Juridical Bivalence and The Rule of Law

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ABSTRACT

The principle of juridical bivalence is often taken to be an unquestionable truth about the general structure of the law. According to this principle, legal standards should be thought of as either applying or not applying in a given situation; and so, the claims and assertions of courts ought to present themselves in a similar bivalent form. Courts must deem a party guilty or not guilty, liable or not liable. This paper questions that assumption. Instead, I argue that we should put the principle of juridical bivalence under close scrutiny, for following a proper analysis of this principle, it quickly becomes evident that juridical bivalence is not as ubiquitous in law as first assumed, and moreover, if one is guided by rule of law ideals, juridical bivalence should be given a limited place in law.

As part of a wider intellectual project, I begin this paper by providing an elucidation of juridical bivalence as a structural principle of law. I then introduce its counterpart: the principle of juridical gradience. With this sharpened picture of legal structure in mind, I argue that the principle of juridical bivalence often comes into conflict with the rule of law. Ultimately, the objective of this paper is to put juridical bivalence in its place and open up a discussion on other alternatives for legal structure that may better comply with rule of law ideals.

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I. INTRODUCTION

A legal system which abides *solely* by the principle of juridical bivalence would be one that makes no allowances for mitigating and aggravating factors; nor for the adjustment of remedies and sanctions. It would also be a legal system that makes no distinction between different legal claims and the degree of seriousness of, say, an offense or loss incurred, and so the system would only allow for a single type of judicial proceeding. English history is well acquainted with a world where juridical bivalence rules. Such a world, Eighteenth century England to be more precise, was regulated according to what has come to be known as the "Bloody Code."[1] The Waltham Black Act 1722 laid out over 200 criminal offenses which, when breached, were to result in the death penalty (regardless of any variation in the degree of seriousness of the offences laid out in the Act).[2] If

1. "The English criminal justice system of the eighteenth century was incoherent and inconsistent. One problem was that punishments were not meted out according to a varied scale. . . . Originally, few offences were punishable by death in the English legal system. The Capital Code then gradually grew until by the end of the Restoration period it included about 50 offences. However, it was not known as the Bloody Code until later. In the period 1688 to 1765 the number of capital crimes more than tripled to 160, and by 1815 it comprised 225 offences." *See*, *e.g.*, E. HELLMUTH, TO MAKE SENSE OF THE SENSELESS: THE REPRESENTATION OF CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY *Proceedings/ Anglistentag 1995 Greifswald* 45-58, 52 (J. Klein and V. Dirk eds., 2016).

2. Section I of The Black Act 1723 (9 Geo. 1 c.22) (my italics):

> For the preventing which wicked and unlawful practices, be it enacted by the King's most excellent Majesty . . . . That if any person or persons, from and after the first day of June in the year of our Lord one thousand seven hundred and twenty-three, being armed with swords, fire-arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been or shall be usually kept, or in any warren or place where hares or conies have been or shall be usually kept, or in any high road, open heath, common or down, or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, or unlawfully rob any warren or place where conies or hares are usually kept, or shall unlawfully steal or take away any fish out of any river or pond; or if any person or persons, from and after the said first day of June shall unlawfully and wilfully hunt, wound, kill, destroy or steal any red or fallow deer, fed or kept in any places in any of his Majesty's forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed, where deer have been or shall be usually kept; or shall unlawfully and maliciously break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed; or shall unlawfully and maliciously kill, maim or wound any cattle, or cut down or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard or plantation, for ornament, shelter or profit; or shall set fire to

anything, a system of this kind—one that does not provide for proportional responses to the acts it criminalises, thereby enforcing excessively harsh penalties, and fails to make any distinction between the degree of seriousness of wrongs—is a system that goes contrary to reason and is an obvious example of injustice. The Bloody Code is an example of a piece of legislation that is blind to nuance, and can be said to be an instance of a legal regime which has *too much* juridical bivalence. To be clear, a system with too much juridical bivalence (and thus with little space for juridical gradience) need not be one where the penalties or sanctions are excessively harsh. If one were to get a slap on the wrist for any offence (from murder to assault and theft of bread), that, too, would be a problem.[3]

To this day, legal standards are generally formulated and treated in bivalent terms.[4] That is, they are formulated in terms of contradictory predicates.[5] This feature of legal ordering has been called juridical bivalence.[6] According to this principle, every legal norm must be either applicable or inapplicable, and valid or invalid. In this paper, I scrutinize this principle of juridical bivalence,[7] and argue that the rule of law, properly understood, cautions against treating juridical bivalence as a ubiquitous principle in the law. In that vein, I argue that legal regimes with too much juridical bivalence, such as the Bloody Code, are not in compliance with rule of law ideals.[8]

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any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood; or shall wilfully and maliciously shoot at any person in any dwelling-house, or other place; or shall knowingly send any letter, without any name, subscribed thereto, or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person, for any of the offences before mentioned; or if any person or persons shall, by gift or promise of money, or other reward, procure any of his Majesty's subjects to join him or them in any such unlawful act; *every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy*.

3. Indeed, the now mostly old regime of contributory negligence in U.S. law proves problematic, among other reasons, because it was a defense that harshly prevented the claimant to claim any compensation regardless of the degree to which his own negligence caused the injury. "Adoption of comparative negligence has been a response, by either the legislature or the courts, to the often inequitable results produced by the doctrine of contributory negligence." J. E. Smith *et al.*, *Comparative Negligence*, 49 WASH. L. REV. 705, 706 (1974).

4. As Endicott puts it, "It is a consistent feature of legal systems that legal institutions treat legal standards as if their application were bivalent."TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 72 (2000).

5. For a more detailed explanation of how bivalence plays out in language, by way of contradictory propositions, see PIETER A. M. SEUREN, THE LOGIC OF LANGUAGE: LANGUAGE FROM WITHIN 28 (2010).

6. ENDICOTT, *supra* note 4.

7. Whether juridical bivalence is a "legal principle" or a "technical device" of the law, as Finnis describes it in NATURAL LAW AND NATURAL RIGHTS, might be a source of contention. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 280 (2011) I elect to call it a principle, without prejudice to this technical feature of juridical bivalence, for the word "principle" emphasises its structural and well-established importance in legal practice: juridical bivalence is not often questioned, and it is seen as the way in which legal standards are to be presented and applied.

8. Though there may be, in this particular case, an issue of radical injustice (which may be better suited for a substantive discussion on the morality, or lack thereof, of disproportionate responses in law) my focus is on the *form* and *structure* of laws of this kind. My focus is on the principle of juridical bivalence. For a more extensive discussion on whether there is any actual distinction between formal

Fortunately, juridical bivalence is less prevalent than might first be assumed, and so less of a ubiquitous principle than the language—guilty/not-guilty, liable/not-liable—we deploy in law and legal practice might imply. Courts need not always choose between two options. Yet, juridical bivalence does have great importance related to whether the law applies at all. For example, courts must use this principle when ultimately deciding when all the elements of an offences have been satisfied. But this principle has far less force in the context of legal remedies. This is because the award of legal remedies is often done in a graded manner by, for example, adjusting the value of compensation, or the time and particulars of a sentence, according to a relevant criterion, such as the seriousness of the offence or loss incurred.

