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Reply to Mr Mackie

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REPLY TO MR MACKIE

I thank Mr John Mackie for his helpful comments. In general, I accept his summary of my main theses at the beginning of his comments. I will take up his criticism point by point. In this response, the Arabic numerals correspond to the same sections in Mr Mackie's comments.

2. I cited the cases of *Butterfield* v. *Forrester* and *Maki* v. *Frelk* to illustrate a point. I noted that the court in the second case – the Illinois Supreme Court in 1968 – followed the so-called rule of *Butterfield* v. *Forrester* that contributory negligence is a complete bar, even though the latter rule may well be the harshest doctrine known to the common law. I suggested that one likely explanation for the Illinois court's adherence to this doctrine was that some of the judges of the Illinois court may have harbored a working conception of the law as pre-existing rule and have become obsessed with this notion. Mr Mackie does not deny this possibility, yet it was the main point of my illustrative use of these cases.

I was not, at this point, using the illustration to show the possible "demerits of a rule conception of law *in general.*" Of course, it is partly by assembling such particular instances that one might show such "demerits in general." Mr Mackie says that it is "prejudicial and unfair of [me] to use as [my] one example a bad, excessively simple, old, and largely abandoned rule." I agree that the rule is bad, but this in fact supports me, for it indicates that something of importance is at stake. I agree that the rule is excessively simple, but we have many such simple rule formulations in the books, a state of affairs attributable in part, I believe, to an excessive rule-mindedness – to over-reliance upon a "rules" working conception. I concede that the so-called rule of *Butterfield* v. *Forrester* is largely abandoned today. Its abandonment by any

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form of legal action has been exceedingly slow, however. Only four American states abandoned it by judicial action (and no English court did so). It remains very much alive in some American states. Yet it has been said that we are talking here of the harshest doctrine known to the common law.

3. Mr Mackie says that he finds some obscurity in my notion of a working conception. He asks: "Is it a conception of the legal system as a whole, or a conception of the job of a court of law?"

A working conception as I conceive it is neither a conception of the legal system as a whole nor a full conception of the job of a court of law. It is a conception a judge holds of some "recurrent normative phenomena of the law." I repeat the list of features (all of which may recur in cases for decision) I gave in my paper:

(a) pre-existing rules,
(b) actual reasons for those rules,
(c) equities between the parties outside any relevant rules,
(d) discretionary judgment (including that involved in the overruling or modification of precedent),
(e) the bearing of ideas of justice and the common good characteristically found in some forms of law,
(f) the general dictates of reasons, including "goal" reasons and "rightness" reasons, relevant to the justification of judicial decisions, and
(g) fiat.

I have singled out a rule conception as a viable judicial working conception. (It derives partly from the rules feature.) I have singled out a reason conception in this way, too. I do not claim that there is a corresponding viable working conception for all features on this list, however. Note that all phenomena on the list may be classed as justificatory resources – resources by reference to which a judge may, as appropriate, decide a case. (Note, too, that I am not saying that a judge who holds a "rules" working conception must believe that the whole of the law consists of a fixed body of pre-existing rules.)

Mr Mackie also refers to a working conception as "the best description of the job of each court in each particular case." But this,

too, is not my characterization. The best description of the total job of a judge would include taking into account (appropriately) all recurrent general phenomena of the law – all justificatory resources – that bear on the case. In my scheme of thought, a working conception is a conception of one type of such phenomena considered in some appropriate sense to be primary.

Mr Mackie suggests that a conflict between working conceptions cannot arise if the rival conceptions are of the legal system as a whole. In my view, however, a conflict is possible even if the conceptions are of the legal system as a whole. It will not do (as Mr Mackie seems to try to do) to legislate away any possibility of conflict between working conceptions of the law *as a whole* by hypothesizing a system in which the only function of courts is to apply rules made by a legislature duly concerned with reason. I did not, however, pursue this in my original paper, for there I address rival working conceptions of general features of legal phenomena that recur in cases and bear on the decisional and justificatory tasks of judges.

