JURISPRUDENCE IN EXTREME CASES

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In the middle of *Justice in Extreme Cases*, Darryl Robinson writes that "[l]egal analysis in criminal law, including [international criminal law (ICL)], requires not only the familiar source-based analysis and teleological analysis, but also a third type of reasoning, which I have called deontic analysis."[1] Deontic analysis is "a type of reasoning focused on principled constraints reflecting our commitment to the individual."[2] Deontic constraints of criminal justice include the personal culpability principle, the legality principle, and possibly the fair labeling principle.[3] Importantly, such deontic principles are moral principles, not "artifacts of legal positivism,"[4] so their contents are not determined by legal texts, past practice, or other social facts. Simply put, deontic analysis is a form of moral reasoning, and deontic principles are moral principles of one important kind.

Robinson argues that deontic analysis should follow a coherentist method or theory of justification.[5] Beliefs or propositions about deontic principles and their contents are justified to the extent that they reflect the best possible reconciliation of all available clues, including patterns of practice, normative arguments, and casuistic testing of considered judgements. Robinson treats deontic principles such as the culpability principle as "mid-level" principles that are consistent with various foundational moral theories.[6] Simply put, we can improve our understanding of such deontic principles through reflection and discussion, without first settling the deepest and hardest questions in moral philosophy.

Who should engage in deontic analysis, and for what purpose? States when they make or modify ICL rules? Scholars when they evaluate existing ICL or advocate for its reform? No doubt, in these ways, deontic analysis "can help us to avoid unjust treatment, and . . . develop better policy."[7] But Robinson does not stop there.

On Robinson's account, it seems, judges should engage in deontic analysis when deciding cases before international criminal courts and tribunals. Robinson

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1. DARRYL ROBINSON, JUSTICE IN EXTREME CASES 229 (2020); *see also id.* at 22–23 ("[C]riminal justice requires an additional and special type of reasoning—deontic reasoning—which directly and normatively explores the principled moral limitations on blame and punishment.").

2. *Id.*, glossary at 282.

3. *Id.* at 9.

4. *Id.* at 52; *see also id.* at 65 (explaining that past treatment of deontic principles as "artifacts" was wrong); *cf. id.* at 13, 63 (asserting that deontic principles are not merely artifacts of positive law and they reflect respect and empathy to the individual).

5. *Id.* at 3, 14, 57, 85, 108.

6. *Id.* at 96–97.

7. *Id.* at 86; *see also id.* at 229 (stating that deontic analysis prevents unjust treatment and shapes "better policy").

writes that "early reasoning in Tribunal jurisprudence engaged inadequately with the deontic dimension, producing an internal contradiction with the culpability principle."[8] According to Robinson, "the Tribunal's reasoning in those cases is an example of hurried doctrinal reasoning that does not engage adequately with deontic constraints."[9] In contrast, Robinson finds it "laudable" that judges on the International Criminal Court engaged with deontic questions in its first case on command responsibility, the *Bemba* case.[10] In his view, it is "a sign of the maturation of ICL: judges are now a little more rigorous and more careful with criminal law theory and with deontic constraints."[11]

At least in some cases, deontic analysis should play a decisive role in criminal adjudication. In his discussion of the *Hadžihasanović* case and its aftermath, Robinson observes that:

> The judicial debate was framed in terms of precedents and teleological arguments. What was largely missing from the conversation is the deontic dimension . . . that is, that convicting a person for crimes completed before she even joined the unit would be a startling departure from the culpability principle at least as hitherto understood. If such a proposition is to be entertained at all, it would require a new understanding of culpability, backed by convincing deontic justification.[12]

Here, deontic justification is a necessary condition of legal justification. Elsewhere, Robinson writes that he would endorse treating command responsibility as a separate offense, rather than as a mode of liability:

> [I]f it were the only way of complying with fundamental principles: in that case, canons of construction could allow a strained textual reading and a departure from precedents to avoid violating fundamental principles. A coherentist legal interpretation would endorse a creative re-reading, if it were the best way of making sense of all considerations.[13]

Here, deontic analysis carries very substantial weight, perhaps decisive weight, in legal justification.

