The Role of Courts in the Making of Policy

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Should judges make policy in the wide sense of making decisions that place more weight on the good of the community than on the rights of parties to litigation? It is argued here that we can only properly understand judging through an appreciation of an ideal account of the judicial role. That account requires judges to ensure fair dealings between litigants in the light of the moral values fundamental to democracy; we best express that idea through rights of individual litigants to equality of respect. It is therefore an unsurprising conclusion that judges should confine themselves to the determination of the rights of individuals in dispute. More significant, however, is that this account allows judges to determine an individual's right by reference to the impact it would have on the community, but prohibits a judge from deciding an individual's right by reference to an enhanced state of the community to which no individual has a right. Where 'policy' refers to this last kind of justification of a judicial decision, then it is contrary to the judicial role to make decisions of policy.

Policymaking and the ideal

This account is intended to provide a standard against which actual judging may be assessed. It is an 'ideal' account to the extent to which it describes what judging would be like if properly done. Since it is inherent to judicial practice that there are right and wrong ways of deciding, reference to an ideal is necessary to explain the reality of judging. Responding to this claim that it would not show how 'in fact' judges decide 'in reality' therefore makes no sense. Suppose a 'reality' according to which several judges differ in their opinions about what the law requires. To say what the position 'really' is, requires some means of resolution, and that requires reference to a standard for assessing what is the 'reality'.[1]

The idea that 'ideal' accounts can have no bearing on 'reality' is a common but confused one. People like to say that 'market forces' are a matter of 'reality' while failing to recognise how the free market is itself an ideal. Economists compare the ideal of the free market against the 'real' world and conclude that, mostly, 'imperfect' markets dominate. For it is only by reference to 'perfect' standards that makes the real market 'imperfect', thus justifying market interventions such as those aimed at reducing anti-competitive forces and ensuring independence and authenticity of bargaining. It is the same with judging. Whatever terms are used, there is no such thing as 'reality' on its own, such that 'empirical' (or 'sociological' or 'anthropological' or 'historical') accounts of what judges have said, what judges 'do', how decisions are made, what their impact is, could be a sufficient explanation of those practices. Such accounts leave out the values according to which judicial acts are insidious, pro-corporate, radical, conservative, or just wrong in conventional ways.[2]

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[1] The argument cannot be more difficult than that. It is common for lawyers to refer to what judges do 'in fact' as though that were of relevance to what they should do. Judges can decide wrongly; no one doubts that. So why refer to the mere fact that they have decided a particular way in an argument about what they should do?

[2] The ideal account could also, following Dworkin, be called an 'interpretive' account, which would be to mix 'the ideal' and 'reality' in a way that draws attention to the existing critical nature of our current practices. Dworkin makes two points in his interpretive approach. One is that our accounts of reality in a variety of practices require reference to ideal standards; judging being one such practice. The other is that those practices are already rooted in the community and legal discourse expresses their operation.[2] But requiring reference to an ideal permits the moralist to lift free from present practices. Why should morality be tied to actual practices? A moral ideal that makes fundamental respect for individuals must be unmoved by the question whether there are any existing practices of morality. See Dworkin *Law's Empire* Fontana 1986 ch.2 for his

Policy as an explanation of the subtext to a decision

Reference to ideals explains a common form of remark about judicial decisions, which is that although judges are doing one thing, they are 'really' doing something else. This remark often occurs in describing policy arguments. The judge, it is said, interprets the law in a particular way so that we assume that he is fulfilling his function of 'applying the law' but, in effect, he is making law according to some general policy that pursues a different, perhaps conservative, purpose. If the courts consistently decide in favour of the employer in labour disputes, for example, being consistent in itself appears to permit the conclusion that the courts are 'deciding in accordance with law' but the sub-text appears as 'the courts are unconsciously pursuing a policy of supporting employers against employees'.[3] Such comments are often extremely perceptive and it is tempting to suppose that thinking this way attracts a special status, as a kind of 'sociological critique' of law. But there is nothing mysterious about the methodology here. Saying that people do one thing while expressing themselves as doing another thing is not mysterious, not even when it done in large numbers.[4] Daily we interpret actions about what a person is 'really' doing. Such actions form a class in which the actors are unable - or cannot be bothered - to reflect on or to articulate what they are doing. To point out that this is sometimes what people do is not especially enlightening even as general psychology, although often interesting in particular cases.

There is more significance in law. Judges provide publicly articulated reasons for their decisions and so these reasons invite careful scrutiny. But the interpretation of 'what the judge decided' requires reference both to the actual decision and to the reasons, and when lawyers comment on a judicial decision, nothing requires them to place conclusive weight, or indeed any weight, upon the articulated reasons. So to insist that 'this was what the judge was really doing' is no different from insisting that there is a better interpretation. 'In reality' adds nothing to the interpretation, perhaps other than to point out that the judge's articulated reasons are not the best indicator of what are the best reasons for the decision.

When commentators make this sort of judgment there is sometimes an additional element intended that the judge knew all along that the interpretation he articulated was not the interpretation to which he was committed. Rarely, in declaring what the judge was 'really' doing, the intention is to point out that a judge was not being truthful. Mostly, though, all that is meant is that some facet of class, or institutional bias, or other unreasonable reason influenced the judge, and he is unaware of it. This way of explaining judicial behaviour is as much a part of general interpretation as anything else. If, as is usual, the point is to criticise the decision, then we should express that much more straightforwardly, by saying that the judge got it wrong, and give the reasons. That way of looking at matters brings out the ideal element in the criticism, for it endorses the view that there was a right way for the judge to have decided.

The introduction of judging into discourse

Imagine that we had not formed a concept of judging, and are in the creative process of inventing it (say, as a group of social reformers around a table). It seems reasonable to assume that the reformers would suppose that the idea should be socially desirable. We can

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discussion of interpretive practices. He has recently written on now moralising is an interpretive idea in several papers which, presumably, he is developing in the book he is currently writing.

[3] See Sheldon Leader, 'Impartiality, Bias, and the Judiciary' in *Reading Dworkin Critically* ed Prof. Alan Hunt (Oxford: Berg 1992) 241

[4] Commentators say that the public expression of grief 'by millions' on the death of Princess Diana was 'really' sentimental self-indulgence encouraged by the 'celebrity culture'.

add that the reformers unanimously accept the abstract requirement that decency to all individuals is of fundamental importance. Perhaps discussion would be like this:

> 'Let us create an institution in which one or perhaps more of us, one who is quick witted, has good moral insight, is a decent sort of person having a good manner with other people, is placed under a duty to consider those sorts of disputes that constantly arise between people and to decide them. This will make all of our lives better. We will obtain resolution of those interminable quarrels. And there is decency, and fairness, in the following idea: both parties will be considered as equal before the judge so that if the judge gets it wrong, at least the wronged party will not be able to say they were ignored, not taken seriously or whatever. The wronged party will in any case realise that any system that enables judgements about questions of value will for that very reason be fallible and there is no better way. Of course, to enable that sense that the wronged party might decently have, this person (let's call him a 'judge' because he or she will have to exercise careful judgement in the envisaged institution) must be impartial and that means they must be independent of influence from anyone. Oh, and let's make him take an oath! Let's appoint intelligent people who haven't an axe to grind, who would not decide 'along party lines', and whose appointment and tenure is not dependent on the government in power. And, let's make sure that these judges come from a diversity of background and class, and there is a proper mix of young and old, of men and women: decency, and fairness, requires it!'

Let us say this new concept gains rapid acceptance and judging becomes a practice of the community. Developments will take place. Over time, people will make critical adjustments to that practice by reference to the original ideal. Their understanding of that ideal will introduce modifications to the practice; *vice versa*, in the light of the practice, people will eventually modify the ideal.[5] We might find, for example, that we need to experiment with the appointment of judges, their period of tenure, their training, their salaries, their education and background, and there will be other factors requiring consideration.