4. Contrary to one of my theses, Mr Mackie says that a working conception with its narrow focus on some recurrent general feature of legal phenomena is not a pragmatic necessity for most judges. He says judges can and should be aware of *all* recurrent general phenomena of the law when deciding cases. Now, I do not deny that a judge can and should be *aware* of all the various types of justificatory legal resources that the case involves. I do not support my pragmatic necessity thesis on the ground that a judge cannot be aware of all such phenomena. Nor do I (any longer, at least for now) try to support that thesis on the ground that a judge can cope with only one kind of recurrent general feature of the phenomena at a time. (It may be that he could simply take each feature as it comes, so to speak.)

I will now briefly try to support the pragmatic necessity thesis with something new, though I confess that I cannot myself get hold of it very well, and in the end it may not do. There is more to the story than the illustrative list of recurrent general features of legal phenomena I have set forth. There is also a problem of the

relation between these phenomena. I believe the adoption of a working conception signifies an assignment of primacy to the feature involved in light of such factors as its authoritative place within the system, its intrinsic justificatory significance, the regularity of its recurrence, and so on. It is not for nothing that a judge has a working conception. Such a conception enables him to cope far more readily (and more efficiently) with the complexity of the relations between instances of legal phenomena that recur in the cases. It provides a kind of tentative "fix" or ordering of those relations which he may bring to each case. Thus if he harbors a rule conception this signifies that he accords a kind of provisional primacy to rules as justificatory resources compared to the other recurrent general phenomena of law. He assumes that this fix or ordering serves him well. It may even seem to "decide" a high proportion of cases for him. A judge without any such (rule or other) working conception is left to work out this matter of primacy *ad hoc* in each case. Of course, for the above-average or unusually gifted judge, this may not prove a difficult matter. But for many judges it may not be too much to say that a working conception is, on the foregoing ground, a pragmatic necessity. This is all I now have to offer to support the pragmatic necessity thesis, and I agree that the matter calls for further exploration.

But let us suppose I am wrong that a working conception is a pragmatic necessity for most judges. If my interpretation of the evidence is correct, it nonetheless remains true that many judges do in fact approach the decision of cases with a working conception in mind. If this be so, then it remains important to inquire into the nature of these conceptions and into whether there are grounds for preferring any one possibility (including ones I have not considered here).

Note that judicial reliance on working conceptions might be *explained* on a variety of bases: the simple truth that certain types of justificatory legal phenomena tend to be more recurrent than others; the normative predominance of some phenomena over others; deep psychological leanings, e.g., the desire for the certainty that rules seem to bring, etc. Note that Mr Mackie assumes that

on my account of the matter only one feature of relevant legal phenomena is *ever* brought into focus – that embodied in the working conception. But I stated in my paper that this is not so. The feature that the working conception brings into focus may be dispositive of the case, but then it may not be, too. And the judge may end up focusing on other justificatory phenomena. Thus I am not saying we must ultimately choose between a *system* of rules and a *system* of reason. I am saying there are different possible working conceptions and that one may be preferable to others.

5. Mr Mackie thinks that if I opt for his proposed interpretation of my allegedly ambiguous claims, namely, that a working conception must be addressed not to the legal system as a whole but to a feature of recurrent legal phenomena from the point of view of a particular court, then this interpretation will fail, as he puts it, to fit other parts of my text. His proposed interpretation is in fact the one I intend. And my text is not inconsistent.

In another part of my text I contended that a working conception of the law as reasoned reconciliation of conflicting considerations meets one of the criteria for a viable working conception, namely that its scope and potential applicability to particular cases is sufficient. I went on to say that this conception may even be the most wide-ranging of candidates. But I fail to see how this is inconsistent with construing my working conception as addressed to a feature of recurrent legal phenomena from the point of view of a court in particular cases. On the contrary, if some degree of reasoned reconciliation were not a sufficiently common feature of the materials that judges confront from case to case, it could hardly serve as a viable working conception. Thus when I say that the reason conception is wide-ranging, I do not mean that *it* is actually a conception of the system as a whole. I am, for one thing, saying that it ranges over – is applicable in some way to – other recurrent features of legal phenomena relevant in cases for decision. For example, it figures in rules and exceptions thereto. It figures in exercises of discretion. It figures in the formulation and application of equitable ideas, and so on.

