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A Republican Theory of Adjudication

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Abstract In recent years there has been a revival of interest in civic republicanism. In light of this revival, it is interesting to consider what sort of theory of legal or judicial adjudication such a doctrine—centered on the value of promoting freedom from domination—would recommend. After discussing the importance of such a theory and clarifying its relationship to broader questions of institutional design, it is argued that theories of adjudication should be assessed according to three criteria: first, their contribution to the republican cause of promoting freedom from domination; second, their suitability to the characteristic features of legal systems; and third, their impact on long-run institutional stability. According to these criteria, a republican theory of adjudication would hold that judges and other legal officials should strive in their decisions and interpretations to maintain and enhance the distinctive value of the rule of law.

Keywords Civic republicanism · Adjudication · Rule of law · Legal institutions · Stability

In recent years, there has been a revival of interest in civic republicanism as a viable contemporary public philosophy or political doctrine. According to this doctrine, we should regard promoting freedom from domination—independence from arbitrary power—as our central, though not necessarily exclusive, political aim.[1] In light of this revival, it interesting to consider what sort of normative theory of legal

[1] See especially Pettit (1997, 2012), Viroli (2002), Maynor (2003), Laborde and Maynor (2008), and Lovett (2010); or for an overview, Lovett and Pettit (2009). Note that I here distinguish civic or 'neo-Roman' republicanism from the participatory republicanism or 'civic humanism' associated with Hannah Arendt and others.

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interpretation and adjudication (hereafter 'theory of adjudication' for short) republicanism would recommend. Should judges and other legal officials actively pursue republican aims through bold and creative interpretations of legal materials, or should they exercise judicial restraint instead? If to any extent the former, what specific republican aims should they strive to realize?

There have been some efforts to answer these questions already which, for various reasons subsequently discussed, prove unsatisfactory.[2] Rather than review these earlier attempts in detail, however, my central purpose in this paper is simply to lay out a better theory. Theories of adjudication, as I shall explain, are tightly bound to specific institutions: thus, the question of which theory republicanism recommends to some extent hinges on the republican view of what sort of legal institutions would be best. On the account I advance, neither activist nor restraint models will be found to serve. Instead, legal institutions ought to have as their specific purpose the maintenance and enhancement of the rule of law, and the interpretation and application of law by legal officials ought accordingly be directed towards furthering that specific aim.

After some preliminary remarks on the role of a theory of adjudication in part one, the paper proceeds in part two to consider some basic criteria any successful theory of adjudication ought to satisfy, before arguing for the republican theory specifically in parts three and four.

I

What is a theory of adjudication, and why do we need one? While these questions are familiar to legal theorists, and the answers I offer not especially original, it is nonetheless important to address them explicitly before advancing a specific theory. Confusion or ambiguity regarding what a particular author means by a theory of adjudication in the relevant sense has stymied many previous discussions.

Let us start by defining a *legal official* as any individual in a given society charged with some degree of responsibility for implementing the laws of that society. Legal officials thus obviously include judges, but perhaps also public prosecutors, the police, some agency administrators, citizens in their capacity as jurors, and so forth. For present purposes, nothing much will hang on how we define this term, and in any case its scope will vary according to the institutional design of various societies. What is important to observe, however, is that every legal official necessarily wears two hats, so to speak. In her capacity as a legal official, on the one hand, she has certain institution-specific obligations, while in her capacity as a human being on the other she also has broader moral and ethical obligations. Of course this situation is hardly unique. Indeed, it arises in every case where a person fills an office—the office of mayor, of doctor, of movie critic, and so on. Every office comes with its own institution-specific obligations. Unfortunately, there is no guarantee that our institution-specific duties as the holder of some public office will always coincide with our general moral and ethical duties as human beings. The

[2] For instance see Michelman (1988), Bellamy (2007), Dawood (2008), or Honohan (2009).

problem of how to balance these two sets of obligations when they conflict can only properly be addressed within a broader account of moral philosophy, and thus lies beyond the scope of our present discussion.

Despite this, much mischief has been caused by confounding these two sets of obligations, as we shall later see, and it is thus important to keep them carefully distinct. Accordingly, let us stipulate that a *theory of adjudication* is a normative account of how legal officials should interpret and apply the law in particular cases according to their institution-specific obligations. In other words, our topic concerns the duties that fall on legal officials *as* legal officials—as the holders of a particular office in some legal system such as the office of judge.[3] It does not, therefore, include an account of how these 'duties of adjudication', as we might call them, should be balanced against other broader moral or ethical considerations.

The value of this answer to our first preliminary question will soon be apparent on considering a second, namely: Why do we need a theory of adjudication? Often, it is easy for legal officials to implement the law. If there is a law against assault, and Andrea clearly assaulted Bob, then it is obvious that implementing the law means punishing Andrea. If there is a law against speeding, and it is clear that Carla exceeded the speed limit, then it is obvious that implementing the law means subjecting Carla to a fine. And so forth. Let us term these *easy cases*. Unfortunately, cases are not always easy. Significantly, there are at least two rather different respects in which a case might not be easy.[4]

On the one hand, a case might not be easy because a strict application of the law would be objectionable on broader moral or ethical grounds. This is often the case in unjust legal systems, for example: South African judges during the period of apartheid were often presented with cases in which the law demanded results repugnant on moral or ethical grounds.[5] But such unfortunate cases can arise even within a reasonably just legal system. The law is in many ways a crude instrument that cannot take every morally or ethically significant detail into account. It follows that even well-meaning laws will occasionally have objectionable results if strictly applied: mandatory sentencing regimes in criminal law, for instance, give rise to many such cases. When this happens, it will not be easy for a legal official to implement the law, insofar as doing so may conflict with her broader moral and ethical obligations as a human being. Let us call such cases *difficult*.