The ambition of the paper is to introduce the idea that gradience in law can assist with rule of law compliance, rather than serving as a further source of arbitrariness in the law. I do this by demonstrating the ways in which bivalence (i.e., the opposite of gradience) might hinder rule of law compliance in specific contexts. In so doing, I pave the ground to a discussion of alternatives to the principle of juridical bivalence. The alternative I propose is what I call the principle of juridical gradience.

The structure of the paper

The paper is structured as follows. In Section II, I offer an account of the principle of juridical bivalence. I introduce at this stage two fictional legal systems: one displaying a legal order without juridical *bivalence*, and one displaying a legal order without juridical *gradience*. These thought experiments will help elucidate the notions of juridical bivalence and juridical gradience, and thus pave the way for me to argue that, despite its apparent prevalence when one first looks at the form of law, the principle of juridical bivalence can only exist in a good, functioning legal system alongside its complement, juridical gradience. (And to be clear, the principle of juridical gradience can only exist in a good, functioning legal system alongside its complement, juridical bivalence.)

Indeed, as I argue in Section III, once we understand its role in law, it becomes clear that juridical bivalence is necessary, even if it is naturally not sufficient, for law that meets the requirements of the rule of law, which for the purposes of this paper I call "formally good" law. "Formally good" law here meaning, law that is good with respect to certain structural rule of law criteria which concern, as Raz puts it, law's "mode of generation and application,"[9] that make it so that law is "capable of guiding the behaviour of its subjects."[10] To be "formally good," law must be applicable to all, "open, prospective, clear, consistent, stable, capable of being obeyed, . . . upheld by officials,"[11] but also in its application, reasons for a

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and substantive conceptions of the rule of law (or indeed of law), *see, e.g.*, Michael P. Foran, *The Rule of Good Law: Form, Substance, and Fundamental Rights*, 78 CAMBRIDGE L.J. 570, 570–95 (2019).

9. Joseph Raz, *The Law's Own Virtue*, 39 OXFORD J. LEGAL STUD. 1, 2 (2019).

10. JOSEPH RAZ, THE AUTHORITY OF LAW 213–14 (1979).

11. JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL 195 (2012).

decision must be given when necessary in the interests of both procedural justice and enabling law to guide conduct.[12]

If we are to assume that the rule of law is an ideal that represents "formally good" law, at least in terms of *mode*,[13] then, as I will show, the principle of juridical bivalence presents a challenge to the satisfaction of such a key ideal, if over instantiated or unaccompanied by its counterpart. A key ambition of this paper is to shed light on why this is the case. To this end, Section III is where I will discuss some of the disadvantages of treating legal standards as bivalent, to further emphasise the claim that juridical bivalence is not the only mode for law. In particular, the paper will open up discussion on the question of what the place of juridical bivalence as a legal principle should be, in a system that aims to respond proportionally to legal conflicts, promote trust in the legal system and its processes, reduce the scope of vagueness and arbitrariness in the law to the greatest extent possible, and following from this, comply with the rule of law and avoid perpetrating radical injustices. Each of these claims will be defended in more detail. Ultimately, the paper aims to understand and explain an alternative to juridical bivalence and to sharpen our understanding of the proper place of juridical gradience in law and legal structure.

II. REVISITING THE PRINCIPLE OF JURIDICAL BIVALENCE

In this section, I offer an account of the principle of juridical bivalence with the ambition of sharpening our understanding of the principle and its reach. Juridical bivalence is the principle that legal standards are often formulated in bivalent terms; i.e., in terms of contradictory predicates. Once the notion of juridical bivalence has been further elucidated it will become evident that this principle does not always assist with rule of law compliance. On the contrary, juridical bivalence, itself, may at times lead to results that are plainly contrary to the rule of law.

A. The Principle of Juridical Bivalence (and the Place of Logic in the Law)

The notion of bivalence has its roots in propositional logic: *Every meaningful statement must be either true or false*.[14] It follows from this that all meaningful statements must have what logicians call a "truth-value" and that a statement cannot be *both* true and false. The notion of bivalence is a logical notion which has been brought to bear in legal theory to help understand the structure of legal institutions and legal reasoning.[15] That said, allow me to briefly say something about the way in which the above notion relates to the present discussion.

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12. Raz, *supra* note 9.

13. *Id.* at 2.

14. For an articulation of the principle of bivalence in logic, *see, e.g.*, Ian Rumfitt, *Bivalence and Determinacy*, *in* THE OXFORD HANDBOOK OF TRUTH 394 (Michael Glanzberg ed., 2018).

15. *Bivalence* is not the first logical notion to play an important role in legal theory, of course. Much has been written on the topics of consistency and coherence in legal reasoning, which are logical notions themselves, and on the role of the legal syllogism in law. *See*, *e.g.*, NEIL MACCORMICK, LEGAL

The story begins with words most ordinarily thought of as obviously legal,[16] such as *liable/not-liable* and *guilty/not-guilty*. Note that these present in a similar logical form. To be more specific, these four notions present as two pairs of contradictories. The same can be said of the notions *applicable/inapplicable* and *valid/invalid*, which are of equal familiarity to lawyers. We say that two propositions are "contradictories" when it is the case that if we assert the truth of one of the propositions we necessarily imply that the other member of the pair is false.

Put differently, of two contradictory propositions, if one is true the other one is false; the two propositions cannot both be true, nor can they both be false. This is different from saying that two propositions are "contraries."[17] Two (or more) propositions are contraries when they may both (or all) be false, but they cannot both (or all) be true. Think for example of the contraries *tall/medium-height*. It can, of course, be the case that Peter is neither tall nor medium-height, he might indeed be quite short for his age, but it cannot be true that he is *both* of medium-height and tall; asserting one of these propositions (e.g., the proposition "Peter is of medium-height") implies that the other is false. Notice that the same cannot be said of the propositions "The referee's decision was *valid*" and "The referee's decision was *invalid*." This is because, when one denies that some action is valid (i.e., asserts that it is false that the action is valid), one is necessarily implying that it *is* invalid. In cases such as these, one of the propositions must be true.[18] Bivalence, then, concerns contradictory statements (and not contrary ones).

Admittedly, the exact context in which the notion of bivalence is of relevance to law and legal theory is a contested matter.[19] This is because although it is mostly accepted that legal propositions (i.e., what is stated by a statement of law) are truth-apt, that is, capable of being true or false,[20] it is quite controversial whether legal standards themselves can be truth-apt. It suffices, for present

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Reasoning and Legal Theory 152–228 (1994); LUIS D. D'ALMEIDA, *ON THE LEGAL SYLLOGISM*, *IN* DIMENSIONS OF NORMATIVITY 335 (DAVID PLUNKETT *ET AL*. EDS., 2019); NEIL MACCORMICK, RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING 32–48 (2005).