Although the logic of the original proposed ideal does not require actual practices to exist, actually, present practices reflect the ideal to some degree. Although people have differing views about the value of these practices, they will be willing to distinguish those practices that 'have to do with' judging and those that have nothing at all to do with it. Often it is easier to say what is clearly not judging from what only might be judging. Our generally accepted patterns of grammatical construction give us some clues as to how we actually think about such things.[6] We have 'this idea' (proposed by its author) and now let us see the value in it. So people will differ as to whether the Nuremberg trials were a case of judging, or merely the application of 'victor's justice'. Some will take issue with Solon's proposal that he should cut a live baby in half in order to determine who its true mother was, and declare that it would not have constituted a 'true' act of judging. Once we are engaged in understanding live practice, 'judging' has become (to employ Dworkin) an 'interpretive' idea where different views about the worth of that idea reflect different standards. Our language is sufficiently robust to take on these differences. So a view on Nuremberg, or on Solon, might be expressed as a slant on judging, as judging 'but not the best', and the test of a person's slant would be what they thought was significant about the ideal and what elements they thought best formed it. So, for example, when a victorious power institutes a post war court to bring its losers to 'justice', does it maintain the requirements – lifted from the ideal - of impartiality and independence? The answer to that will differ according to the particular set of values thought to be appropriate, important, or significant in the original proposal.

Ideals and strategies. All these remarks about ideals come with a *caveat*. Concluding we should treat individuals with respect requires no confirmation from the real and empirical

[5] Development might mimic Rawlsian 'reflective equilibrium'. See Rawls *A Theory of Justice* Oxford UP p.46ff.

[6] Frogs, say, or sonatas are not the same thing as judging, and grammar supplies a clue. And since judging is about settling disputes, it is impossible to find any value at all in a connection between judges, frogs and sonatas, which should come as no surprise.

world, for nothing in the real world confirms or disconfirms that judgement. Pointing to individuals who, it seems, do not deserve of respect, is not going to do it, because to judge an individual as so not deserving respect is already to make an ideal judgement: 'here, in the real world, is an individual who does not deserve the respect he would deserve in the ideal world.' Judgements about value are categorically different from judgements about 'the real' if all we mean by 'real' is the world in which empirical observation provides the only evidence required. Nevertheless, in order to adopt a strategy for bringing about an ideal, we do need a grip on the real world and its 'empirical conditions'. Imagine an unpleasant, uncooperative and relatively violent community. Those who wield what centralised power there is, perhaps a majority, exert their influence through customary practices that involve strictly enforced prohibitions and punishments. The idea of judging might well not take root. That would not mean the death of the ideal; that still stands, independent of the practice. We do not modify the ideal because the conditions are bad; rather, we adopt methods suitable to those conditions that aim at bringing that community closer to the ideal (if that is possible). Probably it begins by persuasion and education, so that people see the advantages in having a judiciary, but it is just a question of tactics. The tactics question uses the ideal to devise a way of changing behaviour in the real world; the particular solution adopted will be in its nature not an ideal solution. Once the tactic has succeeded, the real world should be like the ideal world. The fact that it rarely does is no bar to trying, however, because the extent to which the practice attains the ideal provides the measure of social improvement.

Three kinds of judging

Although designing the institution of judging from scratch is possible, it is not necessary. The history of judging is long and reasonably distinguished and we can use that history in forming and testing the ideal. Of course, as already argued, nothing that has been done – the judging of the Salem 'witches', or the judgements of the Inquisition – will, however, affect the independent value of judging. Nevertheless, we gain some help from distinguishing three conceptions of judging from its history and we can conveniently call these conceptions, the organic, the deviational and the democratic.

Organic judging. Organic judging emerges from the idea of making a judgement. Almost anything can be the subject of judgement but 'acting as a judge' implies there is a competition and that its resolution would be desirable and, too, that the judge is authorised to resolve the dispute. Organic judging requires no institutional base, as in a legal system. An example is the father who adjudicates between his children, and other examples range from the relatively innocuous beauty contests, bingo competitions, book and art prizes, soccer matches and chess competitions (where the judge is a called a 'referee') through to administrative type adjudications on which patient should receive artificial kidneys or expensive drugs. An organic judge decides on a definable set of circumstances that define his role. Take the judges of a book prize. They are authorities on books who are appointed to decide which book is best and should obtain the prize. This is close to legal judging but the differences are still marked. No one pleads 'a case' on behalf of authors, or literary critics, before the prize panel; more importantly, there is no sense that any novelist has a right that their book should win the prize. There is nevertheless a settled logic to organic judging, which is that something more than merely 'making a judgement' is required. Organic judging still requires focus on a particular competitive issue with a view to resolving it. Judging 'a matter' implies a particularised focus that extends to the particular case, and not beyond. What would violate this requirement? Imagine a book prize judge who, after declaring he had not read any of the novels because he disapproves of the genre, awarded the

prize to a charity. This is not judging, obviously not in terms of the ideal, but also in our ordinary understanding. Even the most banal of cases requires this attention to the merits of the particular dispute, say, where a judge makes a decision in a competition about the best description of a brand of chocolate. In the book award case, you would want to say to the judge: if that is your view of novels, why did you accept the job?

Deviational judging. A sceptical and 'deviational' conception of judging is useful in comparison. When people say 'the last place you would find justice is in court' they intend an irony; they mean that one ought to be able to expect justice in court. This characterisation of judging therefore reveals acceptance of a non-sceptical and ideal sense of judging. The ideal attitude is evidenced where people say of a judge who awarded a book prize to her husband's book, that she was biased, or that if he did not consider the entries but just awarded the prize to a deserving charity, that she was not acting as a 'real' judge. These judgements would stand even if that judge honestly supposed her decision to be the best. The important point about deviational judging is not that it is sceptical about an established practice of judging, because there is none. Rather, it suggests ideal points from which we might assess the deviational forms. We consider the different slants on judging and choose one slant over another by assessing the relative values of the different suggested ways of doing it. The organic way of thinking about judging brings us to the idea of a particular forum, involving particular disputants. We can see advantages in that, and we see that it is natural to suppose that a good model would require independence, lack of bias and the exercise of judgement, on circumstances particular to particular disputants, whether novelists, competition entrants, or litigants. So both the organic and deviational senses submit to the governance by an ideal.

Consider the idea of a 'kangaroo court'. We mean something critical of that court. We think it is not a 'real' court and say something like it only 'pretends to be a court', meaning its judgements lack the appropriate justification that other, better, courts have. It helps that we can draw upon the term's etymology in coming to this conclusion. Explanations differ about the historical origin of kangaroo courts, for example, but most explain them critically. An innocent explanation arises from the idea of Californian gold-miners 'jumping' already staked claims, and the consequent *ad hoc* local hearings formed to oust the 'jumpers'. But other sources include the 'jumping this way and that' (like a kangaroo) in argument, suggesting the *arbitrary* quality of decision; the *too-hasty* 'bouncing' from court to gallows; the *ungrounded* quality of the decision-making; the *jumping to conclusions*; and finally just the idea that the convict communities of Australia (the land of the kangaroo) were *lawless*. The twin ideas of lack of firm ground and stability arising from the picture of the kangaroo jumping about, and the convict state of Australia, so associated with the kangaroo, provide a good background to understanding 'court-like' decisions which are actually mockeries of the ideal.

This is how language is. We can contrast, say, the Salem witch trials, which followed procedures commonly accepted in America, in the mid-18th century, and conclude that although these trials were unfair, because they gave too much weight in evidence to accusations, they were not 'arbitrary' as they followed what were then firmly established procedures. They were not, therefore, trials of 'kangaroo courts'. On the other hand, we can and should say that the Salem witch trials were certainly not as trials should be since the Massachusetts legal procedures were seriously deficient in their grasp of evidence (and in many legal systems at the time).