A reason conception is wide-ranging in a further yet related way without being what Mr Mackie calls a conception of the system as a whole. Unforeseen considerations are always cropping up in particular cases. On the reason conception, the judge is a kind of sentry whose duty it is to "be there" to take appropriate account of such considerations.

A reason conception is wide-ranging in the still further sense that it ranges over highly varied institutional, processual, and other sociological structures of the law. This, too, is not to be equated with a conception of the system as a whole.

Finally, a reason conception is wide-ranging in the sense that it is not confined to the law's experience with any narrow class of social relations.

6. Under the heading of "Comparative Serviceability," I argued in favor of a reason over a rule *working* conception on the ground that the reason conception is more congenial to a rationale-oriented method of interpreting legal materials. I do not stop to go into the complexities of interpretation, but Mr Mackie, unlike a great many English and American judges of the past, agrees with me that a reason conception is more congenial in this way. But he says *if* I allow that a rule conception may also include the reasons for the rules then there is really no ground here for choosing the reason conception over this (more sophisticated) rule conception, and he notes that I acknowledge that one rival in the field is in fact a "rule with reasons" working conception.

To this I have two responses. First, I believe that a significant proportion of judges who appear to harbor a rules working conception simply do not incorporate into their conception the actual reasons for the rules as well. Thus, in regard to such judges, the difference between the two conceptions, and my ground for preferring the reason conception, remain real.

Second, it is not clear to me that if a rule conception also incorporates the actual reasons for those rules, then the reason conception and the rule conception must necessarily collapse into one another (in this respect). For example, a judge who works with a

"rule with its reasons" conception may believe that, if the evidence as to reasons is ambivalent (as it not uncommonly is), he may either fall back on the merely literal import of the language of the materials or may regard himself free simply to substitute his own personal views. On the other hand, neither of these possibilities follows from harboring a reason conception as such.

Moreover, there is, beyond ambivalence of actual reasons, a further matter. A rule plus its actual reasons even when not ambivalent is still not to be equated with a reason conception. The possible available reasons may go beyond or be different from those embodied in the rule or "attached" thereto. On the reason conception, the judge would be more readily led to these and thus be more inclined to discard the rule (rather than adhere to it, as in *Maki* v. *Frelk*). Or there might be new and better reasons for the rule than its original ones. On a reason conception, the judge would more readily resort to these (as he should). Not only would this be likely to lead him to uphold the rule; it might also enable him to interpret and apply it better, in light of these new and better reasons.

I argued in my original paper in favor of a working conception of the law as a reasoned reconciliation of conflicting considerations on two further grounds: (1) much pre-existing law does not consist of rules; and (2) often there is no relevant pre-existing law so that it must be made up in light of reason as we go along. Now, Mr Mackie says that these two grounds "seem incompatible." He seems to assume that if I allow for any general type of pre-existing non-rule law, this may somehow commit me to the proposition that *all* the law pre-exists for all possible cases, and that therefore there cannot be any genuinely new issues, any actual "cases of first impression" (as lawyers say), or the like.

But I do not see why this should be so. Let me take merely one type of example familiar to lawyers. Case law as well as statute law sometimes confers broad discretion to be exercised by judges on a case-by-case basis in light of criteria at least partially specified. I call this non-rule law, although specific rules may over time emerge from some of the exercises of discretion. Yet even within

the fields that such non-rule law addresses, relatively novel issues may arise for which, in my view, this non-rule law provides no determinate solutions. But for my point to hold, it is enough that such issues may arise outside these fields, too.