16. I am aware that moral philosophers, for example, use the concept of guiltiness differently, but this concept is "obviously legal" for lay people, to whom these words naturally invoke the concept of law.

17. Even if when we speak loosely, we may use contradictory and contrary as synonyms.

18. Unless the predicate simply cannot refer to the item in question. For example, a cake cannot be valid or invalid, since the predicate "validity" cannot refer to an item such as a cake. Similarly, there are actions that cannot be described as valid or invalid either: for example, the two of us breathing as we read this paper, or the action of walking some place. Importantly, in certain limited circumstances, walking somewhere might *invalidate* something: for example, if I am racing a friend to see who can get a coffee from the nearby café first and I start walking before we agree on a sign for "Go!" Yet, in this case my action of walking somewhere is not valid or invalid, though it might invalidate my participation in this odd contest.

19. For instance, some works focus on how a rejection of bivalence does not hinder Raz's theory on legal gaps, *e.g.*, José Juan Moreso *et al.*, *Legal Gaps and Conclusive Reasons*, 68 THEORIA 52–66 (2002).

20. *See*, *e.g.*, Brian H. Bix, *Linguistic Meaning and Legal Truth*, *in* 15 LAW AND LANGUAGE: CURRENT LEGAL ISSUES 36 (Michael Freeman & Fiona Smith eds., 2013); ANDREI MARMOR, THE LANGUAGE OF LAW 61–84 (2014). For example, though the statement that there is an income tax in the U.K. is true, it is not true that there is an inheritance tax of 90%. Both statements are perfectly intelligible.

purposes, that I make clear that *juridical* bivalence concerns, not the truth-aptness of legal standards, but the treatment of legal standards for which the range of *application* to a situation is bivalent (i.e., there are two contradictory possible outcomes of applying the standard). And so, when we talk of juridical bivalence, we talk of the application of legal standards—which is not a matter of truth, though it is still a matter of logic—in a different way. When a court applies a legal standard to some situation, we may wish to ask "Is this decision [applying the legal standard to this situation] valid?" This question, of course, only allows for one of two answers: *yes* or *no*. And that's where the notion of bivalence emerges, because *correctness* (itself, a bivalent notion) becomes relevant.

Yet, the manner in which the notion of bivalence in law is a logical matter is also a matter of contention. Some describe the relevance of bivalence in law as being a part of its practice; as a way of working of the legal system, which is not rooted in compliance with logic, but rather influenced by it. We *assume* that legal propositions can be true or false and treat them as such.[21] This view can be contrasted with Dworkin's, who would go beyond assuming juridical bivalence, and *assert* it. The fact that law treats a marriage (or some other legal act) as valid or invalid supports the view, according to Dworkin, that it *is* valid or invalid.[22] This view might be traced back to the more radical view that law and legal practice must accord to logical principles. According to what I call the "Legal Logic" view, bivalence in law serves as further evidence that law works *according to* logic. Legal propositions *can* be true or false and their application can be either valid or invalid within a particular legal system.[23]

All the views mentioned above agree on one point which is key to the present paper: that in legal practice we treat this principle of bivalence as concerning the applicability of legal standards too, albeit with some slight adjustments. Legal standards, according to the principle of juridical bivalence, are considered to be either applicable or inapplicable to specific facts; and so, the application of a legal provision to particular facts is considered to be valid or invalid.[24]

I take it that juridical bivalence need not be asserted but is, instead, deeply engrained in the way we speak of law and its application; it is expressive of the way we see legal practice as working. As Endicott explains, the principle of juridical bivalence refers to the law's "way of treating people's legal position":[25]

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21. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 280 (2011); ENDICOTT, *supra* note 4.

22. RONALD DWORKIN, LAW'S EMPIRE 115ff, 134ff (1986).

23. Martin P. Golding, *The Legal Analogue of the Principle of Bivalence*, 16 RATIO JURIS 450, 451 (2003):

> [T]he principle must be formulated relative to particular legal systems (*LS*). It asserts that every statement of law (*L*) that can be formulated in the vocabulary of a given legal system is valid (correct) or else invalid (incorrect) in that system. ("For all *L*, *L* is either valid in *LS* or else invalid in *LS*.") No such statement is legally indeterminate.

24. This is often determined according to whether the so-called fact pattern passes the threshold set by the relevant burden of proof.

25. ENDICOTT, *supra* note 4.

> It is a consistent feature of legal systems that legal institutions treat legal standards as if their application were bivalent. The potential content of court orders is not bivalent, of course . . . But judgments are bivalent. Lawyers talk as if everyone were either guilty or not guilty, either liable or not liable. And courts yield one outcome or the other.

We can put this idea in quite simple terms: since it can be either true or false that a legal standard applies to a certain situation,[26] the claims and assertions of judges ought to present themselves in a similar bivalent form. A claimant is either found liable to pay damages or she is not; a defendant is either convicted of a crime or she is not. Nothing new. That is all we need for an account of the kind of bivalence that presents in law and legal contexts, that is, of what I call the principle of *juridical bivalence*.[27] In resolving legal conflicts, then, courts are required to apply legal standards according to this principle of juridical bivalence. That is, despite the many diverse ways in which a court might articulate its reasoning, the court must ultimately determine whether a legal standard applies or does not apply. Courts in the exercise of their duty understand their role as having to choose between series of bivalent, contradictory propositions, and they must do so, even if in common parlance we might be less at ease with stating that a 14-year-old is guilty of a crime than we would be if, all things being equal, the defendant was 32 years of age.

It will become clear from what follows that more needs to be said about this picture of legal structure. To help flesh out this image I will outline two thought experiments: one of a world without juridical bivalence, and one of a world without what I argue to be its complement, juridical gradience. Through these thought experiments a number of things will become obvious. First, it will become evident that neither of these principles, or techniques, can be fully done away with for a good, functioning legal system. Second, the experiments will shed light on the fact that each technique fulfils a specific rule of law-compliance role, and so, there is reason to use each of these techniques, but only to the extent this role is fulfilled: for too much or too little of juridical bivalence (or juridical gradience, for that matter) hinders the rule of law.

B. A Brief Elucidation of Juridical Gradience

Before I set out the thought experiments, the notion of juridical gradience deserves some further elucidation. The present paper is part of an ongoing intellectual project, and so my elucidation of juridical gradience will be brief and limited. Put simply, juridical gradience is the principle that some legal standards are

26. This, it should be noted, is really quite different from saying that legal statement themselves are either true or false.