The deviational sense of judging makes it tempting to argue that, while we each might have a clear idea of what an 'ideal trial' would be, that is a different question from that of identifying here and now, in the real world, what constitutes 'a trial', good or bad. On the other hand, the deviational sense does not go away and the choice of a central ideal appears to

be the only way of sorting out the different views that people have. How, if there are different views, *could* we solve that question? There is no other solution than a conscious choice as to what counts as a central case of judging. That choice, it seems, is just what counts as morally worthwhile. So the question becomes: what morally do we think that judges should do?

Judging in a democracy. A natural progression is to a third conception, namely, the formal kind in courts in a settled and democratic legal system. Again the test is the value of that conception and it lies in the connection between the moral importance of courts and the improvement of the community as a whole. To suppose that judging is something centrally legal, or part of the democratic process, is not a matter that we should accept too quickly, because we easily understand judging in non-democratic legal systems. There were recognisable judges in South Africa at the time of apartheid, in Germany during the Nazi regime, in the Inquisition, in the courts of Star Chamber, and of course, the judges for the Salem witch trials. There were judges in the inchoate democracies in Greece and Rome as well as the inchoate democracy of England in the 18th Century and earlier and, of course, there are judges in Saudi Arabia, Burma and North Korea.

Perhaps we should just declare that the most important features of judging are those of judges in democratic legal systems. There is something to commend for this tactic. It takes a stance on the importance of democracy and casts a shade on those regimes marked by discriminatory and barbaric practices. The less the legal system mirrors democratic qualities, the less we will think of its courts and judges as real courts, and real judges. This tactic draws our attention to the way we often suppose that judges in such regimes are 'not really judges' but more like the administrators of 'staged trials' and 'kangaroo courts'. So an explicitly moral choice – that democracy is not only a moral good but it represents the best choice that could be made for government – provides an ideal against which we should view other practices as second-rate, shoddy, malign and otherwise not to be taken seriously. To choose judging in a democracy as the central case alerts us to the significance of rights-based dispute settling. The book prize judge does not decide questions about the rights of authors whereas it is a central part of judging in a democratic legal system to decide what rights parties to the litigation possess. On the other hand, legal-democratic judging shares with the generic and organic form of judging the requirements of independence, particularity, impartiality, and authority.

Some will strongly resist this proposal of a central moral account of judging as the legal-democratic. There are two ways that this objection might be expressed. First, an historian might object that we require a workable sense of judging that covers the judging in other cultures, at other times, in both oppressive and non-oppressive regimes. But this would be misguided. The questions with which historians, and sociologists and anthropologists are interested are relatively value-neutral, so they can choose a relatively value-free conception of their own. They could, too, choose the democratic-legal model, as it has plenty in it besides the central moral point that judges settle questions of rights. True, there was not a democracy in Solon's time, nor was there then a settled sense of an individual 'possessing rights' as now. Nevertheless, our understanding of Solon's position as an historical figure known for the justice of his decisions is unlikely to be too far off the mark. We can read back into the famous Solon judgement both the idea that each woman had an equal right to be heard, and that an independent judgement could effectively, and rightly, make a decision about the merits of each claim. It was Solon's particular tactics that made it barbaric, not the institution itself.

Second, some will prefer a more thoroughly sceptical explanation, perhaps one that denies the importance of moral rights. But it is difficult to see how a sceptical argument

could be anything other than the argument for a rival ideal; a sceptical argument must confront equality, democracy and the idea of rights and say either what is wrong with these values or say how they string together in the wrong way. Here is the non-sceptical argument:

> 'There is considerable value in the proposal that individuals who advance opposing claims about how the community should treat them, make those claims in terms of their rights, ultimately, to equality of respect; further, that an independent, impartial institution – the institution of judging – should decide which right triumphs. Here is a way that a democracy can transmit its fundamental values of equality of respect and individual freedom through the judicial process. The transmission of fundamental values goes both ways. Judging reflects equality of respect in its resolution of disputes concerning rights and so the political system that instituted it shows concern for rights to equal respect and is at least an inchoate democracy.[7] If we choose an ideal conception of what judging is, the connection between the overall system and the particular institution of judging must therefore form a coherent whole.'

Judges cannot for long act independently from the political system, although it is surprising how long they can exist to perform their particular function, and how long they can persist with at times unconscious perception that their role is an ideal one.[8] They require, of course, independence in the form of financial support and lack of political meddling. Central government co-operation is also required to enforce court decisions. Those legal systems where the judges hold out against a government that is intent on ignoring claims of rights where it suits are cases of legal systems either in meltdown, or in progression. To characterise legal systems in this sense of placement on some continuum of improvement clearly supports an ideal conception of what judging should be.

The independence of judges and the status of the legislature

When we move from organic judging to judging in a democratic legal system, the question of the representative assembly's power to make decisions for the community becomes an issue, in particular in the relationship that should exist between the legislature and the judiciary. The orthodox way of characterising that relationship is that the legislature, because it is the representative body, may make decisions for the community as a whole as well as for particular groups and individuals. It is duty-bound to endorse and follow values inherent to democracy, such as freedom of representation, and equality in the universal franchise. Some commentators, for example, Ely, have argued for a minimum in judicial manoeuvre within these twin values saying that the outer limit of reach is the testing of legislative procedure.[9] Others, for example, Dworkin, have argued that the judicial reach extends to determination of the content of legislation that has passed a procedural value test; where, say, there is, in Mill's phrase, a 'tyranny of the majority'. Both views endorse some judicial intervention in legislative activity but fall very far short of claiming that judges may make all the decisions that the legislature may make. If judges could do that, the reasons for the procedures setting up the representative legislative body would be suspect, since the point, the value, of the body's being representative is that it is authorised by vote, ultimately the vote of each mature member of the community, to make those decisions. Judges are not such a representative body.

What decisions of a judge would therefore be authorised by a democratic legal system? Here is a suggestion. There is social value in supposing that judges, in the sense so far indicated as an independent institution dealing primarily with disputing individuals, are

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[7] Unless, of course, there are arguments that can establish a better system based on equal respect.

[8] Since the mid-20th century there have been many notable instances, in South Africa, Nigeria, Ghana, Pakistan, Grenada, Rhodesia, Burma, and Malaysia.

[9] John Ely, *Democracy and Distrust: Theory of Judicial Review* Harvard UP 1981

democratically authorised a. to decide matters arising from decisions of the representative body, namely, statutes and subsidiary legislation; b. to decide disputes that arise as a result of those decisions; and c. to decide in accordance with the underlying values determining the decision-making power of the representative body. What democratic value is there in judges, an unelected body, making decisions that do not focus on the matter of dispute between individuals? The legislature's central concerns are with decisions affecting the community at large. If the judges are not representative then it must follow that their decisions should not be able to range over the whole of the community. This narrows the scope considerably for judicial decision-making.

These matters should be uncontroversial but they are not. Sometimes what confuses people is the thought that judges might be either better or less equipped to make decisions for the community as a whole than the elected representatives would be. Often that is the unspoken ground behind the claim that 'in fact' judges do decide 'policy' questions when meant either in praise or as a cynical aside. That the judges do not know 'what the ordinary man thinks' is thought to be a mark against them; that judges are politically impartial is thought to be a mark in their favour. But these arguments are beside the main moral point. Judges do not have particular qualities as a matter of accident. They need to be isolated politically because of the requirements of independence and impartiality; they need to be intelligent because they have to read carefully their past decisions, and the past and present decisions of the legislature, in order to provide a coherent justification for their own decisions. In short, they need to be good lawyers.