I think I know what influences Mr Mackie here. A contemporary legal philosopher known to him (and to me) has ably contended that there are forms of non-rule law that "occupy the whole" and thus predetermine (and uniquely so) very nearly all questions. But it is enough for my purposes to note that there are various forms of non-rule law, some of which are not of this allegedly all-encompassing character.

The contemporary legal philosopher to whom Mr Mackie alludes sees the law as almost wholly pre-existing (and uniquely determinative at that). Mr Mackie takes me to task for not addressing this view as a possible working conception. In defense, let me say this. My own topic grew out of my work with judges in "continuing judicial education seminars," as they are called in America. At no time, in a substantial number of those seminars, did I ever encounter a judge who appeared to hold as a working conception the view that for almost every issue that arises there is almost always controlling pre-existing law, and law that provides a single right answer at that. At the same time, it is a rare judge who holds that judges do not and ought not to make any law. Even the most conservative judges readily recognize that they sometimes must and do *make* law; for law may have to be remade because originally in error or now obsolete, law may be conflicting and thus call for choice, issues of first impression arise, and so on. On the other hand, I have in those seminars met many judges who, it seemed to me, hold one or the other of the two basic working conceptions I address in my paper. Of course, I concede that the best working conception for the usual judge might be something different from either of these. I really only wanted to consider these two widely held ones (if I am right on my facts). I suspect, too, that the contemporary legal philosopher to whom Mr Mackie alludes would not be happy to have his stimulating and instructive theory downgraded to the status of a mere working conception.

(I add, for the record, that my conception of "goal reasons" is not to be equated with "public policy reasons" and thus my "goal reasons" are not severely restricted in their scope in the way "policy reasons" may be.)

7. Under the head of "normative side effects" I set out to explore what some of the side effects of harboring one working conception rather than another might be, and to consider whether one is preferable to the other on this score. I suggested that rule-minded judges will tend to go in for rules as such and that reason-minded judges will tend to go in for reason as such. I tried to put the general case for the importance of rules as strongly as I could and I tried to do the same for the importance of reason.

Mr Mackie says that in this part of my paper I put the cart before the horse. He says that "Prior to the question 'What working conception will be best for the judges to have?' is the question 'What sort of a legal system do we want to have?'" Now I am not sure what, if anything, is at stake here. I agree with Mr Mackie on the priority question. But I do not see how it would follow from this that I have put the cart before the horse. My topic is working conceptions of "the law," and *in the course of* treating it, I have (partially) addressed Mr Mackie's prior question.

Now we turn to more substantive matters, but still under the heading of the comparative value of the rule conception and the reason conception in light of what I call normative side effects.

First, there is a point of some importance on which Mr Mackie appears to have misunderstood me, though this may be my fault. He suggests that I advocate a system in which the law consists largely of *ad hoc* reasoned reconciliations by particular courts with few or no rules. But I do not say this. What I do say is that *if* judges generally harbor a reason conception, this is likely to bring more reason into the law's content than would be the case if judges generally harbor a rule conception. Judges working with a reason conception would, among other things, be constantly looking for opportunities to bring substantive reasons to bear both within and beyond the province of pre-existing rules. This would

be one general ground for preferring a reason conception. But in saying this I am not committed to favoring a *system* of law that consists solely of *ad hoc* reasoned reconciliations of particular courts. Nor does it follow that a reason conception carried to its logical end would give us a system of law consisting solely of *ad hoc* single-instance reconciliations. It just is the reasonable thing, for example, to have some rules, and reason will show us that too.

Second, there is a further and related point of some importance on which Mr Mackie seems to have misunderstood me, though again this may be my fault. He suggests that I think "the best way to get reasoned content into the law as a whole is to encourage particular courts to work mainly by explicitly trying to reconcile conflicting considerations for themselves." Again, I did not say this. I said we are likely to get more substantive reason out of a reason conception than out of a rule conception as such. I speak here only of *working* conceptions. A working conception (used rationally) leaves a place for *all the phenomena* of the law, including rules.