27. Juridical bivalence describes how legal standards are (and are to be) treated. And so, it is a principle in the sense that it is a *general statement* which forms a basis for a system of belief as to how we should go about speaking about the law and its application. This is a rather different kind of principle from the rule of law, and the disambiguation is worth making. The rule of law (and this should come as no news) is a principle in the sense of an *ideal* we sometimes meet and other times can only aspire to.

to be treated in a graded way, or to be treated as matters of degree. As a principle, juridical gradience is best understood as the complement to juridical bivalence, in the sense that it arises from an opposite mode of thinking about the application of legal standards, and in that it serves a *complementary* function vis-à-vis juridical bivalence. Juridical gradience does not concern legal standards being formulated in a way that gives courts a choice between contradictories. On the contrary, it is a feature of legal standards that makes available to courts multiple options—all running along a single scale, that is, different options that vary in *degree*. Juridical gradience appears in a legal system in two ways:

(i) in the award of legal remedies and sanctions; and

(ii) in the categorisation of offences and legal claims according to their degree of seriousness.

The first overarching way (and perhaps, for this reason the most obvious one), is in the award of legal remedies and sanctions (*i*). I speak of legal remedies and sanctions together, here, as both refer to ways in which a legal system responds to wrongs. Under this wide umbrella of legal responses, we can find a number of well-known mechanisms for redress such as monetary damages, injunctions, specific performance, but also penal sentences and other sanctions.[28] And juridical gradience is a common principle in the issuing of remedies and sanctions, such as monetary damages and penal sentences. This is because these types of mechanisms of legal response come in *degrees*. At times, courts must evaluate a party's injury and award monetary damages in proportion to the injury and its consequences. Other times, courts must decide on the appropriate penal sentence for some criminal offence, which may vary from a few days to years, depending on the degree of seriousness of the crime and the degree of culpability of the offender.[29] And of course, a court might have discretion as to the type of remedy and sanction to give a claimant or defendant having regard to the seriousness of the wrong vis-à-vis the seriousness of the penalty and sanction. Thus, in the issuing of remedies and sanctions, it is not uncommon for courts to approach their task with the notion of degrees in mind: what a court ought to do is award a remedy or a sanction which is, in some justified way, *commensurate* to the injury the court is remedying.[30]

28. To be clear, specific performance is a bivalent remedy in the sense that a party is either asked to perform in some way or not. Yet, the instances in which this remedy can be awarded varies depending on the claim in question, and the manner in which claims are categorised is a matter of juridical gradience.

29. In the U.K., the Sentencing Act of 2020 requires courts to consider the *seriousness* of the offence, having regard to the *culpability* of the offender. Sentencing Act of 2020, c. 3, §63. Both "seriousness" and "culpability" come in degrees, of course.

30. *See, e.g.*, R (Hurley & Moore) v Sec'y. of State for Bus., Innovation & Skills, [2012] EWHC 201 (Admin), [2012] All ER (D) 155, at 99 (Feb. 17), where the court directly refers to the idea of the remedial consequence leading to a disproportionate result, and thereby declining relief. I'm grateful to Lia Lawton for this example.

Criminal law is a salient, though most certainly not the only, example of an area of law where this idea of grading legal resolutions through the issuing of gradable remedies is deeply entrenched in the way its processes work. This is because criminal offences are often categorised according to their degree of seriousness which, in turn, is reflected in different degrees of penalties.

The categorisation and classification of offences and legal claims is the second way in which juridical gradience features in law (*ii*), above. Different offences, but also different legal claims and legal rights, have throughout time been categorised and classified according to, for example, their different degrees of seriousness (e.g., in the case of the law on homicide),[31] but also according to different degrees of blameworthiness/culpability (e.g., in the categorisation of different claims within tort) or different degrees of personal interest (in the classification of different property rights, e.g.).[32] It is worth noting that categorisation, in law and elsewhere, is done with a covering value in mind and, in law, the variation of the degree of the covering value tends to correspond to some variation in the sanction or remedy. And so, categorisation and classification in law, though a mechanism for juridical gradience, do not eliminate juridical bivalence. After all, the question of whether a particular category applies to some situation is still one that turns on the bivalent predicate of application. In other words, whether some category is fitting for some situation is still a yes-or-no matter.

In this way, juridical gradience refers to the principle according to which law (i.e., legal rights, obligations and liabilities) are to be framed in terms of degrees. I distinguish it from juridical bivalence for the further reason that juridical gradience in current legal structures mainly concerns *remedies and sanctions*, and so the second level of legal proceedings and not only the matter of application of legal norms (i.e., the first level).[33] The claim to be defended in this paper, however, is that, in certain contexts, juridical gradience in the legal system will allow

31. In some U.S. states, for example, these distinctions in the law of homicide are described as different degrees of murder: from the more serious offence of 1st degree murder to 2nd degree murder, and in some states, to the least serious, 3rd degree murder.

32. Roscoe Pound, for example, had a keen interest in classification in law and recognised that we need not stick with previous classifications of law and legal standards, for these are the result of experience. Law's story itself shows us how throughout time, the structure of legal standards has changed to best achieve their intended aim. In *Classification of Law*, 5 AM. L. SCH. REV. 269, 271 (1924), Pound writes, "[i]t is not that legal precepts are necessary inevitable deductions from a classification, but rather they are, perhaps you might say, compromises proved by experience, which we are trying to put into the order of reason by our classificatory apparatus."

33. The first level of litigation that I refer to above can be thought of as being the stage at which the court must make a finding as to the application of the law (Does a legal standard apply to this case?). The second level can be thought of as being the stage when the court focuses on the question of the extent, if any, of the liability created by the findings at the first stage. In parallel terms, Birks distinguishes between "wrongs and other liability-creating events" and argues that the former give rise to "primary" obligations and the latter to "secondary" obligations. *See* Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. AUSTL. L. REV. 1, 11 (1996). To be clear, the move I propose in this paper is towards *more acceptance of juridical gradience*, and as such, it does not require the elimination of "application" as a test for legal norms. Juridical bivalence is to retain a role in legal ordering. Yet, as a legal ordering makes space for more juridical gradience, the question of whether a

us to resolve legal conflicts in a way that, when compared with the results juridical bivalence would bring about, better promotes the rule of law.[34] Ultimately, this paper puts forward a proposal for change in legal policy, so that there is less all-or-nothing decision making in law.

C. Thinking Through Two Different Kinds of Impossible Legal Worlds

The worlds I am about to introduce the reader to, it will soon become clear, are *impossible* worlds. For as the examples will show there is no possible world in which there is a legal system where you have no juridical bivalence and have only juridical gradience. And there is no possible world where you can have no juridical gradience in a legal system and have juridical bivalence only. In short, juridical bivalence and juridical gradience are *both* conceptually necessary features of a legal system.

A World without Juridical Bivalence

A legal order simply cannot do away with juridical bivalence. At least not if the objective is to maintain a *legal* order, rather than to create some other kind of *evaluative* order. The reason for this is that juridical bivalence allows one to say—to claim, or to hold, even—that a particular legal provision applies to a given scenario.

