The Role of Moral Equality in Legal Argument

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In the film *Crocodile Dundee*, the hero, Mick, is confronted in New York by a Lower East Side hood who pulls a flick-knife on him in a dark alley. 'Call *that* a knife?' mocks Mick, as he pulls a Bowie knife a foot long from his jacket. If the hood were a philosopher, he might have said in reply:

> 'The necessary and sufficient conditions of the truth of the proposition that this thing I hold in my hand here is a knife are fulfilled. It has a handle and a cutting edge, and the fact that it happens to be smaller than yours, is neither here nor there as to its being a *knife*.'

We can imagine Mick's reply. We understood perfectly well what Mick says. He charges or loads the word 'knife' with a meaning that reflects its purpose in that context. The hood understood this perfectly well because he fled. Like a knife, law, too, has a purpose. Like Mick Dundee, we can say of unjust laws 'call that a 'law'!' or, as we might have said of the Nazi legal system, following Fuller, 'call that a 'legal system'?!' One answer to this simple point would be to say that I am really talking about what the law ought to be - as though Mick Dundee were really saying 'that tiddley thing ought not to be called a 'knife'. And, this argument might proceed, I cannot do that unless I have some idea of what law *is*. So I require an 'analytical' account of a proper understanding of law, perhaps beginning with an examination of the use the word 'law' and 'law-related' language, and this account will be quite separate from an account of the purpose of law.

What would this account be? Let us suppose that it means that we have to find some convention amongst us that determines what amounts to correct or incorrect understandings of an idea. This would mean that we accept something to be so *only because* people accept it to be so. Could we find such conventions, for example, in morality? But murder is not wrong because even 100% of people accept it is. The last reason a person would provide to say murder was wrong (perhaps saying why 'standard' murder was wrong in the course of an argument about euthanasia) would be that everyone thought it was wrong. She would probably list 'right to life', 'wrongness of pain', 'victim's choice, not her's', or whatever, but not '100% of people think it wrong'. If she did cite the beliefs of others as the definitive reason for her belief, we would say she was merely parroting the views of others – for example, like saying 'murder is wrong because the priest said so' - and not expressing her own view.

People share many moral views, and there will arise various linguistic practices expressing what is common to these views. It does not follow that because there is a linguistic practice it is thereby descriptive of a convention determining the correct understanding of what it is that people have views about. We can say that there is a 'common understanding' that murder is wrong, and this means just that each person independently holds a conviction that murder is wrong. In other countries, there are different linguistic practices to express exactly the same idea. We can use standard practice, while at the same time departing from it, when we both invoke and challenge a common understanding. That becomes clear when, for instance, we say of the destruction of stem cells, 'I *call* that murder'. More radically, if someone says that justice is to be found in the stars, or in voices in the desert, I would not say the speaker says anything contradictory, nor would I suppose he is reporting what a common understanding was. I would be surprised, but I would wait to hear

the argument if I knew the speaker had not made a mistake about the use of words (for example, if he meant to say that hot gas is to be found in the stars, etc).

This is only to say that conventional reasons, or mere descriptions of common understandings, are not definitive of moral matters. We learn from the judgments of others and part of what that means is that we learn the appropriate reasons for these judgments. We learn from our parents, and others whom we think have special moral insight, we respond to reasons, we change our minds, we respond to the reported experiences of others.[1] Further, conventions are sometimes an important ingredient in our personal moral judgments. It is sometimes right for us to respect the conventions of others, for example, by removing our shoes when entering a mosque. In this sort of case, it is not the convention that determines what we should do, but a duty of respect, or politeness, which determines our conformity to that convention. Our duty of respect need not extend to observing all conventions, say, the 'blooding' of an initiate to foxhunting.

Given that law is so similar to morality, why should law be seen as different? The question is reasonable because the pervasive impact of the law on our lives is similar to the demands of morality: most importantly in the imposition of duties and the conferral of rights. That is to say, given the likeness between law and morality, there has to be some good argument to show why the obligations imposed by law should not *ipso facto* be moral obligations.