We should engage in deontic analysis to *evaluate* the international criminal law we have and to *develop* the international criminal law we need. But why should we engage in deontic analysis to *interpret* or *identify* the international criminal law we have? Why does *legal* analysis *in* international criminal law—as opposed to *moral* analysis *of* international criminal law—require deontic analysis? In particular, what permits or requires judges to engage in deontic analysis, over and above source-based analysis and teleological analysis?

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8. *Id.* at 140.

9. *Id.* at 154.

10. *Id.* at 257, 271; *id.* at 258 (referring to the *Bemba* Appeals Judgment, stating judges engaged with deontic questions in a diligent and direct manner, and noting this attention is commendable); *see also id.* at 192 (commending judges at all three levels for their contemplative engagement with deontic analysis in the *Bemba* case).

11. *Id.* at 266; *see also id.* at 258 (stating that increasing levels of deontic engagement show that ICL is maturing).

12. *Id.* at 157.

13. *Id.* at 169.

Several possibilities exist. Deontic principles might be part of an international criminal court's applicable law. On this view, the contents of the applicable legal rules are not exclusively determined by social facts about the ordinary meaning of treaty terms, state practice, and the like. Instead, the contents of the applicable legal rules are partly determined by moral facts about what we owe to individuals as a matter of justice, fairness, and the like. It might be a necessary feature of all law that moral facts partly determine the contents of legal rules. In legal philosophy, this variant is called natural law theory or simply naturalism.[14] Or it might be a contingent feature of some system or area of law that moral facts partly determine the contents of legal rules. In legal philosophy, this variant is called inclusive legal positivism.[15] Alternatively, a court might be permitted or required to apply deontic principles, even though deontic principles are not part of the court's applicable law. Moral facts do not determine the contents of legal rules, but courts may be legally permitted or required to base certain legal decisions on nonlegal considerations. In legal philosophy, this view is called exclusive legal positivism.[16]

Needless to say, Robinson does not need to settle the long-running debate between naturalists, inclusive legal positivists, and exclusive legal positivists. Robinson does not even need to directly engage with that debate. However, Robinson does need to explain why legal analysis, at least in ICL, requires deontic analysis. Robinson could then leave it to legal philosophers to classify his explanation as naturalist or positivist, inclusivist or exclusivist, as the case may be. But that basic explanation seems elusive. Robinson says very little about why judges should engage in deontic analysis, and what he says points in different directions. My aim here is simply to lay out the available options. Robinson is free to embrace one option and reject the others, or to show that his conclusions follow no matter which option one might choose. But Robinson needs an answer to the judge who asks, "why should I engage in deontic analysis, rather than follow the law applicable in my court?"

I. NATURALISM

Naturalism is the view that moral facts necessarily play a role in grounding legal facts, including by partly determining the contents of legal rules.[17] For this reason, legal analysis necessarily requires deontic analysis. Naturalism comes in many forms, two of which seem attractive to Robinson.

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14. Kenneth Einar Himma, *Natural Law, in* THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2001), https://iep.utm.edu/natlaw/. Note that naturalism also refers to the quite different view that "philosophical theorizing should be continuous with empirical inquiry in the sciences." Brian Leiter & Matthew X. Etchemendy, *Naturalism in Legal Philosophy*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Summer ed. 2017), https://plato.stanford.edu/archives/sum2017/entries/lawphil-naturalism/.

15. Leslie Green & Thomas Adams, *Legal Positivism*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer ed. 2019), https://plato.stanford.edu/archives/win2019/entries/legal-positivism/.

16. *Id.*

17. Leiter & Etchemendy, *supra* note 14.

A. Procedural Naturalism

Robinson gestures at one form of naturalism when he writes that "[t]o ignore deontic principles would not only contravene moral duties owed to the individual, but also probably contradict values inherent to the enterprise of ICL (e.g. the 'inner morality of law')."[18] Robinson cites the naturalist Lon Fuller, who characterized the inner morality of law in terms of formal or procedural requirements that legal rules should be general, public, prospective, coherent, clear, stable, and practicable.[19] So understood, the inner morality of law likely includes the legality principle and may include the fair labeling principle.[20] In contrast, the culpability principle is a substantive requirement, not a formal requirement.[21] The culpability principle seems more at home in the "external morality of law," that is, as an external standard that law must satisfy to be *just*, not as an internal standard that law must satisfy to be *law*.