On the other hand, a case might not be easy because it is actually unclear what the law demands. Since this is a fundamentally different sort of problem, let us call such cases *hard*, rather than difficult. (Of course some hard cases are also difficult, and some difficult cases also hard, but that does not detract from underlying distinction.[6]) Why are there hard as well as difficult cases? Perhaps the most

[3] Note that a complete theory of adjudication need not assign the same duties to all legal officials (judges, prosecutors, police, jurors, etc.), but the discussion here will gloss over such details.

[4] Leaving aside, for the moment, cases in which it is the *facts* that are unclear. Often the law will provide guidance in such cases (specifying standards of proof, for instance), but regardless, such issues are not matters of *legal* interpretation as understood here.

[5] Such cases are discussed in Dyzenhaus (2010, esp. chs. 2–6).

[6] Note that we can remain agnostic as to the relative proportions of easy, hard, and difficult cases: so long as at least some cases are hard, the issues discussed in this paper will be relevant.

obvious source of hard cases is imperfect craftsmanship. The legal systems of modern societies are enormously complex, and the legislators or judges charged with making law are, after all, only human. Mistakes are thus inevitable. Lawmakers may generate laws that contradict one another, or laws that are clearly self-defeating according to their own aims, or laws whose provisions are underspecified or prove unworkable, and so forth. One example might be the nineteenth century privity of contract doctrine, which in effect shielded manufacturers from product liability claims unless the product was 'inherently dangerous' like a bottle of poison, say. While this vague rule might have served when first introduced, with the advance of modern commerce it soon degenerated into incoherence: scaffolding, elevators, and large coffee urns for instance were held to be inherently dangerous, whereas flywheels and steam boilers were not. When a legal official under this regime is presented with a case involving a defective automobile, what should he do?[7] Is an automobile more like an elevator or a steam boiler? The imperfect legal materials available dictate no obvious answer. In such cases, legal officials cannot easily implement the law: in order to render the law even capable of generating a determinate demand, they must first engage in *interpretation*.

Now it might at first seem these are merely practical difficulties that could be surmounted with more intelligently crafted law: contradictions can be avoided, important terms can be clearly defined, etc. Alas, even with the most intelligent and conscientious legal craftsmanship imaginable it is impossible to eliminate hard cases. The underlying reason for this was famously observed by Wittgenstein (1958, esp. pp. 56–88), and has been commented on (in legal and non-legal contexts) by many others since. Essentially, the difficulty is that any rule by its nature can apply to an indefinitely large range of possible circumstances. Consider even a very simple rule such as 'always take a walk Tuesday and Thursday mornings'. Let us suppose that we clearly define what counts as 'taking a walk', 'morning', and so forth in the relevant sense. Even so, what does the rule demand when we go on vacation? Both 'always go for a walk Tuesday and Thursday mornings, even when on vacation' and 'always go for a walk Tuesday and Thursday mornings, except when on vacation' are plausible interpretations of the original rule. Suppose we anticipate this possibility, and specify in our initial statement of the rule that it does not apply when on vacation. But then what does the rule demand when we find the park we walk in is closed some Tuesday morning? Or when our walking shoes are lost? It is simply not possible to account for every possible future contingency in a finite rule statement.

Some have taken these observations to cast doubt on the very coherence of governing our behavior by rules. This carries the insight too far. While it is true that, in principle, any finite rule statement is open to an infinite range of possible extensions, in practice human beings tend to respond to new cases in a very limited number of ways. No one immediately responds to the series 0, 2, 4, 6, 8 as exemplifying the rule 'add 2 until to the number 2,000, then add 4 until the number 4,000, and so on'. Likewise, it is difficult to believe that my efforts to implement the

[7] This was more or less the situation presented in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); see Strauss (2010, pp. 80–85) for a nice discussion.

rule 'always go for a walk Tuesday and Thursday mornings' will founder on my inability to work out in advance how the rule applies to every possible future contingency. What then accounts for the relative ease with which people usually follow rules?[8] Part of the explanation, no doubt, lies in natural instinct. We are simply built to observe and follow patterns—so much so, indeed, that we often seem to find patterns where none exist (and thus we require extensive training to fully understand concepts like 'statistical significance', 'standard error', and so forth). Probably just as significant, however, is our shared cultural experience, which often fills in gaps and resolves ambiguities with implied background understandings.[9]

Natural instinct and background culture strongly condition our interpretation of legal rules, thus ensuring considerable agreement as to their extension and application to new cases. Nevertheless, since there is variation in both instinct and experience from individual to individual, disagreements as to what some particular rule requires in new and unanticipated situations will inevitably arise. One particularly notorious example might be *Roe v. Wade*.[10] Prior to this case, rights to privacy—including for instance various freedoms relating to marriage, procreation, contraception, and child rearing—had already become well-established principles of American constitutional law. But do these rights naturally extend to abortion as well? In the event, people had dramatically differing intuitions on this point. To the extent that such disagreements arise, legal officials will face a hard case in which it is impossible to implement the law without first consciously interpreting it one way or another.