Practical positivism: Let us imagine some practical purpose would come from our *adopting* an understanding that law was clearly identifiable by us all – by adopting a criterion that specified laws as the product of a precisely definable procedure, rather than of moral argument. Such practical good would provide an argument for why we might consider legal and moral obligation to be distinct. The invocation of what would be good for our society, and how such considerations would affect how we see law, is clearly in Hart's work. First, he said that his rule of recognition would 'cure' the social 'defect' of 'uncertainty' that would exist in an imaginary society without such a rule. If we can be 'certain' in our identification of law, he said, there is a distinct social advantage. We can plan our lives more easily, knowing what the law forbids and permits. Second, he said that we would be able to draw a sharp line between our moral consciences and what the law requires, allowing us to confront 'the official abuse of power'. This wedge between what the state claims in the name of law, and ourselves, therefore provides us with a clear enough distance from law in order to appraise it. Hart continued the tradition of the 18th century utilitarian positivists, because his theory allows us to distinguish between being an 'expositor' and a 'censor' of law (Bentham), to declare 'the existence of law to be one thing, its merits and demerits another' (Austin).[2]

Making decent decisions. But the arguments for this way of looking at law are not the only ones. There are other views we could adopt that would serve society better. The stability and security brought about by seeing law as Hart does, are important, but the principles of 'certainty' and 'candour' that serve them can be balanced against other principles, such as those of just compensation, freedom from oppression, fair hearing, etc, and the most general

[1] Even innocuous ideas such as baldness, there is clearly room for contradictory views. The trichologist, whose job is to sell toupees and baldness cures, is only interested *qua* baldness, in the inability to grow hair. His skinhead father, from a more radical age, is not interested in earning a living, thinks baldness is a matter of style, one for which the ability to grow hair is necessary as it shows youth, vitality, and sexual power. Son and Dad might ask each other to revise their individual understandings of baldness (money versus style). These differences clearly cannot be settled by reference to language, convention or common understanding.

[2] See chapter 4 and particularly 9 of *The Concept of Law*. Having viewed personally Hart's struggle and dissatisfaction with his *Postscript*, I discount his arguments there.

one of for treating people decently. Resisting the 'official abuse of power' would be as well conducted in the service of liberal ideals by the adoption of an account of law that directly employed principles of justice, fairness and moral rights.

Underlying explanations for these ideas lie in the moral justification for identifying the officials in a legal system, the arguments that should direct them, and the way they behave.[3] There are, also, particularly good reasons for singling out the role of judges in any moral account of law. Judges play a central role in the identification of law and the systematisation of legal systems and it is they who decide which arguments best justify their decisions. Indeed, in Hart's theory, as in other legal theories, the role of judges is pivotal in determining the question of validity of law, as it is judicial practice that lays down the criteria of legal validity. Hart goes so far as to say that the existence of judges is a necessary condition of the existence of a legal system.[4] So there are good practical reasons for focusing on the nature of legal argument in real cases. Obviously, a better understanding of what legal argument is about will aid the production of sounder arguments and therefore better decisions. It is for a combination of these reasons that the idea that law is intimately connected to justice, fairness and moral rights gains credibility.

The intimacy of the connection between law and justice

The close connections between law and justice are obvious. Hart himself said that he thought justice to be the most 'peculiarly' legal of all the moral virtues. Legal argument full of references to 'unjust' and 'just' and, there are the related ideas that people should act with 'just and reasonable cause', or 'fairly', or 'equitably'. The injustice of an 'unjust enrichment' drives the development of the exploratory category of restitution law. The enhancement of English law by Lord Denning was through his understanding of this sort of fact – that it was a direct engagement with justice that drove the conclusion in the famous High Trees case[5], or the Bundy case,[6] or the outcomes in the various dependants' property cases. In our appraisal of many high profile decisions, it is normal to suppose that their rightness or wrongness lies in whether such decisions are just, or unjust.[7] The phrase 'miscarriage of justice' is undeniably part of public criticism of what judges and other legal officers have done.

Hart who, despite his claim about law's virtue of justice denied a 'necessary' relationship between law and justice, did concede that there was a moral content to law in one sense, that where it has been 'incorporated' into law. But he was clear that he considered such morality to be 'internal' to the law, that is to say, entirely the result of legislative or judicial adoption. Locating morality's place in this way comes at a cost. For example, what makes the law of restitution vital is its direct engagement with genuine situations of injustice. Take the case where someone makes a profit out of running a business without permission on

[3] Note how, in the early chapters of *The Concept of Law* Hart argued that, for understanding law, it was important to distinguish mere coercion or 'orders backed by threats' from law. The example he gave was a comparison between a bank robber and a tax inspector who acts with the justification of law.