In several passages, he writes that the inner morality of law involves recognizing persons as agents.[22] Of course, it does not follow that every deontic principle that recognizes persons as agents is part of the inner morality of law. This may explain why Robinson says that deontic principles *cohere* with the inner morality of law.[23] The culpability principle coheres with the inner morality of law because both recognize persons as agents. It does not follow that the culpability principle is part of the inner morality of law. More importantly, Robinson does not explain how the inner morality of law bears on the interpretation of existing law or the adjudication of criminal cases.

B. Interpretivist Naturalism

Robinson suggests a very different form of naturalism when he tells readers:

> I will argue as follows:
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> 1. For any system that chooses to punish individuals, deontic principles do matter, and thus they should constrain ICL.
> 2. This does not necessarily mean replicating formulations of fundamental principles familiar from national systems; instead, we can return to our underlying deontic commitments and see what they entail in these new contexts.[24]

Similarly, Robinson repeatedly notes that legal analysis requires deontic analysis because deontic principles concern and limit our moral license to punish individuals.[25]

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18. ROBINSON, *supra* note 1, at 229.

19. *Id.* at 229 n.16; *see* LON L. FULLER, THE MORALITY OF LAW 39 (rev. ed. 1969) (citing the same characterizations of legal rules).

20. ROBINSON, *supra* note 1, at 21.

21. *See id.* (arguing that the culpability principle, among others, distinguishes a liberal system of criminal justice from an authoritarian system).

22. *Id.* at 67 n.32, 106 n.96.

23. *Id.* at 70 n.46, 105.

24. *Id.* at 59.

25. *Id.* at 52, 76, 161 ("[A] culpability challenge requires a deontic analysis: one must actually assess compatibility with the fundamental principles that limit our licence to punish individuals.

No doubt, for any system that chooses to punish individuals, deontic principles matter morally, and morally should constrain ICL. But Robinson seems to mean that, for any system that chooses to punish individuals, deontic principles matter legally, and legally constrain ICL. So understood, we can return to our underlying deontic commitments, not only to evaluate and reform ICL, but also to interpret and apply ICL. On this naturalist view, the moral significance of punishment explains why legal analysis in ICL requires deontic analysis.

Ronald Dworkin argued, roughly, that the essential point, purpose, or function of law is to morally justify official coercion in light of past institutional practice.[26] Such a moral justification is possible only by interpreting past institutional practice as reflecting a coherent set of moral principles.[27] The contents of legal rules are therefore determined both by social facts arising from past practice—such as texts, actions, and intentions—and also by those moral principles that both fit and justify past practice. Legal analysis requires deontic analysis in order to identify those moral principles.

So, a Dworkinian might argue, the essential point, purpose, or function of ICL is to morally justify criminal punishment in light of past institutional practice reflected in ICL treaties, customary rules, and general principles of law. Such a moral justification is possible only by interpreting ICL treaties, customary rules, and general principles of law as reflecting a coherent set of moral principles. The contents of ICL rules are therefore determined both by their social sources, such as treaty texts and state practice, and by those moral principles that present their social sources in their morally best light. Legal analysis in ICL requires deontic analysis to identify those moral principles.[28]

For example, suppose that the moral principle of culpability best explains and justifies past ICL practice with respect to criminal responsibility. On the Dworkinian view we are exploring, it would follow that the legal content of, say, command responsibility, is determined both by social facts—about what the Rome Statute says, or about how states customarily behave—and also by moral facts—about individual moral responsibility for the wrongful actions of other individuals. Legal analysis of command responsibility therefore requires deontic analysis.

This Dworkinian view supports Robinson's two core claims, quoted above. Deontic principles legally constrain ICL because ICL punishes individuals, punishment requires moral justification, and the essential function of ICL is to provide that moral justification. As Robinson says, this does not necessarily mean replicating formulations of fundamental principles familiar from national systems.[29] Such formulations may fail to morally justify punishment in light of past ICL practice. Instead, we can return to our underlying deontic commitments to identify the moral principles that best fit and justify ICL practice as a whole.

Robinson cites Dworkin, with approval, several times in his book. Most

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This deontic task requires an assessment of whether the rules are just.") (emphasis omitted).

26. RONALD DWORKIN, LAW'S EMPIRE 93, 96–98, 109–10, 190–92 (1986).

27. *Id.* at 96–97.

28. *Id.* at 229.