Recall from above that a theory of adjudication is a normative account of how legal officials should interpret and apply the law to particular cases according to their institution-specific obligations. It should now be clear that a theory of adjudication is meant to address hard cases, not difficult ones. Since hard cases are inevitable, we need a theory of adjudication. Given that to implement the law is, in effect, to coerce those persons potentially subject to its requirements, the importance of such a theory should be self-evident. Even if we cannot develop a perfect theory that would resolve every possible hard case, it is important we at least try to offer good reasons for interpreting and applying the law as we do.

Nevertheless we must not expect more from a theory of adjudication than it is capable of supplying. Many debates in legal theory persist through confusion as to whether the dispute concerns (for instance) how judges should decide cases in their capacity as judges, or how they should decide cases all things considered. While both questions are interesting, they are not equivalent. Theories of adjudication are designed to answer only questions of the first sort. Accordingly, let us set the problem of difficult cases aside.

[8] Here I basically follow responses to the problem offered by Pettit (1993, pp. 76–106) and Taylor (1995, pp. 173–179), the former leaning more towards a natural instinct story and the latter towards a background culture story.

[9] It follows from this last point that the same set of explicitly enumerated formal rules may yield very different normative social orders in different cultural communities. Herein lies the truth in Cover's (1993, ch. 3) argument that a legal system can arise only through an intersection of formal rules with a determinate lived culture.

[10] 410 U.S. 113 (1973).

II

From the previous section, it should be clear both what a theory of adjudication is, and why we need one. Let us next consider how such a theory is best constructed. Here again there are some confusions to be addressed, starting with the proper relationship between theories of adjudication on the one hand, and normative public philosophies or political doctrines on the other.

Theories of Adjudication and Legal Institutions

Let us stipulate that a *sociology of law* is a general descriptive account of legal systems regarded as distinctive social formations—as particular constellations of observed and experienced concrete social phenomena. Put more abstractly, it is an account of the necessary and characteristic features of law. Some suggest that we cannot develop a sociology of law, so understood, independently of a theory of adjudication: on their view, roughly speaking, this is because we do not know what the law is unless or until we know how its various indeterminacies are properly resolved through interpretation, and it is precisely the job of a theory of adjudication to tell us.[11] This seems to me mistaken. On the contrary, it is critically important to distinguish the two. Let me explain.

A theory of adjudication offers a normative account of how legal officials should interpret and apply the law according to their institution-specific obligations. As such, it is best understood as the conclusion of an argument with two distinct premises. The first or 'major' premise, so to speak, is some sort of overarching public philosophy or political doctrine—as for example utilitarianism, or liberal egalitarianism, or something else—that supplies evaluative standards for the design of basic political and social institutions and practices. The practice of adjudication, however, takes place within a specific institutional context. Thus a second or 'minor' premise must be a descriptive sociological account of that context, which is to say, a descriptive account of legal systems. Both parts are necessary prerequisites for a sound theory of adjudication. Absent a descriptive sociology of law, it is difficult to see how we could work out the institution-specific duties of legal officials—how, for example, such duties would differ from the duties falling on legislators, who operate in an obviously very different institutional context. Likewise, absent a normative public philosophy or political doctrine, no descriptive sociology of law could by itself yield a normative theory of adjudication: no account of the necessary and characteristic features of legal systems alone can tell us how legal officials *ought* to interpret and apply the law.

A complete argument must therefore have something like the form suggested in Fig. 1 below. Here observe a further complication that our derivation of a theory of adjudication is mediated by the issue of institutional design. The first step in our argument will be to ask: *Given* the particular character legal systems happen to have, what configuration of legal institutions would best realize the normative aims of our public philosophy? The second will be to ask: *Given* a configuration of legal

[11] This is famously the view of Dworkin (1986), Perry (1995), and many others.

Fig. 1 Derivation of a theory of adjudication

institutions realizing those aims in some reasonable degree, what institution-specific duties would fall on legal officials in implementing the law? Once presented in this way, it should be obvious that the problem of adjudication is closely intertwined with broader social and political considerations, for the best configuration of legal institutions will obviously depend on the role we expect those institutions to play within the framework of a well-ordered society's overall political system.[12] Since this topic is far too broad to be addressed here, I will provide no more than a suggestive sketch in the sections that follow.