We should determine the question of the limits of judging by reference to the value that idea has in the democratic scheme. Judges must decide with a view to settling the question of the dispute at hand by according proper attention to what the representative body has declared, as well what coheres with that declaration, including previous decisions of judges. But at times, the requirements of deciding what rights an individual has according to the general values shaping democracy will shift between two positions. At times, the decision will have to preserve a right to be treated as an equal before the community, thus taking into account the way the community has treated relevantly the same individuals in the past. At other times, the decision will have to be in favour of what equality, independently from past practice, requires.[10] Where these two values compete, the more fundamental right - independent equality - must dominate, because it is from that value that the right to consistent treatment from the community derives. There appears to be nothing fundamental to democracy that requires that judges decide only in accordance with a requirement of consistency, in spite of Dworkin's claim that integrity is the chief moral virtue of legal reasoning.

The pull of equality towards consistency in decision-making is nevertheless powerful, particularly so in the case of legislation. This partly arises from an implied presence of the legislature in judicial disputes about people's rights. All legal disputes in a democratic legal system are in some sense multi-sided. Although the characteristic judicial dispute primarily involves two parties, that contest requires reference to the democratic rights of the legislature. When a defendant disputes the application of an implied clause in a contract, the meaning of which derives from both statute and previous judicial decision, the legislature has an implied presence in the courtroom. Its claim is that it has a right to the proper interpretation of its statute, for it is not that statutes are merely 'guidelines' that a judge may 'at his discretion' apply, but they express rights that demand attention from the judge.

All rights other than the most basic right to equality of respect can only be putative and judges must seriously assess their weight against the other putative rights in order to

[10] See Dworkin's disagreement 'Reply to Guest' in *Revue Internationale de Philosophie* 2005.

provide a resolution. This is not to say that the dispute is three-sided where the interpretation of a statute is involved, because the arguments put before the disputants will each draw down the force of the putative statutory right to their own respective advantage. The force of that argument may depend on whether they have a right by virtue of the legislature's right to legislate. If the plaintiff has a right to X because that is the correct interpretation of a statute, then he has a right to X because the legislature had a right to grant him that right: it is in the statute, and so the plaintiff claims a putative right. Of course, the court has certain rights (and powers) arising from custom and statute. Some are procedural, as the rule that its decision stands until overruled, and the various rules of evidence and form. Some are substantive, the most important of which arises from an aspect very apparent in its organic guise: no one should use the court for injustice (say, through abuse of procedure). The past decisions of judges have a different effect, however, as it is difficult to make any sense of the idea that 'the judiciary', unlike the legislature, has an implicit presence in the dispute. Previous decisions 'bind' present disputes for different reasons. Consistency is important because of the value of 'certainty', which includes the value of protecting rights to reasonable expectations. Further, reference to previous judicial reasoning adds to accuracy and confidence in making decisions that are just; and, where reference to previous decisions speeds the decision-making, there is the additional value of efficiency.

A note on the representative nature of the judiciary. The argument that judicial powers are limited because judges are not representative means only that the judicial function is not legislatively representative. The legislature must speak for all members in the community and to matters that concern the whole of the community. But the judiciary represents the community in the obvious sense of acting as the central institution for ensuring justice in individual disputed cases. That they are unrepresentative of the ordinary public – that they 'do not know who the Beatles are' or are exclusively white, male and from public schools – speaks only of a sense that judges should be 'like us' (which is an important aspect of equality) in order to be 'our' judges. It does not follow that because judges should be community representatives in these senses, that it is their duty to represent the individual interests of everyone, in every judgement.

The judicial review of legislation

What if the legislature passes procedurally correct legislation that is contrary to democratic values? The most dramatic form would be a statute that abolished democracy and did so specifically to exclude democratic values, say, to reintroduce the feudal system, or institute Taliban type rule, or the Leadership principle. Passing legislation that is more loosely contrary to democracy is more familiar. Is it 'contrary to the values of democracy' to permit an administrator to deny a hearing, or to prohibit the private adult possession of computer generated pornography, or to permit terrorist suspects to be detained for long periods without recourse to a court, or to prohibit the adult wearing of the burqa? We attempt to provide answers to these difficult questions by first consulting the general and non-putative injunction that people have a right to be treated with equality of respect, and then we consider the extent to which that very abstract principle should be applied in given circumstances.

The abstract principles invoked here are only a first stage. The question of who should declare legislation void adds a different layer of complexity, one that requires, once we have settled the general principles on the substantive question, a fresh set of considerations. So let us take the dramatic case, where a democratically elected majority decides to dismantle democracy by instituting a dictatorship. Do democratic judges have power to declare this legislation void, on the ground that it contradicts the values that give

legislation its force? The answer must (in principle) be that there is nothing in the judicial role as it has so far been characterised that should prevent it. That the judges are unelected is not a point relevant to the general principle; 'being elected' is not the determinant of the power to make democratically justified decisions, because even the most basic democratic decider –the single voter casting her or his vote – is unelected. In any case, judges are appointed in accordance with democratically legitimate procedures. A charge of elitism? No, because judges are elite in the same sense as the elected representatives are elite: they hold a particular status and have powers that denied to the people who appointed them.[11]

Since questions about the value of a proposed practice – an ideal - cannot be dependent on the real world, the question whether the judges in the real world should have the power to declare invalid, or 'null and void', legislation contrary to individual rights has no universal answer. The value of a particular practice in the real world depends, instead, on how that practice matches up to the ideal world. A small and stable community with a culture of fair-mindedness might need nothing more than checking mechanisms within the legislature itself, and no requirement for judicial review of legislation. Small enough and fair-minded enough, it may have no need of judges at all and an especially small community of morally good people may not even need a legislature. If it did, its functions might be merely a coordinative 'administration of things', such as determining which side of the road its citizens drive. On the other hand, a large and relatively unstable community might need a rights check of a stronger kind, and different tactics to bring it about will be part of the question, again, of how to bring that community closer to the ideal. Even the question whether a judicial institution is necessary in the real world cannot therefore be given principled *a priori* answers, and so whether judicial review is justified or not, is a question of tactics.[12]

However, whatever the actual state of any particular community, it is difficult to see what is faulty about a moral principle that a. asserts the primary importance of moral rights and b. asserts that decisions made about individual rights should both be impartial and should take particular circumstances into account. And so, the real question of judicial review of legislation, and even more so of administrative action, is whether, apart from the special circumstances that raise countermanding principles (for example, of security and stability), there is anything in principle, in the ideal, that militates against the idea, and the answer to that question must be no.

Policy as judicial activism

A sizeable number of lawyers at least in Anglo-American jurisdictions appear to accept the idea that judges not only make 'policy', but should do so. Some say that the question whether judges should is a side issue; the fact of the matter is that they do and so lawyers just have to live with it. It is impossible to say much about this widespread belief without some refinement of what 'policy' means. But it is clear that common reference to a 'policy' reason envisages widening the scope of reasons justifying judicial decisions beyond the conventionally understood limits of a court's power, namely, the interpretation and

[11] See Dimitrios Kyritsis 'Representation and Waldron's Objection to Judicial Review' *Oxford J Legal Studies* 2006 26: 733

[12] See Jeremy Waldron, *The Dignity of Legislation*, Cambridge UP 1999, and Tom Nagel's thoughtful and subtle review in his *Concealment and Exposure* Oxford UP 2002 ch.12. Consider Waldron's views on judicial review. He appears to choose a situation of ideal democratic legislative activity, then appears to say that judicial review would not be a. necessary and (therefore?) b. democratic. The ideal argued in the above text is for courts to resolve questions of rights, and there is no reason why that should not include rights against the legislature. Maybe if the legislature were perfect, judicial review would not be necessary. Waldron believes that fundamental disagreements about rights need to be resolved (in what he calls the 'circumstances of disagreement'). What is special in such circumstances about legislatures? Practical arguments would seem to secure judicial review where partial, prejudiced and hasty legislation contravenes decent standards. See, on Waldron's arguments here, Annabelle Lever, forthcoming *Public Law*, Summer, 2007, 'Is Judicial Review Undemocratic?'

application of legal rules. For some, the matter ends there, for there are those who perhaps rightly wish to see the business of legal reasoning shaken up. These lawyers want a more 'activist' approach to interpreting the law, and they welcome the making of a more open assessment, and use, of the values underlying or inherent to law. However, because it is uncontroversial that judicial decisions should be consistent and coherent with those values, this sense of 'policy' is not as interesting as others. At most it suggests that the role of courts should extend beyond the application of 'ordinary meanings' or the 'black-letter' of the law. If 'policy' just means 'activist within the law' in the sense of being 'consistent or coherent with the values underpinning the law', then it amounts only to a call to judges to be more imaginative. Few would deny that judges should act imaginatively.