29. ROBINSON, *supra* note 1, at 92.

notably, Robinson writes that "[m]id-level principles are propositions that are arguably embodied in a body of practice (i.e. they *analytically* fit) and are *normatively* attractive."[30] In the accompanying footnote, Robinson writes that the process of identifying mid-level principles is "the same process as Dworkin's search for analytical 'fit' and normative 'value,' at least in his earlier works."[31] Robinson also names Dworkin as a prominent coherentist.[32]

Robinson and Dworkin appear to share both a starting point—the need to justify official coercion—and a methodology or theory of justification—coherentism. So it is tempting to simply attribute to Robinson a Dworkinian account of the role of deontic analysis in ICL. I hesitate to do so, because other passages suggest that Robinson is, instead, an inclusive legal positivist.

II. INCLUSIVE LEGAL POSITIVISM

Inclusive legal positivism is the view that moral facts ground legal facts, and determine the contents of legal rules, if, only if, and to the extent that a legal system so accepts.[33] Moral principles are not necessarily *a part of* the law, as naturalists maintain. Moral principles are not necessarily *apart from* the law, as exclusive legal positivists insist. Moral principles are contingently a part of the law, or contingently apart from the law, depending on the legal system. Put another way, deontic analysis is part of legal analysis if, only if, and to the extent that a legal system accepts it as such.

Robinson suggests a form of inclusive legal positivism when he writes that "fundamental principles are both an external normative yardstick by which to judge the system, [and] also internally recognized by the system as interpretive guides or even imperatives."[34] Fundamental principles are interpretive guides or imperatives because and to the extent that the system recognizes them as such.

Does the ICL system internally recognize fundamental principles as interpretive guides? Under the law of treaties, the general rule of interpretation provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[35] In a footnote, Robinson suggests that "[o]ne could argue that the 'context' includes fundamental principles of justice, or that the object and purpose includes compliance with fundamental principles of justice."[36] Either way, fundamental principles of justice are contingently recognized as interpretive

30. *Id.* at 97; *see also id.* at 115 ("[L]ooking at analytical 'fit' and advancing normative justification or criticism, is an essential part of a grounded normative theory about international criminal law."). outlining the general framework for a conversation that incorporates multiple plausible frameworks).

31. *Id.* at 97 n.46.

32. *Id.*

33. *See, e.g.*, Kenneth Einar Himma, *Inclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (2002).

34. ROBINSON, *supra* note 1, at 114.

35. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention].

36. ROBINSON, *supra* note 1, at 169 n.109.

guides.

Robinson appears to favor the view that moral principles form part of the context for treaty interpretation. He elsewhere writes that teleological interpretation must be accompanied by contextual analysis that reflects non-consequentialist constraints, such as the deontic commitments we owe to individuals.[37] This suggests that the object and purpose of ICL treaties is to end impunity for international crimes and thereby to contribute to their prevention.[38] Fundamental principles limit the pursuit of that object and purpose and, in that sense, create the context within which that object and purpose may be pursued.

The law of treaties does not seem to admit deontic analysis as a form of contextual analysis.[39] Context is not an independent element of the general rule of treaty interpretation, quoted above. Instead, the ordinary-meaning-of-the-terms-in-their-context is a single element of that rule. It follows that only facts that bear on the ordinary meaning of treaty terms can comprise part of the context.

Ordinary meaning is a function of the terms the drafters chose and the context the drafters presupposed or, put another way, what the terms explicitly say and the context that was supposed to go without saying.[40] This explains why the context of a treaty comprises the whole text of the treaty, including its preamble and annexes, as well as any concluding agreements or instruments.[41] These social facts are presumably common knowledge among a treaty's drafters, signers, and ratifiers, who presupposed them when writing and reading each discrete provision.

True, the drafters' shared moral beliefs might comprise part of the context for purposes of treaty interpretation. The drafters may have presupposed these shared moral beliefs when they chose the treaty's terms, considering these shared moral beliefs too obvious to reduce to writing. We need not settle that question here. The point of deontic analysis, according to Robinson, is to form *new* moral beliefs.[42] Using the coherentist method, we reason from existing moral beliefs to new moral beliefs—extending, refining, or revising as we go. But new moral beliefs, which the treaty drafters did not share, cannot tell us what the drafters presupposed, took for granted, or meant to imply. Only social facts of which the drafters had common knowledge can inform the ordinary meaning of the words they chose. Since deontic analysis extends beyond the shared moral beliefs of the drafters, it cannot reveal the

37. *Id.* at 244.

38. Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 38544, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf [hereinafter Rome Statute].

39. *See generally*, Vienna Convention, *supra* note 35 (codifying and crystallizing the customary law of treaties).

40. *See, e.g.*, ANDREI MARMOR, PHILOSOPHY OF LAW 138–45 (2011) (explaining how in the philosophy of language, contextual facts that are common knowledge between speaker and audience are said to pragmatically enrich the semantic content of the words used and the syntax chosen, yielding the full communicative content of what is said. The ordinary meaning of treaty terms in their context corresponds to their full communicative content).

41. Vienna Convention, *supra* note 35, art. 31(2).

42. *See* ROBINSON, *supra* note 1, at 11 (arguing that deontic reasoning focuses on one's duties and obligations to others, which forces one to consider the limits of personal fault and ability to punish).

ordinary meaning of treaty terms in their context.

Robinson might instead argue that it is part of the object and purpose of ICL treaties to respect moral principles. The object and purpose of a treaty is an independent element of the general rule of treaty interpretation and not simply a constituent of ordinary meaning, or so it would seem.[43] Moreover, the object and purpose of a treaty may not be reducible to the conscious intentions or specific expectations of the treaty drafters.[44] Instead, the object and purpose of a treaty may be to respect, protect, or promote a value or principle, the content and implications of which the drafters only partially understood. For this reason, parties to a treaty may not know the full extent of the commitments they undertake. On the other hand, they know that the full extent of their commitments will be determined by the object and purpose that they endorse. That seems like a fair exchange. The ordinary meaning of treaty terms in their context may remain ambiguous, vague, incomplete, or inconsistent. The treaty's object and purpose resolve such indeterminacies, not necessarily in the ways that parties anticipate, but always in light of the values and principles they endorse. Or so Robinson might argue.

To sum up, under the law of treaties, deontic analysis is likely not a form of contextual analysis, but may be a form of purposive analysis. Deontic analysis may unpack or reveal the full content and implications of a treaty's object and purpose. On this view, the law of treaties would make legal facts depend partly on moral facts, rather than on linguistic facts or other social facts alone.

Customary international law raises even harder problems for Robinson. The orthodox view, recently reaffirmed by the International Law Commission (ILC), holds that the existence and content of customary rules is entirely determined by general state practice accepted as law, that is, by social facts rather than moral facts.[45] On this view, deontic analysis cannot reveal the contents of customary rules.

Some scholars argue that the existence and content of customary rules is at least partly determined by the moral judgments of states that a rule ought to be the law.[46] But even on this view, it seems that moral beliefs rather than moral facts determine legal facts. Moreover, the contents of moral beliefs are discovered empirically and not through deontic analysis. Finally, some scholars argue that the existence and content of customary rules are determined in Dworkinian fashion, by the moral principles that best fit and justify state practice.[47] But it is unclear that this Dworkinian view is accepted by the legal system, as inclusive legal positivism

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43. *See generally* Isabelle Buffard & Karl Zemanek, *The "Object and Purpose" of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT'L & EUR. L. 311, 324–25 (1998) (discussing object and purpose as an element of treaty interpretation).

44. *Id.*

45. Int'l Law Comm'n, Rep. on the Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/73/10, at 124 (2018).

46. *See, e.g.*, John Tasioulas, *Customary International Law: A Moral Judgment-Based Account*, 108 AJIL UNBOUND 328, 328–33 (2015) (outlining the moral judgment-based account of customary international law).

47. *See, e.g.*, Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 774–88 (2001) (drawing on Dworkin's interpretivist theory).

requires. This Dworkinian view is best defended on Dworkinian grounds, based on a general theory of law's essential point or function.

Finally, on the orthodox view, currently under consideration by the ILC, the existence and contents of general principles of law are determined by the general recognition of states, that is, by social facts.[48] Of course, states may generally recognize a legal principle that is inspired by a moral principle. Nevertheless, the contents of the legal principle appear to be what states recognize as its contents, not what deontic analysis reveals as the contents of the corresponding moral principle. Robinson suggests as much when he contrasts the inductive method of identifying general principles of law with deontic analysis of moral principles.[49]

All in all, it seems that Robinson will have some difficulty explaining the legal relevance of deontic analysis in inclusive legal positivist terms. If it is part of the object and purpose of ICL treaties to respect deontic principles, then purposive interpretation of these treaties may require deontic analysis. But it may be hard for Robinson to show that international law accepts that moral facts partly determine the legal contents of customary ICL rules, or general principles of criminal law.