In fact, as we have discussed above, the act of holding that something applies is one that can either be done or not; that is, a legal standard either applies or it doesn't. And norms generally require this kind of treatment—norms (and to be clear, rules) entail bivalence.[35] For this reason, the criteria of application of legal

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norm applies becomes subordinate to the question of degree that follows and which will often concern law's way of *responding* to the conflict.

34. As will soon become clear, one way in which the law has embedded gradience in its procedures and outcomes is through compensation. Regimes of compensation allow for either stricter or more malleable rules, and as Birks well remarks, "[c]ompensation for loss is a choice which has been made," and not a necessary outcome of holding that some law applies or that someone failed to respond to a legal duty they had. *Id.* at 14. The move, in most common law jurisdictions, from contributory negligence, as a full defence against the award of compensation to the claimant, towards the idea of a partial defence of contributory (or comparative) negligence is an example of the malleability available when it comes to the mode—absolute or partial—of compensation for loss. The wider project within which this paper sits will explore other ways to further introduce more juridical gradience in legal orders, going beyond the use of compensatory measures.

35. It may be worth noting that some defend a strict distinction between two different kinds of legal standards: rules and principles. *See* Dworkin's account in RONALD DWORKIN, *The Model of Rules I*, *in* TAKING RIGHTS SERIOUSLY 24 (1978):

> The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

See also Matthias Klatt, *Taking Rights Less Seriously: A Structural Analysis of Judicial Discretion*, 20 RATIO JURIS 506, 513 (2007). When it comes to there being a requirement of a bivalent application, a system of principles or loose guiding values works differently from a system of norms and rules. As Klatt puts it, "[p]rinciples are optimization requirements . . . They can be satisfied to varying degrees. Rules, by contrast, are norms which are always either fulfilled or not." *Id. See also* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47–48, 67–69 (Julian Rivers trans., 2002).

provisions, which constitute norms within a system, can either be satisfied or not with regard to a given situation. (It is for this reason that cases falling within the penumbra of uncertainty are seen as problematic; they do not appear to fit this bivalent mode).[36]

A legal system that does not in any way comply with a bivalent structure would have to be a legal system where its standards do not have to be tested against the evidence for their application. That is, it would have to be a legal system that does not work according to a "fitness-standard". Accordingly, it would have to be a system which does not rely on legal norms to set standards of behaviour and solve coordination problems; and one for which there are no previously established consequences for acting (or failing to act) in some prescribed way. In short, it would have to be a system where there is no *application* of norms, and so it cannot be a system of norms. I suspect a legal system of this kind would be quite difficult to imagine. Perhaps because it would look like something that for many would not be called a legal system at all. Indeed, when one takes away,

(i) the idea that a legal system sets standards of behaviour through norms and rules; and

(ii) the idea that a legal standard's criteria of application must be satisfied for a legal standard to *validly* apply to a situation;

one is left with no *legal* system at all.

Now, even if a legal order without juridical bivalence is one which is not a system of legal norms and (because norms and rules entail bivalence), it could perhaps be an order (a system, even) of loose guiding values. That is a system with loose principles that are not binding, but which exist to steer its subjects towards a certain type of behaviour. And, in the eyes of a system of this kind, a subject can be *more* or *less* governed by the prescribed guiding values in his conduct; or he can act in ways that more closely (or less closely) fulfils the system's values. Importantly a judicial decision within in a system of this kind would not have finality, but instead would need to be weighed against other values. After all, a system without juridical bivalence is one that does not allow for absolute orders, with absolute legal effect—only orders that are relative to some other consideration or norm. This, it seems to me, falls short of a fully fleshed out legal system.[37]

36. Limitations of space preclude me from discussing this here, but it seems to me that it does not necessarily follow from indeterminacy in the application of a legal standard that that legal standard is not bivalent.

37. Naturally, those such as Dworkin who defend the view that principles and guiding values are part of the make-up of a legal system, face serious pressure when asked to answer the question of 'how is a court to make, and indeed be able to make, a *final* decision?' Though an interesting question, I park it here, to avoid further digression. Dworkin, *supra* note 35.

A World without Juridical Gradience

Let us now begin picturing a legal world *without* juridical gradience by attending to the historical example I briefly mentioned above: the so-called "Bloody Code".

Imagine, then, a legal system with one single provision. It would have to be a provision in the lines of:

> *It shall be an offence punishable by death to fail to comply with an order of a legal official.*[38]

The point I wish to make here, though, is that a legal order without juridical gradience is one with one single legal standard which calls for the issuing of one single order in response to its breach. One single legal standard because a legal system with multiple legal standards is one that distinguishes between different legal claims, and in so distinguishing deems some claims more or less serious, for example. And so, since categorization is not a tool in the bivalent toolkit, the legal standard will have to remain quite vague. Indeed, it is through categorization that one is often able to make legal standards more precise. In this way, a legal system that is completely bivalent would be one open to excessive arbitrariness and discretion, which is obviously counter to rule of law ideals. A similar provision could be created in private law (but indeed, need not!):

> *A party found to have breached a duty towards another party, shall pay the wronged party £1500.*

In the case of a world of civil procedure without juridical gradience, what we can expect is one remedy for all wrongs, and no distinction between the different ways in which private parties can breach their obligations. Crucially, in this case, private law would lose its ability to issue what can, even in a literal way, be called 'remedies'. That is, a private law system without gradience is one that does not adjust the remedies it awards in a way that reflects the degree of the wrong that the system is trying to fix.

A system of this kind is evidently one that—although highly predictable and certain—does not serve the further rule of law purpose of fixing and addressing radical injustices between parties; instead, these would be propagated by the system itself. It would be a system where the blindfold is so blinding, that the system cannot see the issues it is there to fix and therefore treats everyone and every situation in the same way. Rather obviously, by doing this, the system would fail to solve conflicts between legal subjects, for not all situations can be fixed in the same way. Moreover, it is questionable whether a system of this kind would fulfill the

38. Or punishable with 15 years of jail time, if one wishes to make the example lighter.

ultimate rule of law objective of making it so that law is "capable of guiding the behaviour of its subjects."[39] I shall return to this in the next section of the paper.

An example may help flesh out this idea. Imagine that Josh goes to the market and, upon finding the fruit too expensive, decides to slip in his grocery bag two apples and two loaves of bread. Upon appropriating these items, Josh decides to run towards his car. If a court were to find that Josh has not complied with the law, Josh would be found guilty of an offence. The court would then apply the relevant sentence for that, and all, offence(s). In a world without juridical gradience, this second phase of the curial exercise is straightforward, the offence (as any offence) comes with a set sentence and punishment. The court does not have to account for any other contextual factors beyond the ones concerning the elements of the offence. It would not matter, for example, that Josh has never been in trouble with the law. It wouldn't matter that Josh stole the apples and the bread because his daughter was at home starving since he had recently been laid off from his job and could not afford any food. It wouldn't matter that Josh is a sixteen-year-old father. It would not matter that Josh, unlike Peter, has not systematically stolen televisions and video game sets from department stores to resell them so that he can pay for his luxurious holidays. It would not matter that Josh has not inflicted any physical violence to any of his fellow citizens. None of it would matter. Josh, Peter, and all other offenders would both be sentenced equally—in a legal system of this kind.