[4] See chapter 6, *The Concept of Law*. The idea is prominent in Kelsen, of course, and Raz (see *The Concept of a Legal System*).

[5] *Central London Property Trust Ltd* v. *High Trees House Ltd* [1947] KB 130.

[6] See *Lloyds Bank Ltd* v. *Bundy* [1974] 3 All ER 757.

[7] We might note the following, too. There are Lord justices and the Royal courts of justice. There are the various criminal justice acts and the Administration of Justice Act and the recent Access to Justice Act and the new Youth Justice Act. There are justices of the peace who, in this country, decide over 95% of all criminal cases. There are the scales of justice on top of many courtrooms throughout the world, including our central criminal court at the Old Bailey. Ministries of justice exist in many legal systems, and the Lord chancellor's department has no doubts that its role is the pursuit of justice. The judicial oaths in all Anglo-American legal systems require the judge to administer, or do 'justice' in some form or another. From all this it is reasonable to conclude that people go to law to get justice.

another's land. The direct, and interesting, question is not what a judge decided about whether some, or all, profits, should go to the landowner. In all probability, no judge had said anything on the matter. The question is, rather, about the justice of such a payment. Again, where police unfairly gather evidence in a criminal investigation, the question is whether it is fair to punish someone using such evidence. Or we can take the question of whether a person who kills another under extreme duress, - say, where a terrorist with a gun tells him to - should be convicted of murder. The question that directly engages us is whether it is morally right to send a person to prison for life in such circumstances. In these fairly typical sorts of case, the clarity and 'candour' necessary to establish Hart's liberal 'wedge' between individual and state, has little or no place. And so it is not surprising that Hart relegated these sorts of argument to the periphery. Such cases – the ones to which Ronald Dworkin drew our attention as 'hard cases' – are those in which lawyers centrally display their forensic skills in taking sides in what is clearly controversial. Such cases bring out the 'argumentative' side to lawyers – their skills to argue for a just decision. Emerging from this idea, I think, is the fully formed ideal of being 'lawyerlike'. It encourages thinking of law in an unbroken line between personal convictions about justice, those judgments lawyers make about what the law requires or allows, the judgments that judges make, and the way legislatures should decide.

The judicial role. These thoughts introduce a consideration of the judicial role, including those of lawyer, judge, law teacher and law student. We can bring out the intimacy of the connection between judging and justice by making a comparison with the doctor's role in healing. The overriding judicial duty in Anglo-American legal systems is that a judge has is not to allow his court to become an instrument of injustice. Take, by way of analogy, what the German medical doctors were doing in the medical barracks at the Auschwitz concentration camp. They dispensed torture and death – the opposite of healing - under the guises of Aryan 'purification' and medical experimentation. It is easy to conclude that this was bogus doctoring and frequently not-so-disguised sadism. Martin Amis makes this point very graphically in his book *Time's Arrow*. The camps exemplified the worst of human nature, and the work of the doctors there had become a work of savagery. Amis's point is that the only logical way a doctor in the camp could make sense of his life was by making time go backwards, as he remembers it. And so Auschwitz becomes a symbol of life-enhancement, the story of the Auschwitz camp going backwards in time. The injection of poison by a doctor into a healthy person is now the withdrawing of poison from a dead body, so restoring it to life. Smoke from surrounding paddocks gently rises to the sky where it is gathered and inhaled through large funnels. After a fiery process, newly formed but lifeless bodies are carried to chambers where death is sucked from them and life restored. They are then showered, clothed, directed to waiting members of their families and sent back, by a peculiar system of reversing trains, to their homes all over Europe. This is the only sense that can be made of such a monstrosity of justice and healing.

If we believe that legal judgments cannot directly engage our moral convictions, we lay the ground for an undesirably detached form of judgment. If you are a judge, thinking the identification of law is a different question from thinking about justice, erodes your understanding of the judicial role. If your moral attention does not engage with your understanding of what the law is in hard cases, you are more likely not to trust your personal convictions about justice in determining what you should do. You are likely to succumb to the disease of unqualified deference to the authority of others, 'the sinister form of which lies in the defence 'I was only obeying orders.' Since it is insufficient justification to say, 'it was what I was told', or 'it is what other people think', judges need to develop a conscious understanding of the moral convictions they in fact hold. They might conclude, as a part of

those convictions, that being deferent, out of respect to some other institution, will often be the right thing to do. Whether such deference is right is a question of justice.