In the past two or three decades, in Anglo-American jurisdictions, there has been a sea change in attitude to the invoking of abstract value, and there is now much less self-consciousness about invoking 'reasonableness', 'fairness', 'justice' and other moral values. In those days, for example, there was invariably a reaction to many of Lord Denning's judgements, which many thought were more concerned with justice than with certainty, or with helping the relatively helpless in the face of corporate interest. Closer inspection reveals Denning's judgements to be 'abstract' and imaginative rather than concerned with the formulation of 'policy' to be carried out irrespective of what the law said. He shaped and reformulated the law, true, and certainty was not the only value that he thought lay behind the law. Many of his judgements, while 'imaginative' and 'activist', are assimilable under the existing law.[13] We can explain his suggestion that his way of deciding 'policy' was novel, even radical, by understanding him to mean that he did not view legal reasoning as a matter of the mere application of rules. These days, we better appreciate that any case admits of different interpretation and that the arguments required to resolve them are sophisticated. Denning's time was that when legal education was not as widely regarded as worthy of academic study as today. Before the early sixties, many in universities regarded the study of law as training rather than education, something akin to the learning of technical rules; further, that what judges did was merely a 'mopping up' process at the edges of law.

Legislative or common law policy

Closely related to this use of 'policy' is another in which lawyers urge courts to interpret laws in accordance with its 'underlying policy'. It is a different sense from Denning's, because narrower. In the case of statutes, it urges courts to pay attention to the policy intended by the legislature in a context where another interpretation, usually a literal interpretation, would lead to a different result.[14] Again, this idea of policy does not contradict any matter argued so far and, indeed, it is almost uncontroversial that a court should try to give effect to legislative intention. If that intention is to institute a particular policy, the court must consider the possible policies the legislature had in mind. Difficulties arise in relation to the conflict of other principles at odds with pursuit of that policy, but the courts have developed methods for dealing with them. If, for example, in a criminal statute, the literal wording favouring a defendant was at odds with its clear policy, the court could choose the meaning favouring the defendant from considerations of fairness. In cases of civil liability, the courts will often

[13] The decision in the well-known 'High Trees case' in UK contract law is now almost universally regarded as assimilable under general principles of equity existing from long before that case although at the time many thought the decision was an unjustifiable departure from settled rules, indeed, an abandonment. See [1947] KB 130. This is only one among many of Lord Denning's judgements in which novelty was mistaken for legislative activity.

[14] See the way Lord McKay uses 'policy' in relation to the question of equality comparators for men and women's pay while interpreting the Equal Pay Act 1970 in *Hayward* v. *Cammell Laird Shipbuilders Ltd. (No. 2)* ICR 464, 473: '… the policy of the Act is more consistent with … the natural meaning of the words … than with the meaning put forward by the respondents.' In the same case, Lord Goff, illuminatingly referred to the 'the philosophy underlying the subsection' (478).

favour a literal interpretation where sufficient weight appears on the side of a party's 'reasonable expectation' that the literal interpretation would be enforced. Nevertheless, these conflicts between 'the policy of the statute' and 'what the defendant reasonably expected' are perfectly consistent with supposing that the court's task is to examine various possible interpretations of what the law could mean. The use of 'policy' is perhaps even less controversial than the sense in which critics have used it of Denning; it is quite an ordinary idea that legislatures have the power to devise policies and express them in statutes. When making 'policy judgements' in this sense, courts are merely following the legislature and there is no suggestion that they are striking out on their own. The policy they enforce will be the policy of the legislature, not their own.

The question is more complex in the case of judge-made law. Usually courts do not formulate policies but decide the case on the particular facts before them, applying the law. Sometimes, however, one can discern some underlying rationale to previous cases that is suggestive of an unspoken policy, such as that it is the 'policy of the common law' to exclude evidence of drunkenness or drug-induced disability. What does 'policy' mean here? Unlike the legislative case, there is no formally enunciated statement that drunkenness is not to be a defence to criminal liability. Further, there is no obvious principle at stake such as that the legislature's intention should be carried out, for the policy appears to be that of a personified 'Common law'. 'Policy' here means that judges have found that it made good sense in the past to exclude such evidence on the grounds of expedience; certainly, this accords with a pragmatic sense of 'policy', as when it is said that, in spite of the merits of a particular case, 'there is a policy' that forbids giving consideration to those merits. The carrying out of such a policy is seen as improving the impact on the community as a result of the court's judgement. Much the same sense of 'policy' obtains in statutory criminal offences that have a strict liability component, such as under-age offences. The policy behind the creation of such offences is to place the onus on a possible defendant to ascertain age, something socially desirable in itself, and to expedite the hearing of court cases. Usually when 'judicial policy' or (in England) 'the policy of the common law' is invoked, it is invoked in this sense, and so it is similar to the legislative policy sense. Once the court is aware that the reason for the decision in a set of past cases was to prevent drunkenness being pleaded as a defence, it then proceeds, as it would in interpreting that policy if it were expressed or implicit in a statute. As in the legislative sense, there are countervailing considerations such as the important principle that, for criminal liability, defendants need to have *mens rea*, and these may successfully override the drunkenness policy. This explains, for example, *Majewski*, which decided that for what judges call a 'specific' intention, a defence of drunkenness might be pleaded.[15] In short, there does not seem to be a dramatic difference between judicial policymaking and legislative policymaking in the sense thus far discussed; each seems uncontroversial. 'Policy' is also sometimes used in one breath to refer to both statute and common law: a classic example being the reference by the House of Lords in the *Three Rivers Case*,[16] to 'the well-established policy of the English law of imposing a more extensive liability on intentional wrongdoers than on careless defenders'. As indicated here, we can explain both 'policy' type arguments in terms of rights of the state that its legislation and court decisions are taken seriously. In each case, the court is either bowing to the legislative policy, not its own, or following a judicial precedent.

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[15] [1977] AC 443. See earlier remarks in this article. *Majewski* also demonstrates the interplay between the courts and the legislature since it decided that a statute had to be read to incorporate the drunkenness exclusion except as far as specific intentions were concerned although there were no words to that effect (s.8 Criminal Law Act 1967). That interpretation was expressed as a presumption that the legislature 'would not have intended' to exclude the common law rule.

[16] *Three Rivers D.C.* v. *Bank of England (No.3)* [2003] 2 AC 1, 162.

Policy merely as a way of expressing hypothetical, universalisable judgements

If judgements about people's legal rights are compatible with assessing the impact on the community, it is possible to draw illuminating connections between the individual and the community. Neil MacCormick, for example, understands what he calls 'judicial consequentialism' in a way consistent with the arguments so far advanced. He thinks that judges may look to both the real and hypothetical consequences for the community in justifying their decisions. Although he calls this account 'full-blown' and 'full-blooded' consequentialism, his examples show that the judicial decisions he has in mind must be compatible with the rights of the litigants. For him, 'consequences' are those the acceptance of which in the course of universalising the reasons for the decision do not, as he says, 'subvert' the values 'at stake'. To illustrate his view, he says it was right for the court to consider the possible consequences for subversion of the value of 'respect for life' in the famous cannibalism case of *Dudley & Stephens*.[17] Did the two defendants have a right to kill the defenceless cabin boy for food, given the enormous strain they were under, sometimes termed 'duress of circumstances'? MacCormick argues that the judges should imagine what it would be like for there to be a universal right in such circumstances to kill. Would this produce bad consequences for the community in the sense of promoting 'disrespect for life'?