Ultimately, a system of this kind would fail. For it would be a system that would strive to completely eliminate discretion in judicial decision making; and as the above examples show, the availability of discretion may be *necessary* for certain legal rules and principles to be applied in a manner that can be justified, and indeed, just. There might exist many justifications for legal intervention, however, in this paper, I take it that most of us count on the legal system to intervene for two main reasons: *(i)* to resolve conflicts between citizens that might require a third non-involved party and *(ii)* to set standards of behaviour. As will by now be clear, legal responses under a system without juridical gradience would be incapable of fulfilling these two central objectives that justify legal intervention in the lives of legal subjects. Eighteenth-century England reached a similar conclusion. The Bloody Code quickly became difficult to enforce, as the people turned on the system and, in their role of jurors, refused to convict under these radically unjust laws.[40]

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39. I follow Raz's conception of the rule of law, which he articulates in *The Authority of Law*. *See* RAZ, *supra* note 10, at 213–14. Sunstein and Vermeule, amongst others, understand the goal of the rule of law differently, for example, as that of promoting good governance. *See generally* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924 (2018).

40. *E.g.*, Peter King & Richard Ward, *Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery*, 228 PAST & PRESENT 159, 186 (2015):

> Just as high indictment rates could lead to harsher pardoning policies, as they did in the 1780s, so low indictment rates in particular regions on the periphery tended to reduce the desire to hang property offenders. This mechanism, combined with the ways in which jurors on the periphery

III. THE CONFLICT BETWEEN JURIDICAL BIVALENCE AND THE RULE OF LAW

The previous section should have already shone a strong light on why a system structured only in terms of bivalent standards would not yield a good, functioning legal system (or indeed, a legal system at all). Expanding on this idea, the remainder of the present paper is dedicated to further defending the idea that the principle of juridical bivalence is often in conflict with the principle of the rule of law. By conflict I mean to say that the legal resolutions the principle of juridical bivalence yields are not always the most compliant with the rule of law, or at least, are often resolutions that do not promote the rule of law. For this reason, I defend the idea that certain legal standards we have in our legal systems should make the move towards more gradience. Prima facie, this might appear an unreasonable request; the principle of juridical bivalence, after all, is often associated with certainty and finality (ideas which the rule of law, itself, prizes). Yet, I argue, some legal conflicts call for a gradient treatment to prevent their resolution at law to contravene rule of law aims. The remainder of this paper is dedicated to defending this claim by setting out three (non-exhaustive) reasons for why juridical bivalence may work against the rule of law. Notably, all three reasons explored should be read as coming together in support of each other, for they all ultimately concern a broader claim: that a system which recognises the value of juridical gradience, rather than avoiding it, is a system that is better capable of guiding its subject's behaviour.

Allow me to make one further brief note. The claim I make in this paper, though undertheorized, is not radical. Indeed, it can be argued that it serves as a post-hoc justification for what legislators are already doing. For example, since 1794, and starting in Pennsylvania, multiple states in the U.S. have subdivided murder into different degrees so as to be able to punish some instances of murder more severely than others. This is now the legal structure in most states.[41] Moreover, since 1824, following England's lead, the rule of comparative negligence started emerging in Massachusetts in response to general dissatisfaction with the contributory negligence rule.[42] At present, only four states and the District of Columbia maintain a rule of contributory negligence. Under this new regime of apportionment of liability in negligence cases, both the claimant and the respondent's liability track each's *degree* of fault or responsibility for the injury. These two examples showcase a move towards more gradience but also more

systematically reduced the proportion of offenders who were fully capitally convicted, seems to have created a scarcity of executions for property crime that sensitized the public in a unique way. If we turn to more qualitative sources, to the fragmentary insights contained in newspapers, government correspondence and more particularly in the pardoning archives, it becomes clear that communities on the periphery (and key officials such as the sheriffs) were particularly sensitive to, and often willing to challenge directly, the use of capital punishment against routine property offenders.

41. *See, e.g.*, Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1948); Frank Brenner, *The Impulsive Murder and the Degree Device*, 22 FORDHAM L. REV. 274 (1953).

42. *See, e.g.*, Philip W. Bouchard, *Apportionment of Damages Under Comparative Negligence*, 55 MASS. L.Q. 125, 126–27 (1970).

proportionality in responses to legal conflicts. The latter is the first reason I give in praise of juridical gradience.

A. Proportionality and the Rule of Law

My first argument goes as follows. By putting juridical bivalence in its place and opening our legal orders up to juridical gradience,[43] we will also be making the space for more proportional (and therefore, more justified) judicial decision making. This is because juridical gradience allows for the adjustment and tailoring of the way in which the system responds to breaches of law. Proportional responses to legal conflicts are not only more easily justifiable, but also promote trust in the system of resolution—that is, in the legal system.[44]

Let us return to our earlier historical example. The most obvious flaw with the system created by the Bloody Code was that the penalty for committing one of the offences contained in the Act was not adjustable to the different instances to which the legal norm applied. Legal standards of this bivalent kind, as we have seen, do not allow for adjustments or mitigations.[45] They do not allow for proportionality. And increased proportionality in legal responses, I argue, ultimately promotes the trust subjects have in the law and its processes, but also is capable of justifying state and court intervention. That is, so long as legal regulation in general, and courts' responses to legal conflicts more specifically, are proportional to the wrong in question, the intervention that the response requires is more easily justifiable. In making this argument, I do not wish to get tangled up in the discussions on proportionality in the law and legal reasoning.[46] My interest does not lie with the proportionality tests in administrative law or human rights adjudication, but rather with a much more common judicial practice of avoiding radical injustices which may take the form of obviously unreasonable–obviously disproportionate–responses to a legal wrong. For example, a 3-hour prison sentence for rape and an award of two million dollars in damages for the late delivery of two bottles of juice, are obviously unreasonable, obviously disproportionate, and obviously unjust legal responses to the wrongs in question. Legal resolutions of this kind simply do not touch the sides.

So, what would proportionality in legal responses look like? And how is it that juridical bivalence restricts a court's ability to respond to a legal conflict in a

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43. Fortunately, we need not do away with juridical bivalence to justify and enshrine juridical gradience in legal processes and ordering.

44. The two sections that follow from this one expand briefly on these two claims.

45. One could argue that the different ways in which capital punishment was conducted allowed for some gradience, given that different methods vary in the degree of pain and torture that they inflict. The English penal system sure made use of different techniques. However, the degree of severity of the method did not always match the degree of seriousness of the wrong. A discussion of this kind seems to be evidently problematic for reasons that go beyond the remit of the present study.