Before continuing, however, a bit more on the major premise. In order for our argument to get off the ground, we need to start with a normative public philosophy or political doctrine. Fortunately, given the limited scope of our exercise here, we can simply stipulate that the relevant doctrine is the civic republican one. On this view, we should regard promoting freedom from domination as our central, though not necessarily exclusive, political aim.[13] Roughly speaking, we can here regard domination as a sort of dependence on arbitrary power: persons or groups experience domination to the extent that they are dependent on a social relationship in which some other person or group wields arbitrary power over them. Domination in this sense is paradigmatically experienced by slaves at the hands of their masters, by wives at the hands of their husbands under traditional family law, by unprotected workers at the hands of their employers in markets with structural unemployment, and by citizen at the hands of tyrannical or despotic governments.[14] Our agenda, then, will be to find the theory of adjudication ultimately recommended by a political doctrine centered on minimizing domination.[15]

To begin our search, we must pause and reflect on the particular features we would expect ideal legal institutions to have. As we shall later see, our choice over possible theories of adjudication is largely driven by our prior choice over possible configurations of a legal system.

[12] Ward (2002, pp. 55–62) correctly observes that many accounts of adjudication fail to recognize this dependence.

[13] For examples, see n. 1 above.

[14] On this arbitrary power conception of domination, see Pettit (1997, ch. 2) and Lovett (2010, chs. 2–4).

[15] I will not consider in this paper whether the same theory of adjudication might not also be supported by other political doctrines as well (utilitarianism, liberal egalitarianism, etc.); if it can, of course, so much the better.

Criteria for the Design of Legal Institutions

Supposing our aim is to realize freedom from domination, we must balance two distinct considerations in designing a political system.[16] On the one hand, we will want that political system to be a force for the republican cause, identifying and mitigating instances of domination as they appear in society at large. On the other hand, we will also want to ensure that the political system does not itself become an agent of domination in the process. These two considerations may obviously cut against one another to some extent: the more powerful and centralized the political system, the greater a force for republican aims it can be, but also the greater a potential source for domination; conversely, a weaker and more decentralized political system will be less threatening, but also less of a force for republican aims.[17] Conventional wisdom holds that, whatever the appropriate balance between these considerations, our overall institutional scheme must include some sort of independent judiciary—that is, a political sub-system within with disputes can be settled in a predictable manner by legal officials who are not themselves party to those disputes and who are at least partially insulated from the pressures of ordinary politics. No society in which the coercive capacities of the political system are not at least constrained by an independent judiciary in this manner can plausibly be described as well-ordered on the republican view.[18]

Let us simply grant that this conventional wisdom is roughly correct. Given that a well-ordered society must have some sort of independent judiciary, we can narrow our focus to the particular role we expect that judiciary to play within the political system as a whole, for it will ordinarily be on legal officials of the judiciary that the burdens of adjudication will fall most heavily and most consequentially.[19] What criteria, then, would we want an independent judiciary to satisfy if soundly designed? Three come to mind. The first, and most obvious, is that we would expect the judiciary to make some positive contribution to the overall aims of the political system—namely, to the realization of the various ends specified in our preferred political philosophy or public doctrine. Suppose, however, as is very plausible, that the overall project of realizing those ends will be best served through some sort of division of labor, according to which each of the different parts of the political system is assigned a portfolio tailored to its particular institutional strengths and weaknesses. In this case, it will be a second criterion of a soundly designed

[16] This framing is due to Pettit (1997, ch. 6), and has been adopted by many contemporary civic republican writers.

[17] This tension might be articulated theoretically as a tension between legitimacy and justice. The most *legitimate* political system, on the republican view, would be the one least likely to itself inflict domination on its citizens; a somewhat less legitimate state, however, might be more *just* if it manages to reduce more domination from other sources in society than it introduces through its own activities. Pettit (2012) can be read as an attempt to resolve this tension.

[18] Here I merely gesture towards a broader republican account of institutional design. Historically speaking, the classical republicans generally advocated dispersing political authority over multiple agents via what they described as a 'mixed constitution'. For further discussion, see Pettit (1997, pp. 177–180).

[19] While it is true that the police, for instance, must sometimes interpret rules of law in order to apply them, such interpretations are provisional: people are not imprisoned or fined until courts conclude that there has indeed been a breach of law.

independent judiciary that its assigned portfolio be well-tailored to the characteristic features of legal systems which it necessarily shares. If certain important tasks are not easily accommodated to courtroom hearings, say, it would be counterproductive to assign those tasks to courts.

In addition to these first two criteria, there is also a third: namely, that whatever design we implement, we will want it to be stable in something roughly like Rawls's sense of this term (1971, pp. 453–458, 567–570). The idea here is simply that we cannot regard an independent judiciary as soundly designed unless we can reasonably expect it to continue to perform its job well over the long run. To be stable in this sense, the design of the judiciary must be such that its institutional health does not depend on the heroic virtue of its office-holders, the exceptional wisdom and patience of ordinary citizens, or both. Rather, imagining that legal officials will be well-meaning if not heroic, and that citizens will have a reasonable if not exceptional understanding of the legal system, the judiciary will be stable if its ongoing operation according to its assigned portfolio tends to solidify, rather than undermine, its own institutional health. Later, we shall see that stability in this sense depends on our securing a sort of congruence between legal institutions on the one hand, and the theory of adjudication those institutions tend to engender on the other.

As stated, these criteria should not be controversial. Accordingly, our next task is to determine the particular configuration of legal institutions they recommend. This is the aim of part three below. Only then can we properly move on to a consideration of theories of adjudication in part four.

III

What sort of independent judiciary do our criteria recommend? Three highly stylized, ideal-type models will be contrasted.