Equality as the basis of justice[8]

Justice is a dimension of morality that brings proportion, balance and distribution into our dealings with one another. I think it is fundamentally about equality. Further, rules loom large in all accounts of law because they describe decision-making justified by equality through the idea that like cases should be treated alike.

Seeing the force of comparison in equality helps to understand its importance for justice, since it introduces the ideas of proportion, balance and distribution. People are not just 'equal' but have to be 'equal to' or 'equal with' someone else. This idea of comparison has caused problems, since thinking of human beings as 'equal' is at first sight odd. It led Jeremy Bentham, for example, to reject the idea of equal rights if it was to be based on such things as physical likeness. He claimed that to regard people as equal we would have to equate, somehow, the sane with the insane: 'The madman has as good a right to confine anybody else, as anybody else has to confine him. The idiot has as much right to govern everybody, as anybody has to govern him.'[9] The obvious answer to Bentham is that what is common to all people is their humanity - everyone is a human being - and it is in their common humanity that each person is equal. Some point out, though, that to say that we should treat all people in respect of their humanity is something we can say perfectly well without any reference to equality. The moral injunction, it is said, is only that you should treat people with the respect that humanity requires. 'Equal' adds nothing more, in other words, than a reminder that it is all people, not just some, who are entitled to that respect. If this argument were right, for example, Dworkin's fundamental 'right to *equal* concern and respect' would mean no more than a fundamental 'right to concern and respect'.[10]

The normative force of equality: *grading people*. The argument that equality lacks independent force appeals to the logic of universals. If you say that A has a right to B, then all things that are A must – as a matter of logic – have a right to B and so it seems obvious that an appeal to the fact that one A is 'equal' to another A adds nothing. Equality would add force in real life situations where only a few As, but not all, had Bs, where pointing out that there were some As that were entitled to B might usefully be characterised as drawing attention to an inequality of distribution. Further, drawing attention to someone's unequal treatment of two As, whereby one gets B, but not the other, would be a way of drawing attention to that person's irrationality: she cannot manage the logic of universals. But logic is not the only determinant of our understanding, since we can and do employ ideas that are normative, that is to say, supply reasons for acting in particular ways. Take Raz's example

[8] I am not concerned with equality as *instrumental* to welfare, or well being, as in Bentham's idea that equality was desirable because, by decreasing envy, it increased the security which was fundamental to happiness. Instrumental equality does not bring out sufficiently what bothers people about equality, I think, and depends on empirical truths rather than principle. A society in which envy was reduced or suppressed by manipulation or drugs would not be desirable.

[9] *Anarchical Fallacies* in Waldron, ed. *Nonsense Upon Stilts*, p.51

[10] One such thinker is Joseph Raz, who argues that the term 'equal' usually is no more than a redundant, although sometimes rhetorically forceful, reminder to us that, when we lay down principles of moral conduct, these principles should apply to all people to whom they apply. See ch.9 of *The Morality of Freedom*. It is a striking claim that the cry of the French revolutionaries of 'liberty, fraternity, and equality' included an idea that was in fact redundant, particularly in the light of the extremes of inequality in wealth and status distribution in 18th century France.

where ‘equality’ can be used ‘rhetorically’ as a kind of *ad hominem* device for showing irrationality:

> ‘A parent who gives medicine to the healthy child and not to the sick one, or who deceives one of his children and not the others, is treating them unequally. A person who keeps his promises to one person and breaks his promises to another is, likewise, treating them unequally. But in all these cases, the wrong is the same as where a parent has only one child whom he deceives, or to whom he denies the medicine when he is sick, or when a person always breaks his promises to all … In these and in many other contexts in which equality is invoked it functions contextually rather than normatively. It indicates features of the situation in which the wrong is perpetrated which have nothing to do with the reasons for it being a wrong, nothing to do with the kind of wrong it is.’[11]

This example is incomplete. It does not specify the parent’s ground for not giving medicine, not deceiving, etc. What if a parent gives his white child medicine because his other child, being black, is less deserving? Here, moral force is present in the injunction ‘you are treating them unequally’ since it tells the parent that each child, despite being of different colour, is of equal *worth*. This morally normative statement has nothing to do with the logic of universals, since it would not be sufficient for the parent to reply to the injunction ‘I would do the same for any black child’. A variant on the example is where the parent treats the two children the same way, encouraging each to play strenuous football, although one of them is sick. We say: you are not treating them as equals - as of equal worth - since you are being cruel to one and kind to the other. In any case, as I argue below, I think a parent who fails to give his only sick child medicine, fails a moral test of equality, as he fails to treat his child as of equal worth to himself.