46. For such discussions, *see, e.g.*, Paul Craig, *Proportionality, Rationality and Review*, N.Z. L. REV. 265 (2010); Philip Sales, *Rationality, Proportionality and the Development of the Law*, 129 LAW Q. REV. 223 (2013); FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017); MATTHIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY (2012).

proportional manner? Think, for example, of a case where a party has been put under duress whilst contracting. In some jurisdictions that contract will be void or voidable.[47] The rendering of a contract void is a bivalent response. Instead of only making available to the claimant the option to avoid a contract, a court could award a remedy according to the seriousness of the duress, for example, by awarding compensation for the duress, or requiring the parties to revisit and renegotiate particular terms of the contract which the coercive situation affected, rather than undoing the entire agreement. Depending on how much duress a party has been put under, they might have weaker or stronger feelings about the contract they have entered, and a legal system which is open to juridical gradience could allow for that. In other words, different forms and extents of duress may warrant a stronger or weaker intervention in a legal conflict to properly resolve it.[48]

Indeed, there may be a great number of legitimate reasons to think that responding disproportionately to legal wrongs is unjustified, perhaps even going beyond the role of the courts. Yet the reason I wish to put forward here concerns the idea that legal intervention (and more broadly, the intervention of state actors) must be justified and limited. Scholars have long debated the exact limits of permissible state intervention on individuals' liberty and autonomy and on matters concerning the lives of private individuals, which are to this day highly contested.[49] However, a good test for whether some court's intervention is unjustified is whether its intervention, i.e., the way in which it responds to some legal conflict, is obviously disproportionate to that wrong or to what it would take to right that wrong.

To the extent that citizens trust the legal process to resolve their conflicts, they do because, among other reasons, they trust that judges will be reasonable, impartial, and fair in their reasoning. They trust judges to avoid biases and attempt to resolve a conflict in a manner that truly resolves it. A court's decision is, after all, the closest one can get to a final resolution. Of course, responding disproportionately is unlikely to adequately resolve conflicts. It may very well add fuel to the fire.[50] For this reason, I argue that if courts consistently respond to legal claims in a manner that is clearly disproportionate to the issue they are tasked to resolve, subjects will no longer look to the law to resolve its conflicts or trust its processes to guide their behaviour. Though it might be true that people might trust things

47. Barton v Armstrong [1976] AC 104 (PC) (Austl.); IFR Ltd. v. Fed. Trade Spa [2001] EWHC (QB) 519.

48. The example given here is only meant as an explorative example. I am confident that there are other areas of law that may benefit from less bivalence and more gradience. I explore these further examples in the wider project to which this paper belongs.

49. Most famously, JOHN STUART MILL, ON LIBERTY (1860). When setting the limits of state intervention, one should go beyond the question of when intervention is permissible or justifiable. Indeed, one ought to also consider the question of *what kind of intervention* is permissible or justifiable. The present paper focuses on the latter question.

50. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) can be used as an example of a case where a court's resolution is not adequate, leading to political consequences. Historians have argued that the U.S. Supreme Court decision prompted the civil reaction that led to the Civil War. *See, e.g.*, Roberta Alexander, *Dred Scott: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643 (2007).

they should not all the time, in a fully rational world, such an attitude towards a legal system (of not trusting but being guided by) would not hold. In this way, the quality of trust in law and legal processes appears to provide us with a certain kind of reason for belief in the system's efficacy. I return to this argument on the relation between trust and the rule of law at *III.C.*, below.

B. Reason-Giving (Where Possible) and the Rule of Law

The second, related, reason why too much juridical bivalence might contravene rule of law aims, is that juridical bivalence leads to instances of arbitrary decision making that are more difficult to justify than those to which juridical gradience undeniably also leads.[51] It is possible to accept that vagueness in the law may be a positive characteristic of law, without accepting the idea that the scope of vagueness should be unrestricted. Indeed, I accept Endicott's argument in his paper, *The Impossibility of the Rule of Law*, that vagueness may be good in the law.[52] Yet, from this, it does not follow that no restrictions should be put on the vagueness we allow in the law. On the contrary, I argue that vagueness should be, alongside arbitrariness, restricted to a large extent; indeed, to the greatest extent possible. Of course, we should not (and indeed, cannot) cease to make use of vague language in law. But by being more open to juridical gradience, we might limit the reach of juridical bivalence and, by extension, reduce the extent of instances of the kind of arbitrary decision making in the law that are particularly tricky to justify.

The argument I wish to make here is that although graded standards (such as the requirement of proportionality) may be vague standards just in the same way as some bivalent standards are, the arbitrariness which standards of the former kind create in their application is more easily justifiable.[53] Different legal provisions will have different purposes, and the acceptability of a bivalent or gradient form is likely to depend on the provision's particular purpose. However, one ought to recognise that bivalent standards force a court to decide on one side over another even when it comes to borderline cases, where there may be no reason to choose one over another. Gradient standards, on the other hand, allow a court to choose amongst a number of different options along a continuum, and as a result, in borderline cases, a court will

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51. By an arbitrary decision, I mean a decision which is not determined by reason, rather than the pejorative sense of a decision made based on a failure to act or respond to reasons that one had a duty to respond to. The distinction I draw here explains why there is a difference between deciding who must take the bins out on a particular day by flipping a coin and apportioning a quantum of damages arbitrarily. In the latter case, one has a duty to respond to certain reasons and so an entirely arbitrary decision would be unsatisfactory.

52. Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 7–8 (1999).

53. I am thankful to Timothy Endicott for the following example of an extravagantly vague standard: "Theft shall be an offence punishable by imprisonment for a period that is proportionate to the seriousness of the offence." I do not wish to dispute that this standard is vague. But I do want to defend the idea that the application of legal standards with vague language of this kind is more easily justifiable than the kind of vagueness one can find in a bivalent standard: "It shall be an offence punishable by death to fail to comply with an order of a legal official."

have the opportunity to decide at its discretion but with more precision. To bring this idea to light, think of the difference between (a) asking someone to decide whether a particular shade of teal is a shade of blue or a shade of green (a question concerning bivalent classification), and (b) asking someone to choose amongst, say, ten different shades of the blue-green spectrum of colors, the one that more closely aligns with the shade of teal one has been shown.[54] In case (b), one is still likely to find oneself struggling to make sense of the borderline cases of the color teal, but one's response to the exercise will be more precise assessment of the hue of the shade in question than in case (a), for one is able to choose the most fitting or *proximate* grade of the relevant covering value. Thus, although juridical bivalence and juridical gradience lead to instances of vagueness in the law alike, the kind of vagueness juridical bivalence leads to results in more discretion in judicial decision making—contrary to one's initial assumption.[55] And too much discretion, unsurprisingly, impairs the rule of law.[56]

C. Trust and the Rule of Law

Recall now my earlier articulation of what I believe to be law that complies with rule of law ideals and is thus "formally good" in terms of its mode of operation. For the benefit of clarity, allow me to reiterate and expand on this idea here. A "formally good" law is a legal norm that is "capable of guiding the behaviour of its subjects."[57] To be capable of serving this guiding purpose, certain features of the way in which the legal standard is generated and applied need to be compliant with rule of law ideals. For example, a legal standard that is "open, prospective, clear, consistent, stable, capable of being obeyed, and upheld by officials,"[58] is one that is capable of fulfilling its role of serving as a guide for the subjects of a certain legal system. Yet, there is also an element of *trust* that must be accounted for when one talks of "formally good" law or the ideal of the rule of law.[59] Indeed, it is rarely the case that one commits oneself to be guided by someone (or

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54. Raffman helpfully discusses a similar example at length in DIANA RAFFMAN, UNRULY WORDS: A STUDY OF VAGUE LANGUAGE 136 (2014).