Third, let me say straightaway, however, that if I were faced with the false choice between what Mr Mackie calls a *system* consisting "largely of fairly stable rules" on the one hand, and a system consisting "largely of *ad hoc* reasoned reconciliation by particular courts" on the other hand, I would, *without knowing more*, be inclined to opt for the latter. Fairly stable rules may be utterly devoid of rightness and goodness. It is, I think, somewhat more implausible to suppose that *ad hoc* reasoned reconciliations by particular courts may be similarly devoid of rightness and goodness. Let us not assume that everyone is morally haywire. Let us take Anglo-American societies. One (but not the only) argument for my position here would be that, in such a society with a legal system consisting of *ad hoc* reasoned resolutions, each decision would have to be publicly justified on its own terms. Comparable problems governed by rule would all be settled in advance in one relatively short rule-creative moment. Such "rule" law would thus not be continuously tested case after case. Yet we know that, among other things, law becomes obsolete as social conditions

change. Processes of *ad hoc* reasoned reconciliation stand ready to take account of such factors. Furthermore, a bad *ad hoc* decision is confined in its effect to the parties at hand; not so, a rule. But of course, as I have said before, no choice is required between a system obsessed with rules and one obsessed with reason. I have pursued this merely because Mr Mackie seems quite certain that, as between the two, a "rule" system would be preferable.

Fourth, I suspect Mr Mackie and I do differ in our perceptions of the need to improve the quality of substantive law through the injection of reason (by whatever means). He suggests I would be hard pressed to find very many examples of bad law (whether in rule form or other). He notes twice in his comments that I cite only one example of bad law and notes that I admit that even that one is now being overhauled. Without undertaking the tedious task of citing chapter and verse, let me assure him that at least in America the law is not so well off as all that. This is not to say that very much of it is now evil (though that, too, was so only a very few years ago). It is to say that, through reason, there is considerable scope, in America at least, for the improvement of the substantive law.

8. Mr Mackie says it would "be better to ensure, as far as possible, that judges do not become obsessed with any working conception, than to speculate about which conception, if they do become obsessed with it, will do less harm." With this much I agree. But it does not follow that it is of no importance so to speculate. If I am right, judges do become obsessed with their working conceptions (I note that philosophers write about rule worship). It is not evident to me that the consequences of these obsessions may not vary significantly, depending on the conception involved. I know of no way to prevent obsessions, but it may be possible to induce judges to opt for the working conception that causes the least havoc when it is known that some proportion of judges will become preoccupied with whatever working conception they happen to hold.

In conclusion, I want to address briefly an important assumption I find running through Mr Mackie's comments. The theme is that in the best justified division of legal labor in a modern system of law, rules are to be made and changed largely by the legislature and only occasionally (and then only "perhaps") by the highest courts. If this be assumed, then what Mr Mackie says against my position in his Section 7 may be somewhat more plausible. But again I am not ready to grant Mr Mackie his assumption about the best division of legal labor. First, there is always genuine scope for common law. (Where, incidentally, did it come from?) Many lawyers, liberal and conservative, would even agree that some kinds of matters are better left to judges than to legislatures. It strikes me as far from obvious that the work of legislatures is generally well reasoned and defensible, or even that it is regularly better in quality than law made by judges. Moreover, I do not see why all judge-made law must be viewed as undemocratic. Second, I have always found it difficult to understand why in recent times there should have been, in the English system, such unwillingness to overrule precedent. The common law is not always sound when made. I do not think *Butterfield* v. *Forrester* was rightly decided at the time. Moreover, change takes its toll even on common law which was sound when made. Why should not the courts have responsibility for some – perhaps most – genuine common law renovation that does not pose controversial issues on which political parties divide (and that would otherwise be appropriate)? And would the House of Lords be able to do a better job in such cases if it had before it arguments pro and con from the courts below? Of course, there are many complexities here, and I have been able to touch on only a few of them.

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