Logical equality has nothing to do with the idea central to all those who value equality. It is an important value we use to resist judging people in terms of a graded hierarchy of worth. This idea is not captured by the idea that people are ‘human’ or ‘people’, because people come in all types. It is depressingly common how a ‘grading’ of worth will govern judgments about people, as in all systems of caste and class hierarchy. The special moral force of equality is not captured, either, by various biological categorisation of people as ‘human’, or the moral idea of ‘treating people with humanity’ since these ideas still allow for different ‘types’ of people, or different degrees of being human, and a consequent grading in a hierarchy. A decent account of the equality of people will address what is wrong with the callousness towards people that is implied by grading. To take the example of ‘being human’ as an injunction how to behave towards people; we can be ‘human’ to slaves, to the aristocracy, etc, while at same time drawing divisions in human qualities. One ‘knows how to treat one’s butler’, for example, or ‘how to treat one’s servants well’, etc. We cannot see what is wrong with these ways of treating people ‘as human beings’ without an independent principle of equality. That principle says something like ‘From the moral point of view, I am no different from these others, and they are no different from one another and so there is no ground for grading them.’ This leads to the idea that inequalities in wealth, status, welfare, etc, put egalitarians on guard, so they demand that such gradings are justified. Instead, a principle is required that says why the infamous categorisations that say that different human beings should be treated not as equal to ourselves are wrong. This is a substantive moral position. It is not settled by any logical point about the fact that equality in many cases (perhaps in arithmetical contexts) is only comparative, or a universal, or, as Raz says, a ‘closure’ principle.[12] ‘Respect human beings as equals’ is adamantly opposed to this idea

[11] *The Morality of Freedom* p.229
[12] See Dewey in ‘The Ethics of Democracy’: ‘Equality is not an arithmetical, but an ethical conception.’

because, far from being intended as a reminder that all human beings are human beings', it is asserting the strong moral principle that we are each alike, despite, one might say, the fact that we are human beings and so unlike each other.

Equality can supply us with something beyond the injunction 'treat others as human beings'. The appeal of 'being equal to others' has an intuitive tug that expresses itself naturally in equality terms. What is important about the other is that she is like me and I would not want her to be treated in a way that I would not want myself to be treated. This idea can be brought out by paying attention to what it means to 'grade' people into classes. To treat people as a grade below you is to behave callously. In fact, being callous strongly emerges as the other extreme to treating people as equals. If we recoil at grading people, we must know why. What qualities of being human make us tend to rank them? Virtue? Is a person worthy of better treatment merely because they are more virtuous? There are some moral accounts that rank people exactly like that, on the basis that the more virtuous you are the more you deserve.[13] Equality opposes that on the ground that people of no virtue are of equal worth and entitled to respect.

Equality of outcomes: Nevertheless, there are difficulties in how we are to understand equality. It is commonly supposed that equality is a distributive ideal, partly because of the comparative idea at its core. How should whatever goods 'humanity' requires that people have, be distributed amongst them, assuming that many such goods are limited? Equality commends a distribution. We compare the worth – the 'humanity' one might say - of one person's life with the worth of another's say, by comparing people's happiness or how much money they have. We then look at proposed government policies and say: 'this is the better policy because it equalises the distribution of what humanity requires amongst all the recipients'.

But there are problems in this idea. The first one lies in the idea of equalising by simply adding welfare or wealth to people's situations. It is impossible to describe our lives in terms of equalising outcomes without taking account of our personal circumstances, yet we accept differences among us that are outside the range of any just distribution. Our personalities have many contingent features, as do our circumstances, even when we have been treated fairly or justly. It is a fact that we each have different psychological dispositions to enjoy our lives, and that we are born in different circumstances. Some of us are just 'misery guts', like Scrooge, others are 'happy Pollyannas', and these are in-built psychological mechanisms. Even when we have no complaint about out treatment 'as equals', our circumstances can differ dramatically. Some people have children who die tragic deaths where no one is at fault. Some have painful and disabling diseases that nothing - no extent of good will - can alleviate. It is uncontroversial to say that in our personal affairs and projects, it is both possible and natural to end up with states of welfare or wealth much lower than we would have wanted. But if we have been treated with respect - if we have been treated fairly - then we do not have a justifiable cause for complaint. And so it is possible to consider oneself justly treated but thoroughly miserable because somehow our plans do not work out in the way people would want them to - as for those who do not succeed in writing the Great American Novel, those whose investment is unsuccessful, and those whose personal relationships fail.