The Active Judiciary Model

Consider first what we might call an *activist* model. On this model, the assigned task of the judiciary would be to strive to realize republican aims directly so far as it reasonably can—which is to say, to identify and mitigate instances of domination wherever they appear in society at large. The law should be regarded as an all-purpose instrument for advancing freedom from domination. Accordingly, institutional rules regarding jurisdiction, venue, standing, and so forth should be permissive and flexible so as to create as wide a portfolio for legal officials as possible. In order for these various efforts to have real and lasting effects, of course, judicial determinations concerning the demands of republican justice and legitimacy must be treated as final and beyond the authority of other political institutions to revise or reverse: thus courts should have expansive powers of judicial review, at least when it comes to advancing republican aims.

While no particular author advances the active judiciary model in such bold terms as these, something like this view is implicit in many republican accounts of

the judiciary function. Yasmin Dawood, for instance, proposes that the 'role of courts' on a republic view should be

> … to ensure that the procedures by which the ground rules of democracy are determined … are not distorted by domination and the appearance of domination. In general, … courts should adopt a 'minimizing-democratic harms' approach in which the judicial task is to prevent or minimize the democratic harm of domination. (Dawood 2008, p. 1416)[20]

So how does this model fare according to our criteria? On the plus side, it will surely to do very well by the first: not only will the judiciary make a positive contribution to the overall project of achieving republican aims, it will indeed strive to maximize its contribution to that project. Unfortunately, the activist model is not so likely to score well on the second criterion. If the aim of the judiciary is simply to promote freedom from domination *simpliciter*, it is not clear what its distinctive contribution to that project is supposed to be vis-à-vis the other parts of the political system. The activist model is not well-tailored to the particular strengths and weakness of legal systems, considered as a distinctive bundle of practices or ways of doing things. Minimizing domination may often require settling extremely complex and highly controversial issues of socio-economic policy, for example. Such issues are much more likely to be addressed in a successful manner through public deliberation and bargaining in legislative assemblies than they are through the legal process.[21] The nature of law is such that courts are usually presented with problem cases and (as the saying goes) hard cases make bad law. It is unlikely that the optimal design of national health care policy, for instance, is best determined by a high court's ruling on some singular and highly unusual local dispute.

The Restrained Judiciary Model

Let us then consider instead what we might call a *restraint* model. On this second model, the portfolio of the judiciary should be strictly limited to the resolution of formal legal disputes—that is, disputes about what the letter of the law as such demands. As the institution specifically charged with the job of resolving such disputes, its determinations on formal legal questions should be treated as final and beyond the authority of other political institutions to revise or reverse: thus courts must have absolute, though narrow, powers of judicial review. But in no way should the judiciary aim to realize freedom from domination directly, or even take such considerations into account when resolving legal disputes: that job is left to other parts of the political system whenever possible. Indeed, institutional rules regarding jurisdiction, venue, standing, and so forth should be strict and precisely adhered to so as to reduce temptations in an activist direction.

[20] See also Honohan (2009) for a similar view. Both authors, however, discuss reducing domination in the political sphere only.

[21] Among others, Waldron (1999, ch. 5) and Bellamy (2007, ch. 2) have made this point.

Something roughly like a restrained judiciary model is proposed by Richard Bellamy, who would confine the role of courts to upholding the law 'consistently and impartially,' and the scope of judicial review to the 'modest' tasks of 'maintaining consistency through … the casuistical interpretation of the law' and 'supplying a means of challenging failures to apply it in an equitable manner' (Bellamy 2007, p. 88 and 16 respectively). In contrast with the activist model, the restraint model clearly scores very well on our second criteria. Perhaps building on a strict interpretation of the famous separation of powers doctrine, according to which the various functions of government (legislative, executive, judicial) are assigned to different government branches, this model would design a judiciary that maximally respects the portfolios of the other parts of the political system. Moreover, the restraint model seems to play to the institutional strengths of the judiciary as an impartial arbiter of formal legal disputes. But alas, it just as clearly falls short on our first criteria, for a judiciary so-designed would make little contribution to the project of realizing republican aims. Indeed it might sometimes hinder that project. In cases of clear legislative error, for instance, the judiciary would be charged with consistently enforcing the bad policy as literally written, regardless of the consequences. Knowing that policies will be so interpreted, the other parts of the political system might waste tremendous resources on policy details, attempting to anticipate each and every possible contingency in advance.

The Rule of Law Model

We have found that the active and the restrained judiciary models each fail according to one of our first two criteria. Consideration of the third criterion will be postponed, for reasons that will be clear when we return to it in part four below. In the meantime, the failure of these models prompts us to seek an alternative. What might a better model be? One possibility is to start with the thought that a well-designed independent judiciary should indeed have a portfolio tailored to its particular institutional strengths and weakness, but suggest that this portfolio be limited by its practical aims rather than by its formal jurisdiction. Let me explain as follows.