Perhaps Robinson should simply lean into his apparent Dworkinian sympathies. Before doing so, there is one more jurisprudential approach he might consider.

III. EXCLUSIVE LEGAL POSITIVISM

Exclusive legal positivism is the view that moral facts cannot determine legal facts or the contents of legal rules.[50] Legal facts are grounded in social facts, and only social facts can determine the contents of legal rules.[51] When the law appears to incorporate moral values, principles, or concepts, in reality the law is directing legal actors to engage in nonlegal moral reasoning and make legal decisions based on nonlegal moral considerations.[52] These legal decisions, which are social facts, may then have legal effects.[53]

Robinson suggests such a view when he writes that:

> [W]e apply coherentism on two levels: in legal reasoning and normative reasoning. Legal reasoning is a special form of reasoning, distinct from other practical or normative reasoning, because it circumscribes the relevant sources and the permissible argumentative moves. I believe that legal reasoning is nonetheless coherentist. We seek the best reconciliation of all of the types of consideration that are recognized in legal analysis: text, context, objects and purposes, coherence with surrounding legal

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48. *See* Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Rep. on General Principles of Law*, ¶ 2(c), U.N. Doc. A/CN.4/741 (Apr. 9, 2020) (noting agreement that recognition is essential for the existence of a general principle of law).

49. ROBINSON, *supra* note 1, at 87.

50. *See, e.g.*, Andrei Marmor, *Exclusive Legal Positivism*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 104, 104 (2004).

51. *Id.* at 110.

52. *Id.* at 117.

53. *Id.*

norms, pertinent precedents, and general principles.[54]

In contrast, Robinson writes that "we also use a coherentist method in our normative reasoning, including in our deontic analysis . . . . We draw, among other things, on normative arguments, moral theories, and our intuitive reactions to try to form models that reconcile experiences and beliefs to the best extent possible."[55] These passages suggest that deontic analysis is a form of normative reasoning, not a form of legal reasoning as such.[56] This fits well with the exclusive legal positivist claim that legal facts are determined by social facts alone, never by moral facts discoverable through normative reasoning.

Nevertheless, legal analysis may require deontic analysis, as Robinson insists. Indeed, ICL seems to require judges to base their sentencing decisions on nonlegal, moral considerations. The Rome Statute and the Rules of Procedure and Evidence (Rules) seem to require judges to consider a subset of moral reasons at sentencing. The Rome Statute requires judges to "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."[57] Plausibly, judges must take into account the *moral* gravity of the crime and the individual circumstances of the convicted person that bear on their *moral* culpability. The Rules provide that "the totality of any sentence . . . must reflect the culpability of the convicted person," again requiring judges to sentence based on a subset of moral considerations.[58] The Rules further require judges to "[b]alance all the relevant factors, including any mitigating and aggravating factors . . . " again requiring judges to engage in moral reasoning in order to make a legal decision.[59] Finally, the Rules provide that "[l]ife imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person . . . ."[60] In context, "justified" seems to mean "morally justified."

In each provision, the law limits the moral reasons that judges may consider to those bearing on individual culpability. But the law does not create the moral reasons that it requires judges to consider. The law directs judges to look outside the law, to moral facts, and make a legal decision on the basis of nonlegal, moral considerations. Robinson could easily argue that the law requires sentencing judges to engage in deontic analysis. The exclusive legal positivist would simply insist that such deontic analysis is not, strictly speaking, legal analysis. Instead, deontic analysis is nonlegal analysis that the law itself requires.

Throughout his book, Robinson insists that judges should engage in deontic analysis when interpreting modes of criminal responsibility, most notably command

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54. ROBINSON, *supra* note 1, at 226–27.

55. *Id.* at 227.

56. Robinson distinguishes between legal analysis and moral analysis in other passages as well. *See, e.g.*, *id.* ("We seek the best reconciliation of all of the types of consideration that are recognized in legal analysis: text, context, objects and purposes, coherence with surrounding legal norms, pertinent precedents, and general principles.").