But this apart, there is a greater problem. Trying to isolate a distinct moral principle of equality in the outcome for people of their overall feelings of welfare, or their wealth, famously does not work. If you compare two outcomes, say of welfare, etc, of differing

[13] Nietzsche challenges, but also confirms this idea by declaring our morality is in truth the result of a slave revolt in value judgments. See *The Genealogy of Morals*.

amounts between two individuals, or two groups, you discover that levelling people down satisfies the equality requirement just as much as levelling them up. Bluntly, if half of the community is physically disabled we can simply equalise matters by disabling the rest. The problem lies in the fact that equality so conceived is neutral between overall good and bad outcomes. Therefore, if we are to hold fast to an ideal of equality, it cannot be to equality defined as outcomes for people's lives.

A way into the problem would be to note the asymmetry between looking at an unequal outcome from the point of view of each of the two recipients. The gainer has a different point of view from the loser – she gains - and we may feel more concern for the loser – she loses. Perhaps our concern with her is a concern with equality.[14] The advantage is that, because of the asymmetry, we avoid the counter-intuitive levelling-down solution since the loser would not be content with even less. However, the solution is to give the loser more welfare and so seems to be entirely about welfare and not about equality.[15] It is rather that the fact of unequal outcomes triggers a welfare response: you note that one of the parties has less than the other has and so she should have more. It is not clear that equality is involved here.

But there is some insight to be derived from this example. It directs us to consider justification from the *point of view* of an individual. We can ask her whether she has been treated as an equal, and her reply need have little, if anything, to do with outcomes. Her concern cannot only be with the idea that she has ended up with something that is not equal in amount to that of others, for if that were the criterion - it is, in fact, the criterion we are testing - then she would be as happy with levelling down as with levelling up. It follows that if she has any sense of inequality at all, it must be of a different sort than equality of outcomes. If equality for her meant no more than 'I want more welfare' then our concern with her would be fulfilled by just giving her more welfare, but perhaps with the patronising sound of 'pay her off' or 'let her eat cake!' (Indeed, she could say, 'I don't want more; just treat me properly').

Real equality: 'I'm a person, too'. If we want to persist with equality as a moral ideal, it means that we should not say that a state of affairs is morally unequal and therefore wrong because it consists of unequal outcomes. Rather, we should understand equality as a relationship between *ourselves* and others. If we have genuinely been treated as an equal then we cannot have a grievance about justice. Directing our understanding this way shows that an appeal to equality is displayed in the common sort of complaint that goes 'I'm a person, too', or 'Try to see it from my point of view', or 'Be fair to me.' Here, treating a person as an equal means 'acting with the awareness that another is, in the important aspects, equal to yourself'. This way of understanding equality preserves its comparative and proportional thrust by making the comparison now between ourselves and someone else – and not between two people external to us. I could call this form of equality 'first person equality' in order to distinguish it from the equality of outcomes which can be ascertained by comparing second and third persons, or groups. But as it expresses what I think is the nerve of morality, I will call it 'real' equality. Real equality could not possibly allow levelling down by physically disabling people because that shows a particularly gross form of violating equal worth. But real equality might allow levelling down on some occasions. For example, a community would be more equal in this sense without its community-funded, racially segregated tennis courts, and it would not, therefore, offend real equality forcibly to close it.[16]

[14] See Temkin *Inequality* (1993), and McKerlie 'Equality' *Ethics* (1996) 274.
[15] See McKerlie.
[16] Would the community be more equal without its only racially segregated hospital? A community denies real equality by not providing blacks with hospital treatment and so it will be better to treat some people as equals

Further, and of course, it will often follow from real equality that an equality of outcomes is required, for example, through a law prohibiting murder. *Vice versa*, it will often be reasonable to assume that a situation of outcome equality implied that people have been treated with equal respect, for example, in a situation where each person is entitled to vote. Essentially, the driving principle is real equality, and in many cases, the only formula that might be offered as a guide to just distribution will be the relatively unhelpful injunction: 'other things being equal, equal outcomes are to be assumed'. This formula is relatively unhelpful because most of the work will have to be done in the determination of what 'other things being equal' means.