But there is a better way of asking that question. Would it be a denial of the victim's right to self-respect if the defendants killed him under those terrible circumstances? If that respect really means an equality of respect, it must be possible for us to imagine duress so great that what we do is at least understandable, and if the greatest duress of all, excusable. It should be possible for us to imagine that we could forgive our equal, imagining ourselves in the same position as they. Posing the hypothetical question this way is a powerful argumentative tool that adjusts the focus on the question of respect. MacCormick's way of putting it, that it would 'subvert' the values at stake, is suggestive of a different and possibly misleading line of thought. This would be to suppose that the hypothetical question was whether, if *Dudley & Stephens* were decided in favour of the defendants, people would have less respect for human life. Put that way, the test would be a kind of slippery slopes type, utilitarian argument. In the extreme, if people would start to think in the hypothetical case that 'cannibalism was OK', then MacCormick's argument might imply that the defendants would have had no right to kill the cabin boy. But this is more dramatic than what is required. All that is necessary is to ask whether respect for people requires that, in the particular circumstances, the defendants not kill the cabin boy. And so the hypothetical question is just part of the general question of what respect entails. In fact, a better interpretation is that MacCormick's reference to 'consequentialism' is not a reference to the consequences at all; merely to an imaginative exercise of uncovering what respect requires, and if so, it is much closer to Kantian universalism than to Benthamite total happiness sums.[18]

The moral nature of the justification of policy decisions

Whether 'policy' reasons are 'legal' reasons or not, is surprisingly not of great importance to the general question of whether judges should make policy decisions. The central issue is, instead, whether a judge should 'make policy' in a sense 'otherwise than in accordance with

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[17] *R.* v. *Dudley & Stephens* [1884] 14 QBD 273

[18] Take the criminal law of duress. The argument for allowing the defence concerns fairness to the defendant. At its most general, the argument is an appeal to humanity; look, it says to the courtroom, think of yourself being in the same circumstances as the defendant. Would you be able to resist the terrible pressure of a gun nozzle at your face, where it is clear that you will die if you do not commit the offence? In comparison, the consequentialist argument that instituting the defence of duress for murder would encourage crime looks very weak.

the values underpinning the law'. Rather, the reasons that support the choice of the ideal case – the democratic legal system – are straightforwardly moral. Those reasons suppose that the proper role of judging includes acting on moral convictions. But it is interesting to note that, according to each of the two most influential and opposing theories of legal reasoning, judges should consider moral reasons in their decision-making. The 'positivist' theory, which claims that laws are ultimately identifiable by reference to social conventions, comes in two forms, one 'hard' and one 'soft'. The opposing theory, most accurately called 'non-positivism', claims that laws ultimately must be identified through moral reasons.

The dispute as to what occurs in 'hard cases' is an important and interesting one because it addresses the question of what counts as good reasons for a judge to draw upon. Legal positivists, known as 'hard positivists', such as Joseph Raz, take the view that reference to social facts in the form of judicial conventions of applying statutes and previous decisions, exhausts the identification of law.[19] In those cases where there is no 'hard fact' identifying what the law is, the judge's decision cannot be based on law. Raz still supposes that judges, like anyone, should behave morally and so he endorses the view that their reasons require moral justification. In many cases that will mean the courts will have to apply the moral values underpinning the conventional law. Where the law is not well supported by moral values (for example, Atzec law - which instituted torture on a grand scale - or Nazi law) the judges would presumably be required to apply moral reasons which would, in that case, not be at variance with the 'hard' law. In each case, according to Raz, there is no warrant for calling the reasons that the courts justify their decisions 'legal' reasons because there is no convention for identifying what counts as a legal reason.

Another group of positivists, known as 'soft' positivists, hold what they intend to be a version of legal positivism more congenial to encompassing hard cases within the ambit of law...[20] Although they claim they believe, like Raz, that the identification of law is dependent on conventional social facts, they believe that judges use 'softer' conventions, constructed by making moral sense of the 'hard' conventions, to justify court decisions. Since all positivists believe that there can be law that lacks moral content, both sorts of positivist must agree that there will be a conflict for the judge when the conventions, hard or soft, are contrary to morality. Where the moral reasons for not applying the legal conventions are stronger than the reasons for applying them, it seems that for positivists of both kinds, the judge should decide on moral grounds. Further, positivists of either kind who hold that 'policy decisions' by courts may be justified one way or another *and* hold that 'policy' means 'going beyond what the hard or soft conventions allow' would also have to agree that 'policy arguments' had to be justified morally.

The remaining legal theorists hold, in one way or another, that morality is the source of any conventional identification of law, and that all legal reasons are sophisticated elaborations of moral reasons. Where a judge invokes a 'policy' reason, therefore, it can only count as a legal reason if it is also a moral reason.

Policy arguments as *expedience*

Some forms of judicial decision based on expedience are justified. Mostly, though, compromises of the sort that arbitration encourages are not properly part of the judicial role.[21] It is helpful to draw a distinction between two kinds of decision, each of which represents a

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[19] Joseph Raz, *The Authority of Law* Oxford UP 1979 ch. 3; 'Authority, Law and Morality' in *Ethics in the Public Domain*, Oxford UP 1994, Essay 9 and, particularly, in 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Coleman *Hart's Postscript: Essays on the Postscript to the Concept of Law* Oxford UP 2001

[20] See, for example, Jules Coleman, *The Theory and Practice of Principle* Oxford UP 2003

[21] It is not pedantic to point out that most legal systems distinguish adjudication from arbitration.

compromise between certain 'real' states in the world and an ideal. Only one kind of compromise is consistent with ideals of judging. This is the ideal compromise and that turns out to be little more than tolerance.

The sort of situation is familiar when expressed as 'a reality that has to be faced'. First, in a 'non-ideal' compromise, a temporary compromise may constitute a morally justifiable decision because it is consistent with the ideal situation. An example is to be found in the *Brown II* case that followed in the wake of *Brown* v. *Board of Education* in which the US Supreme Court held that the City of Topeka's policy of school segregation was unconstitutional. In *Brown II*, the Supreme Court held that because of the difficulty of organising bussing immediately, the desegregation could be phased over a period.[22] This was not ideal, but rather a temporary measure in lieu of total desegregation. The Supreme Court thought it was the ideal solution, we might say, in the particular circumstances. Secondly, in an 'ideal' compromise, a compromise as the permanent solution will only be justified if is the best the ideal can *ever* do; it would be wrong for a judge to accommodate a non-meritorious claim, only because it was temporarily forced on him. An extreme example would be where the judge says, 'I was ordered to come to the decision and told that my family would be deported if I decided otherwise'.

We can distinguish that desperate situation from a decision respecting the relative stability of civil conditions where a compromise may be morally justified, even when permanent. The constitutional cases following the Rhodesian revolution of 1965 are a good example. There was no rival government or legislative claim to power and the courts, in spite of recognising the government's unconstitutional exercise of power, decided on the ground of 'civil necessity' - which was, in effect, a principle of civil order and stability – and declared the usurper the permanent lawful government.[23] This was an 'ideal' compromise. It was a solution morally justified because it aimed at respecting existing and established rights; continuing the uncertainty of the unconstitutional nature of a government that had now been established of three years, it was thought, would have raised an unacceptable risk of serious civil disorder. Ideal compromise, then, is one form of morally justified judicial decision-making, one that recognises a certain 'reality' about how things currently are.