Recall that on the civic republican view, we should regard promoting freedom from domination as our central political aim. Coercion is an important, though it is not the only, source of domination. While many other forms of domination (economic, cultural, etc.) are perhaps best addressed through democratic political processes, coercion is special: it is crucial that people be able to form reliable expectations as to the circumstances under which they are likely to experience coercion. Now the distinctive value of the rule of law, one might argue, lies precisely in its constraining and channeling the exercise of coercion so it is not experienced as arbitrary, and thus does not constitute domination.[22] Legal practices are particularly well adapted to this task, insofar as they are built on a system of generally predictable social rules.[23] Therefore, it is natural to think that a well-

[22] Pettit (1997, pp. 174–177), Viroli (2002, pp. 47–53), List (2006), and Lovett (2010, p. 216). See also the recent parallel discussion in Krygier (2011, pp. 75–80).

[23] For accounts of the law as a system of conventional social rules, see Hart (1994) or Postema (1982).

designed independent judiciary might be built on the premise that it will be assigned the specific portfolio of tending to the rule of law. In other words, the job of courts should be to strive to realize and maintain the rule of law so far as possible—to ensure that people generally do not experience coercion except as the public sanction attached to a known social rule. Notice that determinations of the judiciary need not, on this view, be regarded as final, beyond the authority of other political institutions to revise or reverse.[24] Rather, on this model the judiciary is understood to be an equal partner with other political institutions in the overall project of realizing freedom from domination, albeit one with a distinctive area of specialization.

Let us call this the *rule of law* model. How does the rule of law model fare according to our criteria? With respect to the first, it certainly does well indeed. The rule of law constitutes an important part, though not the whole, of our freedom from domination. In promoting the rule of law, the judiciary will therefore be contributing to the overall project of advancing republican aims.[25] Notice that its portfolio on this view is defined by its practical aims rather than its formal jurisdiction. On the restraint model, the role of the judiciary is understood to be the resolution of strictly formal legal disputes—that is, disputes about what the letter of the law as such requires. On the rule of law model, the role of the judiciary is more flexibly understood to be ensuring that individuals experience coercion only as the public sanctions attached to known social rules. Sometimes this will require moving beyond the so-called letter of the law, so as to take into account broader social expectations. In any given legal community, a combination of background culture and natural instincts will strongly condition how people interpret ambiguous or incomplete rules of law, for example, and legal officials should respect these interpretations when they can.[26] It follows that the rule of law model will score better than the restraint model on this criterion.

The rule of law model nevertheless places definite limits on the role of a well-designed independent judiciary within the political system as a whole. Specifically, the judiciary should concentrate on attending to that aspect of the republican project it is most naturally suited to address—namely, the maintenance of the rule of law. This tailors the portfolio of the judiciary to its particular institutional strengths and weaknesses. While courtrooms might not be the best forums for debating the intricacies of controversial issues of socio-economic policy, they are ideally suited to revealing public understandings and expectations with respect to ambiguous or incomplete rules of law: the legal process provides an opportunity for individuals to

[24] Cf. Ward (2002, pp. 73–99), who argues that courts are well-suited to deciding controversies, but not to permanently fixing constitutional meaning.

[25] Or at any rate, it usually will in passably decent political regimes. By contrast, it is possible that upholding the rule of law in an especially evil regime may do little good, in which case the broader moral obligations of legal officials might assume priority over their institutional obligations. There is some evidence, however, that this path should not be taken hastily: authoritarian regimes can bypass courts altogether when they are found insufficiently compliant, in which case it will no longer matter what legal officials do (see Pereira 2008). I am grateful to an anonymous reviewer for highlighting this important issue.

[26] Note that in societies characterized by reasonable pluralism, this might entail being sensitive to local variations in expectations: see Cover (1993, ch. 3).

cast their interpretations as reasonable, legal argument often involves drawing out the good or bad consequences of competing interpretations, and so forth. These aims are not so likely to be well-served by deliberation or bargaining in large public assemblies. It follows that the rule of law model will score better than the activist model on the second criterion. So far, so good.

IV

Our initial discussion has revealed that a rule of law model for the design of judicial institutions has some advantages for over either activist or restraint models. The argument is not complete, however, until we consider what all this means for a theory of adjudication.

Now it is precisely in this connection that our earlier-mentioned third criterion—the criterion of stability—comes into play. Particular institutions, we might naturally suppose, have a tendency to engender particular constellations of values and beliefs among those individuals whose behavior the institutions govern. Thus for instance, economic institutions organized along pure free market lines might tend to generate instrumental and competitive attitudes among their participants, whereas economic institutions governed by Rawls's difference principle might tend to foster attitudes of reciprocity and fair cooperation.[27] It follows that, assuming we care about stability, our choice among possible theories of adjudication is severely constrained: specifically, in selecting a particular model for the design of judicial institutions, we are in effect constrained to select as well whatever theory of adjudication would tend to be engendered by the institutions answering to that model. Why so? Simply because any other theory would not be congruent with those institutions in the long run. We might imagine, perhaps, a judge of heroic personal character who persistently observes principles of restraint in the face of judicial institutions designed to encourage activism (or vice versa). From a practical point of view, however, we cannot expect the long-run stability of judicial institutions to rely on many individuals exercising a more than reasonable degree of personal virtue.