Respect for equality of worth. The directness of the appeal that others are 'the same as me' has a powerful intuitive hold on us. Real equality prevents the mistaken and unpleasant assumption that because people differ in their characteristics they can be distinguished in terms of those less or more deserving of humane treatment. One of the reasons for accepting real equality as a deeper principle than outcomes equality is that it connects your assessment of your own self-worth to the treatment of others. A powerful metaphorical test for understanding what treating another as an equal requires, is to put yourself in that other's 'position'. You then understand that others are not 'higher' or 'lower' grade people merely because they have or lack certain qualities, or because their personal circumstances are different. This is not to say that you cannot have contempt for others' dispositions, tastes, actions, omissions and styles, but, rather, that you do not thereby have contempt for the worth of the person in whom these dispositions, tastes, and so on reside. One reason why you might be inclined to accept this bifurcated view – where you see another on two planes - is that you, if you are properly self-critical, are capable of recognising that you, yourself, have worth, independently of those dispositions, tastes, etc, in *yourself* of which you do not approve: 'He that is without sin among you, let him first cast a stone at her.' Equality is good at showing us that there is a way of respecting people that runs deeper than judgments of the sort 'A is a better person than B'. It is a principle of sympathy, or empathy, with another. Despite the lack of virtue in others, you consider them as equals to you because you can recognise deficiencies in yourself. The largeness of spirit and imagination required here, in seeing one's own deficiencies yet appreciating what is valuable about oneself, and in turn seeing what is equivalently of value in others, explains why 'being egalitarian' is also a personal virtue. It displays human warmth and human understanding and it is hard to imagine ethical knowledge starting anywhere else.

This last point obviously needs elaboration. The complex metaphor that we might put ourselves in the position of others makes use of several ideas, each of them problematic. There is the difficult dimension of feeling. You are encouraged into action by seeing what it would be like for you, were you in the same position. You are moved by the possible occurrence of an event that would bring about this situation, despite the fact you do not suffer their precise pain, or frustration, by your identification with that other person. However, no claim can be made that all moral actions are motivated in this way. Rationality undoubtedly directs our moral judgment on many occasions, as when we reconcile contradictory intuitions. On the other hand, it is difficult to imagine our moral education, or our moral reflections, at no stage engaging our feelings. There is a fundamental dimension to moral

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rather than no one as equals. But this is an extreme example. Accepting the situation would be the last consideration in practice. There is no denial of real equality where the community is denied the all-white tennis courts.

judgment that begins in warmth and 'human understanding' between people.[17] So, as Hume recognised, the appeal cannot entirely be an appeal to rationality.

Some feminists affirm the importance of warmth in the idea of 'caring for others'. You cannot be moral unless you *care*. But one can go too far with this requirement. It is too psychological, even self-indulgent, to be helpful. Perhaps one reason some people dislike equality is that they confuse empathetic understanding with sentimentality (as evidenced by the dismissive description of some liberals as 'caring and sharing'). If caring is some form of 'emotional identification' then that will be insufficient for producing even a sketch of justice. Identifying with another this way suggests losing sight of one's own separate existence and independent value and that would deny the possibility of identifying one's own worth in another. But one useful way of connecting the warmth in treating others as ourselves with rationality is to think simply of moral reasoning as an 'enlightened or 'reflective' empathy. Reflecting on how things would be if we were other people will change the way we treat others, and change the way we come to view ourselves.[18]

Respect for a person requires specifying the *value* we must respect, and the derivative values of showing or marking respect. To respect someone as an equal, in the relevant sense here requires our valuing the other as we value ourselves, and so there is an endorsement of our own worth in the judgment that another is equal to us. In Heinrich Mann's *Man of Straw* written in the early twentieth century, the chief character Diederich, feels no respect for his mother: 'Her resemblance to himself made that impossible, for *he* had no self-respect.' One thinks of Diederich as having a disordered personality. His mother's similarity to himself makes her a mirror to himself and no value comes out of the comparison because of his own lack of self-value. But 'he was compelled to love' his father, who is more 'terrible' than a 'gnome' or a 'toad'. As a boy, Diederich finds satisfaction in admitting his 'crimes' to his father and says to his father's workmen that they would be 'glad to be beaten' by his father. At school, he admires only the 'strong' teachers, those who rule by fear. On the headmaster's birthday, the children place flowers on his desk and blackboard but Diederich winds a flower garland around the cane. The story of Diederich's rise in Wilhemine Germany and his embracing of the 'leadership' principle is a psychologically convincing account of a personality disorder. Diederich is callous yet sentimental. He is so hypocritical he does not even know what being honest means.[19]