Policy as expedience suggests the outweighing of what we might normally expect in a decision; it therefore sets off a warning bell as to why judges should ignore, or give insufficient weight to more normal reasons. If a judge uses 'policy' to refer to this sort of ground, there is the interesting question raised as to what special circumstances give rise to it. It is probably better to refer to this kind of judicial reasoning as the making of *ad hoc* policy, and this helps distinguish it from, say, the 'common law or legislative policy' type of reason.

The special case of emergency. There is a special case of expedience where there is an emergency, such as war.[24] This is governed by a clear and distinct category of moral justification wholly dependent on the occurrence of a catastrophe. We can explain some of the logic of this category in terms of self-defence. Equality of respect for people includes

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[22] The original *Brown* decision is at 347 U.S. 483 (1954). In *Brown* v. *Board of Education* 349 U.S. 294 (1955) ('*Brown II*'), a year after the famous decision, the Supreme Court considered how relief might be sought given the difficulties of immediate implementation of desegregation and ordered that desegregation occur 'with all deliberate speed', delegating the task of supervision to the district courts. Amongst other directions was the following: 'The courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.'

[23] *R* v. *Ndhlovu* [1968] 4 SALR 515; the court stated that '*de facto*' legality had 'ripened' into '*de jure*' legality.

[24] War is a clear case, but emergencies come in different shapes. A single judge faced with a split second decision about child custody in the middle of the night in the weekend; an ambulance driver faced with red lights; the situation in *Dudley & Stephens* (see n.15, above, and the discussion relating to it)

self-respect and this reasonably permits a right to retaliate in the special state of imminent attack; further, equality of respect generates a principle of proportionality so that (as it were) the damage to loss of respect in the attacking party goes only so far as to ward off the 'damage' to the defender's respect. Martial law suspends rights, too, and again there is a principle of proportionality at work. But any balance metaphor should not imply an argument of a utilitarian sort. (Some utilitarians like to say that the case of emergency proves utilitarianism). Rather, the argument derives only from the massive nature of the onslaught on human respect. In emergencies, we form the shape of a person's right to respect in the light of the possibility that it is close to being lost altogether. Let us say it made us .05% safer from arbitrary violence if we instituted a benign police state where some basic rights, to freedom of movement and expression, say, were removed. Would the restriction on my rights be justified by that extra tiny margin of safety? If we think that only the rights of others should restrict our rights, what are those other rights? The right that others have to .05% extra safety? The idea that a person has a right to a particular degree of safety, at least at that low margin of safety, seems odd. We do not have a right (against whom, for example?) to a marginal increase in security, no more than we have a right to have a marginal improvement in our air quality, or the gross national product. But it does not seem odd when there are significant threats to our safety. We then have a right against others that their rights be reduced. The balance metaphor can then be used a balance between people's rights, as opposed to a 'balance' between the general community's marginal increase in well-being, and an individual's rights.

'Policy' as a strategy to achieve a state of affairs to which no individual has a right

The case of emergency suggests a further argument in support of judges not deciding questions of policy. Let us assume a. that individual rights are fundamental and b. that in a democracy there is a case (that is to say, it is in principle morally right) for a judiciary to determine, in cases of dispute, what people's rights are, or should be. On these assumptions, it is reasonable to claim that decisions that ignore rights are illegitimate, that is, are morally unjustified. As already argued, if 'policy' means no more than a result that is consistent with the rights of the parties to the dispute, then policy arguments are justified. But there is clearly a need for decisions extend to bettering the community as a whole and if rights are of primary importance that appears to mean that the community in some sense comes second.

What moves us to suppose that individual rights are important? The best account, if inchoate, comes from a sense of ourselves, and the importance we place on identifying others around like us in the relevant respects; this naturally leads to common right to respect.[25] If rights are primary, the rights of the community derive from the rights of each member of the community; if an individual's rights are primary, the community therefore is incapable in crucial ways of having greater rights than its members.

The question then arises with what justification may a community make decisions on behalf of its members. Respect requires that people have a putative right that the community, through representational mechanisms, take their wishes seriously. Where there are two broad and contradictory demands facing the community, the majority prevails where there would be no violation of any individual's right. Why? At first sight, a bare majority satisfies a basic requirement of respect: if more people want X than want Z then it would not treat each member of that majority with respect if their freedom to choose a policy were denied in favour of the minority's policy. The majority can always say to the minority 'you had the chance to vote, but there were more of us'. It would be unfair, because if the minority won,

[25] See Stephen Guest, 'The Role of Moral Equality in Legal Argument' [2004] *Acta Juridica* 18. The argument is developed in 'Objectivity and Value' in *Law and Philosophy: Current Legal Issues* ed. Ross Harrison (forthcoming Oxford UP 2007).

that must deny that the majority members have equal standing to the members of the minority; given they have equal standing, then numbers alone can swing the balance. In the real world, as always, subtleties of adjustment are relevant, given the test is one of fairness. The community might rightly regard some matters as so important (the ceding of sovereignty, or basic constitutional amendment) that something more than bare majority is required. Or competing views of fairness might under some circumstances warrant different voting systems that give different senses to the meaning of 'majority'.

Some philosophers doubt the force of the majority fairness argument, saying that to give weight to a majority denies the right to equality of respect to the minority. Consider two groups, one with six people in it, and the other with three, and each group is equally at danger of destruction, but someone can save one of the groups. We can imagine a mountaineering scene where the climbers are joined by ropes and it is a question which rope is cut. Just before the rope-cutting, sending one group to its death, each climber has a 50% chance of staying alive. So intentionally cutting the rope to send the smaller group to its death is a decision that, arguably, accords 0% respect to the members of the smaller group, but 100% respect to the members of the large group. 'They were not given a chance', a relative of a member of the smaller group might later claim. But the alternative of deciding between the groups by random (a coin toss, say) which would give all the mountaineers a 50% chance also does not show sufficient respect for people: it takes a 50% risk on whether more climbers will die.

One test to distinguish the two cases would be to ask those whose lives are about to be diminished, perhaps completely, whether they consider that they have not been treated with respect. It is not at all difficult to imagine that members of the smaller group of climbers would see sense in the idea. Certainly, it is difficult to imagine how any one of them would articulate a complaint that they had been treated with contempt, as an inferior to any member of the larger to be saved group. Imagine that the groups were the same size, but one consisted of blacks, the other whites, and the rope cutter chose the blacks because they were 'inferior'; then any member of that group would easily be able to claim that the decision was racist. In the case of those medically experimented on without their consent, the complaint is clear: to treat a person this way shows contempt for their personal sovereignty, let alone well-being. The mildest articulation would be 'at least you could have asked me.'[26]

Respecting another as an equal consists not simply of supposing that each person has an equal right to life (or anything with the exception probably of torture). That is the mistake of supposing that treating people with respect requires treating them equally in the sense of giving them equal amounts. Seeing another as an equal to yourself means seeing them as a person, and respecting the fact that they are like you, a sentient person whose life is worth just as much as your own. Seeing equality like that – a true equality of respect - grounds our intuitive response that more human lives saved is better than fewer.[27]

Further, the decision to save the greater number comes nowhere near justifying all moral decisions by reference to the consequences for a majority of people. If moral decisions in general were justified by reference to the consequences for human life measured in numbers alone, the results would be unpalatable. It would mean that performing medical experiments on a few people without their consent would be justified at least in those cases where there are enormous benefits to the quality of life that the vast majority (measured well into the future) would enjoy. No one treats anyone in the mountaineering scenario the

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[26] See the clear discussion of this sort of problem in Thomas Nagel, Review of Thomas Scanlon's *What We Owe to Others* Harvard UP 1999 in the *London Review of Books* Vol.21 No.3 (February, 1999).