Accordingly, we shall compare the distinct theories of adjudication naturally engendered by legal institutions designed according to the three models. Each of the corresponding theories would agree, presumably, that courts should respect and apply the law whenever it is reasonably clear and not inconsistent with the demands of social justice or morality.[28] In healthy legal systems, these will constitute the greater bulk of cases, especially at lower levels of the judicial hierarchy. The theories diverge, however, in those cases where the law is indeterminate or normatively problematic. These are precisely the cases, of course, that are most likely to ascend the judicial hierarchy and receive the most attention.

[27] These issues are central to Rawls's concerns in the third part of *A Theory of Justice* (1971).

[28] Less plausible theories, of course, might disagree. For example, certain ideological approaches to adjudication (fascist, communist, etc.) might hold that political considerations should sometimes trump legal considerations even in easy cases.

Let us consider the activist model first. On a theory of adjudication congruent with this model, legal officials in the judiciary should strive to advance justice and legitimacy directly when presented with indeterminate, incoherent, or otherwise problematic rules of law.[29] Indeed, to the extent that it is able, the judiciary should aim to increase its portfolio by turning easy cases into hard ones so as to give a greater scope its efforts.[30] In hard cases like *Roe*, where it is unclear how to extend a rule under new circumstances, or *Brown v. Board of Education*, where the applicable legal materials are confused and discordant, we should first ask what outcome would be normatively best according to our preferred public philosophy or political doctrine, and then interpret the law accordingly.[31] By this criterion, we may suppose that both cases were rightly decided, if not necessarily rightly reasoned. It is less clear on this view how we should decide cases like *MacPherson v. Buick Motor Co*., where the implications for justice or legitimacy are rather more difficult to discern, but we must endeavor to do the best we can.[32]

Most republican authors who have considered the problem of adjudication seem to recommend some variety of activism, according to which judges and other legal officials should strive to realize republican aims directly when presented with a hard case.[33] But would we expect a judiciary operating along these lines to be stable? Probably not. In the process of crowding out the portfolios of other branches, an activist judiciary will in the long run tend to undermine its own institutional legitimacy and good will (Rosenberg 2008). If the judiciary is imagined to be no different than the other parts of the political system, what justifies its independence and insulation from ordinary political processes? Such a judiciary will likely provoke strong resistance to its efforts, while at the same time exposing itself to politicization.

So what about the restraint model: will it fare any better? Probably not. On a theory of adjudication congruent with this model, legal officials in the judiciary should always follow the strict letter of the law as such whenever they can.[34] This would suggest that *Brown* and *Roe* were wrongly decided, since both involved significant departures from what was explicitly required by the relevant legal materials. Indeed, the one republican author advocating a theory of restraint expresses doubts about both decisions (Bellamy 2007, pp. 43–44). In many

[29] It is less clear on this theory what duties of adjudication fall on other legal officials. For instance, should the police likewise strive to see that justice is done whenever rules they are charged with enforcing are unclear or ambiguous?

[30] One example of an activist theory might be the pragmatist approach discussed and critiqued in Dworkin (1986, esp. ch. 5); the integrity approach Dworkin himself prefers (Dworkin 1986, esp. chs. 6–7) represents a more moderate activism in which legal officials resolve hard cases in light of the best normative justification for the legal materials available.

[31] See n. 10 above, and 347 U.S. 483 (1954) respectively.

[32] See n. 7 above.

[33] See Michelman (1988), Dawood (2008), Honohan (2009), again noting that they discuss political rights and liberties only. Their specific recommendations provide less guidance in hard cases such as *Roe* or *MacPherson* that do not obviously implicate political processes one way or another.

[34] Textualism, originalism, and doctrinalism are examples of this sort of theory. As in the case of an activist theory, we might again wonder whether the duty of restraint is supposed to apply to all legal officials, including the police, public prosecutors, and so forth.

problematic cases, adhering to a narrowly literal interpretation of the legal materials will moreover generate absurd or counterproductive consequences. Consider for instance a simple safety ordinance that requires pedestrians to walk against traffic. What about those few occasions when this is clearly the more dangerous option? Is the correct interpretation of the ordinance 'always walk against traffic, even when this is clearly more dangerous'; or 'always walk against traffic, except when this is clearly more dangerous'?[35] On a restraint theory of adjudication, it would seem we must conclude the former. What is worse, confined by its own institutional portfolio to acting as an impartial mouthpiece of law, courts will be unable to address problems of genuine indeterminacy in good faith. They will be institutionally pressured to conceal indeterminacy and pretend there are no gaps in the law. Since courts cannot help but sometimes engage in discretionary interpretation, an ideology denying this will in the long run be self-defeating. Especially when it comes to high-level constitutional questions, over which the judiciary claims final authority on the restraint model, the court's bad faith will be most egregious.[36]

This leaves us with the rule of law model. A republican theory of adjudication congruent with this account of judicial institutions need not pretend that the law is always determinate or that some issues are not genuinely political. It can acknowledge in good faith that the judiciary must engage in discretionary interpretation when faced with hard cases. However, it directs that interpretation towards the particular aim of maintaining and enhancing the rule of law: judges and other legal officials should strive to ensure that people generally experience coercion only as the public sanction attached to known social rules.[37] What might this mean in practice? By definition, of course, the law itself provides no determinate result in a hard case, but it does not follow that people were acting without expectations of any kind. When faced with hard cases, we should strive to respect as best we can the reasonable expectations of the various parties affected.