57. Rome Statute, *supra* note 38, art. 78(1).

58. INT'L CRIM. CT., RULES OF PROCEDURE AND EVIDENCE r. 145(1)(a) (2019), https://www.icc-cpi.int/resource-library/Documents/RulesProcedureEvidenceEng.pdf.

59. *Id.* r. 145(1)(b).

60. *Id.* r. 145(3).

responsibility. Presumably, Robinson thinks judges should engage in deontic analysis when interpreting crime definitions as well. If a legal standard includes a moral term—like "justified" or "excessive"—then the law requires judges to look outside the law, make a moral judgment about the term's proper application, and, on that nonlegal basis, make their legal decision. Or so an exclusive legal positivist would argue.[61]

Under the Rome Statute, command responsibility requires that a military commander failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of international crimes.[62] In the *Bemba* case, the Appeals Chamber found that the prosecution failed to prove that the measures that the defendant failed to take were reasonable.[63] Robinson commends the judges for engaging in deontic analysis, though he questions their conclusion.[64] Robinson might argue that "reasonable" is a moral term. The Rome Statute therefore requires judges to look outside the law, engage in deontic analysis, make a moral judgment about the reasonableness of the measures Bemba failed to take, and on that nonlegal basis, make their legal decision to sustain or overturn his conviction.

Similarly, under the Rome Statute, command responsibility requires that a military commander knew or should have known that forces under their control were committing or about to commit crimes.[65] Robinson argues that judges rightly interpret "should have known" to include inadvertent negligence.[66] Plausibly, "should have known" is a moral term. The Rome Statute therefore requires judges to look outside the law, engage in deontic analysis, make a moral judgment about whether a commander should have known of crimes of which they were inadvertently negligent, and on that nonlegal basis, make their legal decision to acquit or convict.

More controversially, Robinson argues that judges should engage in deontic analysis in order to interpret and apply apparently causal terms.[67] Under the Rome Statute, command responsibility requires that the crimes at issue were committed "as a result of" the military commander's failure to exercise control properly over their forces.[68] Robinson argues, partly on deontic grounds, that judges should consider this causal contribution requirement satisfied if the commander's failure

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61. ROBINSON, *supra* note 1, at 14–16.

62. Rome Statute, *supra* note 38, art. 28(a)(ii).

63. *See* Prosecutor v. Bemba, ICC-01/05-01/08A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute," ¶ 184 (June 8, 2018), https://www.icc-cpi.int/CourtRecords/CR2018_02984.pdf (acquitting Bemba of charges of crimes against humanity and war crimes).

64. ROBINSON, *supra* note 1, at 272–81.

65. Rome Statute, *supra* note 38, art. 28(a)(i).

66. *See* ROBINSON, *supra* note 1, at 202–05, 208 n.66, 219–20 ("Some scholars and some systems (e.g. Germany, Spain) distinguish between "advertent" and "inadvertent" (or 'conscious' and 'unconscious') negligence, depending on whether the accused was aware of the risk to others.").

67. *Id.* at 191.

68. Rome Statute, *supra* note 38, art. 28(a).

aggravated or elevated the risk that the crimes would occur.[69] Robinson argues that ICL adopts a normative conception of causation, rather than a naturalistic conception of causation.[70] Robinson would likely argue that, in ICL, causal terms are at least partly moral terms. Accordingly, ICL requires judges to make nonlegal, moral judgments of "causal" responsibility and make legal decisions on that basis.

Exclusive legal positivists often argue that whenever source-based legal analysis runs out, leaving the content of legal rules vague, ambiguous, incomplete, or inconsistent, judges are legally permitted and morally required to resort to moral reasoning to decide the case before them. The argument proceeds roughly as follows.

Judges are human beings. As human beings, judges are always subject to moral norms, including deontic principles.[71] Judges always have moral reasons not to convict or sentence a defendant absent culpability, or out of proportion to desert.[72] These moral reasons exist and apply independently of any applicable law.[73] Judges are legally free and morally bound to act on these moral reasons, at least unless the law says otherwise.[74] If the law says otherwise, then judges may face a moral conflict between their moral reasons to follow the law and their moral reasons to not convict the innocent or punish out of proportion to desert.[75]

Importantly, such a moral conflict arises when the law is clear, unambiguous, and otherwise determinate. When the law is vague, ambiguous, or otherwise indeterminate, it is at least arguable that no such conflict arises. In these cases, the law does not say one thing while morality says another. It is not clear what the law says. Judges therefore remain legally free to base their legal decisions on their moral reasons. For example, judges may acquit a non-culpable defendant for moral reasons, any time the crime definition or mode of liability leaves it indeterminate whether or not the defendant is legally responsible for a crime. The exclusive legal positivist would simply insist that judges in such cases necessarily switch from legal reasoning to moral reasoning when legal reasoning reaches a dead end.