[27] See the literature, well summarised, in Hsieh, Studer & Wasserman, 'The Numbers Problem' *Phil & Public Affairs* 34, no.4 2006 at 352. The debate arose originally from Elizabeth Anscombe's 'Who is Wronged?' *The Oxford Review* 5 (1967) 16.

contempt and lack of respect that the performing of medical experiments on an unwilling person signifies.

Respect for the individual person must therefore ground favouring the majority in the usual sort of case. Fairness requires that the majority have its way in many cases and in some sense the community does have at times great rights than its individual members. But these greater rights derive from the authority accorded to it by the representative nature of the democratic institutions that derives from the rights, and accompanying duties, of individuals. What rights are these? First, the community can, and should make decisions that advance and enhance the rights possessed by its members. The weight of numbers does make a difference, a considerable difference, to the legitimacy of a community decision, but not to the detriment of any one member's rights. However big a majority a representative decision-making body has, it cannot legitimate contempt for any of the community's members. The decisions that the community makes, therefore, must refer to those sorts of states of affairs that bring about betterment of the community consistent with those rights. What sorts of decisions could they legitimately be?

Let us define 'policy' to mean a strategy whose aim is a state of affairs that is achievable without violating an individual's rights. This definition has value in drawing our attention to a possible creative and forward-looking function that a community has while recognising that it is defined by reference to the possible collision between community goals and individual rights. The community can look forward to how things could be. It may be better off if the overall resources available in the community are increased, or there is more art, or there is a more pleasing environment. And there are all sorts of ways that the rights of individuals may be improved, perhaps by creating clearly spelled out particular rights through the legitimate process of democratic decision.[28]

We are now in a position to see what a 'collision' between 'rights' and 'policy' would be. The correct question will be not whether the legislature can override the most basic right to equality of respect, because it cannot do so legitimately. That is a popular way of putting the question and it suggests much more of a collision than is necessary. Rather, the concern should be how best to give content to a putative right n the light of the putative rights of others. Putting it this way means that we can test our intuition on the extent of that putative right. We should put the question: 'does a person have a right where there is a community interest in that person's not having that right?' This is much more direct, and illuminating, because it draws attention to the measure of community impact in determining whether a person has, in fact, a right. Imagine an extreme case of a religious fanatic claiming a right to pursue a policy of imposing religious observance on all non-believers in a community. It might be realistic, if he has coercive powers, but this is beside the point.[29]

It makes no sense to express that claim as a right. Forcing people to pretend they hold certain beliefs when they do not is an insult and we can turn that point on the fanatic. Although he is genuine in his belief, he should in consistency believe that the reason for conformity with the rituals of his religion requires genuine belief, which for him would mean conformity because God commanded it. If his religion extraordinarily tells him that outward conformity is required for others, those who do not believe in God, but not for himself and others of his religion, then he violates equality: he cannot think that the right arises out of the respect due to him as an equal.

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[28] What Dworkin calls 'institutional' and 'concrete' rights, the latter being particular decisions pertaining to particular people: see *Taking Rights Seriously* London: Duckworth 1978, ch.4

[29] The relationship between coercion and right holding has no ideal status. Jews at Auschwitz had rights and the Germans had no right to treat them as they did; but the Germans had the power of coercion. Where coercion is allied to rights there is another moral premise in the background: that the coercive powers are used to morally good purpose.

Now consider this situation in another light. The religious fanatic claims a right not that others observe his religion but that they respect the fact that he has this belief, and the manifestations of his belief in his temple, his sacraments, and his own rituals. Respect must require that, even although respect is consistent with, and sometime requires, protestation that the fanatic holds his belief for bad reasons. If the religious fanatic forms part of the vast majority in the community, the community's skyline is likely to be dramatically different from what the non-religious minority might ideally want. That skyline is one that the minority might not only dislike as a visual reminder of the irrational and the doctrinal but as one disinhibiting for them (say) from some economic gain. Nevertheless, the principle of respect embodied in what 'majority' means permits that skyline. Respect for the equality of people must be measured not just by the independent and genuine forming of belief, however ill founded, but the putting into action of that belief. The threshold of respect is breached only when the majority imposes that belief in a way that marks disrespect for the equality of worth of each individual, believer or non-believer, in the community.

These considerations show how impact on the community cannot be the sole factor in determining what rights individuals have. A non-religious example is that of the environment. A majority might adopt various contestable stances on what constitutes aesthetic worth for suburban development; alternative stances cannot ground an argument that the rights of those constituting the majority (channelled through the representative legislature) are putative. One way of putting this would be to say simply that living in a community comes with a cost. That cost is not one of merely 'putting up with' what others want, but one of recognising that others, too, have a right that their views be heard, just like one's own, and that one's own views, genuinely held, are part of what it means to be a person. The cost follows a genuine commitment to supposing that others have the rights to equality of respect as you do. The limit to the right comes most clearly when the religious majority demands your compliance in a way that is not compatible with their own requirement of internal acceptance, so denying your right to self-respect.

In judicial decisions, the impact of a declaring a litigant to have a right can still be considerable. A court will at times have to take into account the impact its decision will have on the community when calculating what the litigants' rights are. It would be absurd to suppose that the court should never consider how its decision affects the community as a whole; clearly, it does when it considers how to interpret a statute. If advocates of judicial policy-making are only saying that judges should consider community impact, that is not much. What is crucial is that the calculation of that impact specifically works out what rights the litigants have. We often work out whether a person has a right by referring to what he has a fair share to, in the form of a hypothetical: we say 'let us suppose that A has a right to X' and then work out what X would be. If we find that what A has a right to under this calculation is too much - an unfair amount - we conclude that his right is limited to the fair share.[30]

This argumentative caste is quite common. Take the law of nuisance, which embodies the principle that because certain kinds of activity are a nuisance, those affected by the nuisance have a right either to stop or abate it, or to obtain compensation. Here is how an argument might progress where A wishes to build a glue factory in a suburban area. We would suppose that A has a putative right to do so without the expense of having to pay compensation to anyone affected by the pollution. (Why? Because of the supposition in favour of freedom in a democracy). We would then calculate the impact in that suburb on that supposition. There will come a point where a balance has to be struck between a general right A has to act freely, in his case, to produce glue, and the rights others have, say, to

[30] This would seem to be the right way to adjudicate the so-called 'positive' rights in constitutions such as, for example, the rights to health and housing in South Africa.

produce sensitive goods in a glue pollution-free atmosphere, or to breathe glue pollution-free air, or to continue to enjoy an attractive suburban landscape. In this way, attention to impact shapes the right to which A is eventually entitled. The same argument applies for the law of negligence, which bases rights to compensation on the unreasonable behaviour of someone whose activity poses a potential danger to others. To work out whether any litigant has been unreasonable we would look again at the impact of the litigant's having that putative right. Take driving a car; if A did not have a duty to make any judgements at all about the possible impact his driving could have on others, other drivers would be at risk. It would be *unfair* to them. That argument is such an obvious one that we tend to bury it within our normal assumptions about how we ought to behave socially. In some legal systems, the principle that people should drive carefully is consigned either to the criminal law or to the censure of morality and the rights to compensation are determined only by the extent of injury. The principle remains in one or other form, however: people have a right that people drive carefully, and the content of that right can be determined by measuring its impact on others.

Conclusion

The argument of this paper forms a proposal as to how judges should decide cases. That proposal reaches several conclusions: a. that democratic judging should form the central understanding of the judicial role; b. that judges should only decide rights in a disputes between litigants; c. that most meanings of 'policy' are consistent with the view that judges should decide on rights grounds only; d. that strategic arguments for community states of affairs, such as an improved environment, or an improved economy, which are states of affairs to which no one has a right, are alien to the judicial function; f. the functions of producing policy are appropriately discharged – that is, without distorting the judge's moral role - by other institutions within a democracy, significantly the legislature.