For example, in cases such as *MacPherson* where the applicable legal materials have become confused and discordant, we should apply whatever rule unbiased persons in the relevant community regard as most sensible and natural under the circumstances. Benjamin Cardozo's opinion in *MacPherson* does precisely this, repudiating the unworkable privity of contract doctrine and replacing it with the rule that manufacturers are liable for foreseeable injuries caused by their own negligence. The latter rule was not only more sensible under the circumstances, but indeed better explained the various prior decisions under the old regime: it was in effect, though not officially, the rule courts were already following. Arguably, the Supreme Court faced a similar problem in *Brown* after a series of cases attempting to refine the 'separate but equal' doctrine had degenerated into incoherence. On the republican theory, the ruling in *Brown* was correct less because it advanced social

[35] See *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E.2d 987 (1939).

[36] This problem of 'bad faith' is analyzed extensively in Kennedy (1997).

[37] With suitable refinement, the republican theory of adjudication might be extended to all legal officials: it is more plausible in my view to say that the police, for instance, should strive to ensure that people generally experience coercion only as the public sanctions attached to known social rules, than it is to say either that they should strive to realize justice directly, or that they should strive to enforce the letter of the law regardless of circumstances.

justice (though of course it did) than because it dramatically clarified expectations in a natural and sensible way, stating explicitly the rule the high court was in effect, though not officially, already following by that time.[38]

What about cases in which the existing rule is clear, but the proper extension of that rule under new or unanticipated circumstances is strictly indeterminate? Here again our guide should be the reasonable expectations of the affected parties. When natural instinct and background culture tend toward convergence in the relevant legal community, the rule should be extended accordingly. Thus in *Tedla*, the court correctly concluded that most sensible and natural interpretation of the safety ordinance favors the extension 'always walk against traffic, except when this is clearly more dangerous', since this would further rather than frustrate the obvious purpose of the ordinance.[39] When variations in instinct and experience produce serious disagreement rather than convergence, however, the issue is more complex. The best courts can do under such circumstances is respect those disagreements so far as possible, either by not imposing a specific interpretation through judicial fiat or, when this is unavoidable, by minimizing its scope. It follows that on the republican theory of adjudication, *Roe* was probably decided wrongly.[40]

Importantly, legal officials need not have the final authority to settle questions of law or policy on the republican view.[41] They may claim to be the final arbiter of any particular dispute, but this need not be the same thing. The portfolio of the judiciary centers on enhancing the rule of law, one aspect of the broader republican project. Other parts of the political system, however, will presumably have their own portfolios. Recall that our overall aim is to realize freedom from non-domination, and our initial assumption was that this aim might be realized most effectively through a sort of division of labor within the political system that grants distinct portfolios to different political sub-systems. The various parts of the system should be regarded as mutual partners in the overall scheme. To the extent that a well-designed independent judiciary advances its particular portfolio so defined, it will thus contribute to the overall republican project in a way that enhances, rather than detracts, from its own institutional legitimacy.[42] Unlike either of the other theories, it seems to me that the republican theory of adjudication will tend to support the long-run stability of legal institutions.

V

By way of conclusion, let me briefly remark on an issue set aside earlier in this essay: the general moral and ethical obligations of those individuals who happen to

[38] Here I follow the illuminating discussion of *Brown* in Strauss (2010, pp. 85–92).

[39] See n. 35 above.

[40] It does not follow, however, that *Roe* should be overturned. Having been declared and repeatedly reaffirmed, reasonable expectations have now been built around abortion rights. Insofar as the republican theory of adjudication directs legal officials to respect reasonable expectations, it will place considerable weight on the principle of *stare decisis*.

[41] It is beyond the scope of this paper to consider what this means in terms of the details of judicial review, but it would certainly involve limiting the scope of that authority considerably.

[42] Or at least it usually will if the political regime is passably decent: see n. 25 above.

occupy an office in the legal system. These obligations presumably include, for example, some sort of duty to realize justice, as well as humanitarian obligations such as charity and rescue. Their existence necessarily complicates our picture.

Broadly speaking, there are two sorts of difficult situations to consider. In the first, an individual holds legal office in a bad political system—that is to say, a political system which is in some substantial degree unjust. Here we might think of South African judges under apartheid, for instance: these judges frequently faced cases in which the rule of law seemed to dictate seriously unjust or inhumane outcomes. In the second situation, an individual holds legal office in a good—that is to say, reasonably just—political system, but faces a bad case. The case is bad in the sense that, despite the well-meaning best efforts of the political system as a whole, the peculiarities of the case are such that the relevant legal rule seems to dictate seriously unjust or inhumane outcomes.

In either situation, the legal official faces an unenviable choice. However, we cannot say what she should do without answering much broader questions of moral philosophy.[43] My point here is simply to observe the possibility that such situations might arise, and caution that they present problems distinct from the problems theories of adjudication are meant to address. It is important to do this so as to not confuse our theory with intuitions more properly addressed elsewhere.

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[43] Solum (1994), however, points out that we might consider how different approaches to such difficult cases might affect a legal official's settled disposition to respect his duties of adjudication in normal cases. To the extent that he is right, we might indeed extract some guidelines for difficult cases from our theory of adjudication.

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