While this approach seems plausible, it may not help Robinson. As Robinson observes, when legal analysis leaves the definition of a crime or (presumably) mode of liability ambiguous or obscure, the rule of lenity requires acquittal.[76] The rule of lenity leaves no room for deontic analysis. If deontic analysis favors acquittal, then the rule of lenity renders it superfluous. If deontic analysis favors conviction, then the rule of lenity precludes judges from acting on it. For deontic analysis to play a

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69. ROBINSON, *supra* note 1, at 190–91.

70. *Id.* at 179, 269.

71. *See* Joseph Raz, *Incorporation by Law*, 10 LEGAL THEORY 1, 2–3 (2004).

72. *Id.* at 6–9.

73. *Id.*

74. *Id.*

75. *Id.*

76. ROBINSON, *supra* note 1, at 130–32. Robinson does not fully endorse the rule of lenity, in part because he thinks it too easy to evade. Strained source-based analysis or "maximal" teleological analysis can always be used to claim that the law is not so ambiguous as to trigger the rule of lenity. Be that as it may, the point here is that, if deontic analysis is not a form of legal analysis, then deontic analysis cannot be used prior to applying the rule of lenity, let alone in order to evade the rule's application.

meaningful role in ICL interpretation, it must be a form of legal analysis, in which judges must engage before turning to the rule of lenity. As we have seen, exclusive legal positivism denies that deontic analysis, or any other form of moral reasoning, is a form of legal analysis. If exclusive legal positivism is true, and the rule of lenity operates as it seems, then Robinson cannot make much use of this line of argument. Robinson will instead have to identify fairly specific points at which ICL requires judges to switch from legal analysis to moral analysis, from legal interpretation to moral judgment, and make legal decisions on nonlegal moral grounds.

IV. CONCLUSION

Legal analysis in ICL requires deontic analysis, according to Robinson. In particular, judges must engage in deontic analysis when they interpret and apply the law in the criminal cases before them. The jurisprudential basis of these claims is unclear. While Robinson need not settle longstanding debates between naturalists and positivists, or among positivists, he should give judges some explanation of why they should engage in the form of deontic analysis he defends.

On balance, Robinson most likely favors a form of Dworkinian naturalism, according to which legal analysis necessarily includes deontic analysis because legal analysis necessarily aims to morally justify coercion and punishment in light of past institutional decisions. This view is highly controversial, of course, but it both fits Robinson's coherentism and potentially justifies his main substantive claims.

Robinson shows some affinity for inclusive legal positivism, according to which legal analysis contingently includes deontic analysis to the extent that a given legal system accepts. The law of treaties may permit deontic analysis as a component of purposive analysis, if and when a treaty's purposes include respecting or protecting moral principles. In contrast, it is hard to find a place for deontic analysis within the dominant understandings of customary international law and general principles of law.

Finally, Robinson occasionally gestures at a form of exclusive legal positivism, according to which legal analysis permits or requires moral analysis, not as a form of legal analysis, but as a nonlegal basis for legal decision-making when legal analysis runs out. On this view, ICL may require deontic analysis at sentencing as well as in the application of moral terms in the definitions of crimes and modes of liability. However, the rule of lenity seems to preclude resort to nonlegal considerations, including deontic analysis, in the interpretation and application of non-moral terms, even when conventional legal analysis leaves the content of legal rules ambiguous or obscure.

Robinson begins in the middle. He may resist anchoring himself to a single foundational jurisprudential theory. He may argue that his central claim—that legal analysis in ICL requires deontic analysis—is consistent with naturalism and positivism. And perhaps he would be right. Perhaps judges and scholars of various comprehensive jurisprudential views will converge on an overlapping consensus supporting his approach to deontic analysis in ICL. But perhaps not. Perhaps Robinson will discover that his view is inconsistent with some jurisprudential views, or consistent with only one. Perhaps Robinson will follow his web of available clues far enough that he will end at the beginning.