55. *Cf.* Diana Raffman, *Vagueness in Law: Placing the Blame Where It's Due*, *in* VAGUENESS AND LAW: PHILOSOPHICAL AND LEGAL PERSPECTIVES 49, 62 (Geert Keil & Ralf Poscher eds., 2016):

> You might think the problem would be ameliorated, if not solved, by employing infinitely many truth-values or degrees of truth in order to accommodate the continua at issue. But then arbitrary boundaries would exist between the two members of *every* pair of incrementally different cases; the members of every pair would receive different evaluations. The problem would be worse, not better. This suggests that bivalence in the language is not the culprit in the cases at issue. Rather, the source of the trouble is the law's need for stable rulings. Judicial decision making cannot be fluid in the manner of ordinary speakers' applications of vague words.

56. Endicott, *supra* note 52, at 17–18.

57. RAZ, *supra* note 10, at 213–14.

58. GARDNER, *supra* note 11, at 195.

59. The idea that if the law does not promote a certain ideal, its subjects might lose their "respect" for legal institutions is not a new one. Bentham, for example, unsurprisingly thought that to secure *compliance*, law must maximize utility, and the conditions for the rule of law should be conducive of this aim. *See* JEREMY BENTHAM, *The Power of the Laws over Expectation*, *in* PRINCIPLES OF THE CIVIL CODE (Edinburgh, William Tait 1843), www.laits.utexas.edu/poltheory/bentham/pcc/index.html

indeed, something) one does not trust. If there is no trust in the system, the law cannot guide. If there is no trust in the system, the law will not be complied with.[60] As Simpson argues, cultures of trust offer support to the rule of law.[61] This is a feature of the rule of law that is often brushed aside, but which carries deep implications for what we should expect of a legal system that abides by this principle. In a good, functioning legal system, not only must the rule of law support a culture of trust, but it must also be supported by such a culture.[62] After all, as Wallace and J. Goodman-Delahunty put it, "[a]n individual's level of trust or confidence in courts will not only affect their willingness to turn to them for help, but also the likelihood that they will comply with court decisions,"[63] and in turn, the extent to which the law is able to guide.

My argument here is that a system which has too much, or too little, bivalence (or gradience) would be one which is not guided by reason or, indeed, fails to fulfil its purpose—as the thought experiments and the two previous sections above demonstrate. It would be a system that leads to obvious injustice and fails to properly resolve legal conflicts. For this reason, one cannot expect its subjects to trust, and as consequence, to comply with and subject themselves to a system that they see as clearly not being backed by reason. Trust in a system or authority, moreover, has been shown to increase cooperation with that system.[64] If the majority of subjects do not cooperate with the system, then it will at the very least be more difficult for the system to be able to guide. In this way, it should not come as surprise that the mode in which law is applied also affects law's ability to guide. Unjustified application of legal norms (which, as we have seen in *III.A.* and *III.B.*, juridical bivalence may lead to) is likely to impact, in the long term, subjects' cooperation and trust in the legal system, as a system capable of resolving their legal conflicts. And since lack of sufficient justification in judicial decision making ultimately leads to a loss of trust in law and legal processes, it will naturally also weaken law's ability to guide its subjects. History shows us as much. Hence the significance of having a limitation on unjustified arbitrary decision making.

[https://perma.cc/WZ77-9SCX]. This is a point Timothy Endicott explores in Timothy A. O. Endicott, *The Coxford Lecture: Arbitrariness*, 27 CAN. J.L. & JURIS. 49, 53 (2014).

60. Trusting a system need not entail agreeing with its ways or decisions. Arguably, the subjects of an autocratic legal system follow the rules of said system, even if they do not approve of the rules. Still, the subjects believe that that particular legal system is authoritative and trust that it resolves their conflicts (even if in ways the subjects disapprove of). It is that trust that forms a base for them to be guided, by trusting that a certain norm of the system will apply (or not). Having said that, a subject also trusting their legal system to provide *just* resolutions will only strengthen that relation of trust and deference they have towards that system.

61. Thomas W. Simpson, *Trust and the Rule of Law*, *in* CONVERSATIONS IN PHILOSOPHY, LAW, AND POLITICS 99, 100 (Ruth Chang & Amia Srinivasan eds., 2024). "A culture of trust promotes the rule of law, and a culture of distrust undermines it." *See id.* at 109–13 (explaining this proposition).

62. *Id.* at 99.

63. Anne Wallace & Jane Goodman-Delahunty, *Measuring Trust and Confidence in Courts*, 12 INT'L J. CT. ADMIN. 1, 2 (2021).

64. *See, e.g.*, Tom R. Tyler & Peter Degoey, *Trust in Organizational Authorities: The Influence of Motive Attributions on Willingness to Accept Decisions*, *in* TRUST IN ORGANIZATIONS: FRONTIERS OF THEORY AND RESEARCH 331, 336 (Roderick M. Kramer & Tom R. Tyler eds., 1996).

As we well know, in judicial decision making, reasons (which may be more or less extensive) must be given to justify a particular decision.

IV. CONCLUSION

Ultimately, a system with too much juridical bivalence may eventually be perceived as overly arbitrary and incoherent due to the disproportionate resolutions to which it gives rise. And moreover, a legal system of this kind may be rendered untrustworthy or not trustable in the eyes of the subjects it is meant to guide, thereby hindering the rule of law. Yet, and of even more importance, one should not underestimate the fact—which this paper has shed light on—that without juridical gradience the law cannot, quite simply, be just. It would be dangerous to assume that the *form* of law, the options with which it leaves us, do not impact the rule of law or, even, law's ability to be just. With this newfound awareness of juridical bivalence and juridical gradience, we carry further tools to understand the structure of law and its normative implications to the promotion of rule of law ideals. My hope is that this paper has provided the reader with sufficient reason to question whether the areas of law they engage with could benefit from more juridical gradience or whether there are strong reasons for mechanisms of juridical bivalence to be preferred.