurisprudential tracks, within legal positivism. In his recent comprehensive study of Hart’s legal theory, Professor MacCormick discusses the idea, which Hart has discussed in similar terms on more than one occasion, of “the separation of law and morals.” MacCormick approvingly refers to Hart’s “insistence on the absence of any necessary conceptual link between law and morality.” Following the positivist tradition, MacCormick affirms “that the existence of a law is always a conceptually distinct question from its merit or demerit.” He says that “all laws” are “always open to moral criticism.”

It is implausible to combine MacCormick’s view with the notion that legal requirements always merit some respect, or with the notion that there is always an obligation to obey the law. And yet MacCormick, apparently without noticing the point, seems to slide into that position. Without further argument, he implies that one requires justification to disobey legal requirements. He says, for example, “[t]he positivist thesis makes it morally incumbent upon everyone to reject the assumption that the existence of any law can ever itself settle the question what is the morally right way to act.” The individual must “have regard to the actual law . . . of his community as relevant to what is right; but only relevant to it, not determinant of the issue.” These formulations imply that law automatically merits some respect; that disobedience must be justified. Indeed, MacCormick (here echoing both Hart and Bentham) goes on to say that “the most basic ‘duty of a citizen’ requires one to respect the law, even if higher moral loyalties sometimes do and should override the duty.”

MacCormick thus places the presumption precisely where it does not belong. There cannot be such a “duty of a citizen” (even one that can be overridden) unless the law satisfies some minimal conditions. We cannot assume that there is such a “duty,” over and above mere legal requirements, unless we can assume that those legal requirements are justified or that there is always a sound argument for obeying the law. And “the separation of law and morals” makes it implausible to assume this.

One can find the slide in MacCormick’s position, in one form or
another, throughout the positivist tradition. This is a striking phenomenon, for it generates just the sort of paradox, if not downright inconsistency, that one would expect such theorists to be anxious to avoid, given their insistence on “the separation of law and morals.” I suggest it represents a blind spot which is traceable in part to the ambiguity of the language that bridges law and morality, combined with an insistence on regarding legal requirements as genuine obligations and legalistic arguments as genuine justifications.

This terminological explanation is unlikely to be the whole story. It seems clear that powerful forces encourage the assumption that law merits some measure of respect, no matter how bad the law may be. One factor is the commitment of legal theorists to the possibility of justifying law, of showing, for example, that no matter how bad the law may be it does more good than harm. Such a commitment would be understandable among those whose lives are linked with the practice of law and of adjudication. But this explanation suggests that self-deception is at work.

Holmes was keenly aware of the theoretical problem, and so he urged us to wash terms like “duty” with “cynical acid” when we use them in the context of the law.30 There is merit to his recommendation, but we can see now that he did not go far enough. The literature of jurisprudence shows that legal theorists, even those who insist on “the separation of law and morals” and the moral fallibility of law, are prone to inflate mere legal requirements into obligations and to regard all decisions that are required by law as justified.

This way of talking about the law promotes a naive conception of judicial responsibility. It encourages one to suppose that the responsibility of a court in a logically easy case is morally much simpler than it often is. It encourages complacency, if not about the law, then about the responsibilities of a judge. For this reason, we might be better off not using these loaded terms within the law.

If we insist on using loaded terms like “justification” in thinking about the law, then we have no right to assume that morally hard decisions that are required by established rules of law are truly justified. If a decision cannot be justified on its merits, then there must be a morally adequate argument for following the rule, or else the decision cannot be justified at all. For what needs to be justified is not a move within a complex esoteric game but what we do to people who are governed by the law. Someone who took this view of the judicial role would not fall into the naive assumption that “the proper function of a court is to apply an established rule of law to the dispute before it.”

30. Holmes, supra note 1, at 461-62.
would do more justice to the judicial role. We have no reason to assume that even routine cases facing courts are simpler than the problems we face when we must make hard moral decisions.