Although it is clear that there is no disordered rationality in Diederich, it does not capture the problem just to suppose that his disorder is just a moral one. Having a 'disordered' personality is part of moral experience, and we assign moral responsibility according to a central notion of personality. Insanity can excuse. It also is insufficient to say that Diederich is 'not normal', since that merely suggests an averaging of personality type that would not serve as a critical benchmark (what is 'normal' in the community might be defective). It is unclear what is wrong with Diederich, other than a failure to see others the right way. But explanations can be given as to why he is like this. As a child he is 'frightened of everything'. He is inconsistent, sometimes extremely callous and then genuinely compassionate. (As psychiatrists say sometimes, 'there is a conference here').

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[17] Autistic children, to give another example of problematic personality, find it difficult, if not impossible, to 'imagine what it would be like for the other person'. One theory offered is that autistic children have an inability to understand properly the separate identity and feelings of others, in particular, the emotional impact of their actions on others. Piaget, in his *The Moral Judgment of the Child*, thought that moral understanding was 'born of the actions and reaction of individuals upon each other' and a 'desire for reciprocity'. See his Chapter 3.

[18] See Gordon 'Sympathy, Simulation, and the Impartial Spectator' *Ethics* (1995) 727.

[19] If Piaget is right that moral development in children requires moving from respect for the authority of parents to an understanding of the equality of relationships, Diederich's excessive admiration for authority looks like arrested moral development.

Perhaps psycho-pathological, rather than a moral judgment that distinguishes Diederich's degraded recognition of his own value. It is striking that Diederich's actions can mostly be explained in terms of how he sees himself through the public's eyes – as though he had no sense of himself apart from being a mirror to the outside. It is too quick to say that 'valuing oneself' requires an independent test of morality, since there are many bars to understanding, or appreciating what is of value in oneself that are not simply moral mistakes. 'Putting oneself in another's shoes' is a useful way of understanding what to do to respect others. It is a metaphor for reminding us that it is not only ourselves who feel pain, or are frustrated. People sometimes take it too literally, insisting on an inescapable dilemma of logic in the metaphor. If we 'put ourselves in another's shoes' is it ourselves in the 'other's shoes' temporarily 'borrowing' the rest of the other's characteristics? Or is it that we become that person altogether, in which case we lose our own judgment? It must be something like the first, since it is you who makes the test, and you make it in order to make a judgment. You make judgments about how to treat another by considering how you would consider it if you were that person. The obvious candidate for trying out the metaphor is pain. On the whole, pain is without value to you, and so it is of no value to the other. Therefore, a requirement of respect for equality means: avoid causing others pain. More complex is telling the truth. If you lie to someone you do not treat them as of equal worth to you because you remove a reason they would have for acting that is available to you. They are therefore at a disadvantage - a grade lower.

Some philosophers find insurmountable difficulties in the idea of 'putting oneself in another's shoes' because they think it cannot account for the sadist, or bully. The special technique of the sadist or bully, it is claimed, is that they put themselves precisely in another's shoes in order to find out what special features of that other's personality might be exploited to cause pain. As Williams says:

> 'But one thing must be true is that the insightful understanding of others' feelings possessed by the sympathetic person is possessed in much the same form by the sadistic or cruel person; that is one way in which the cruel are distinguished from the brutal and indifferent. But the cruel person is someone who has no preference to help … Yet he certainly *knows*.'[20]

We can add evidence from psychologists that psychopaths seem to appreciate moral standards, yet show no constraint or remorse for what they do (Fred West was like this). But the matter cannot end here. Sadistic and cruel people have something *wrong* with them in their understanding of the other's feelings, because they cannot place themselves as fully as others can in the position of the tortured, or bullied. The same sorts of argument must be applicable here as were applicable in Diederich's case. There is a failure of character, not just to be explained by recourse to the tautology that sadists are morally bad because their characters are morally bad. Perhaps it seems simple to say that what is wrong with sadists requires a psycho-pathological explanation, not a moral one, but it must also be too simple to say their problem is just that they behave immorally. Probably, the more interesting cases are the less extreme cases where it will more convincing to say that, for various reasons, there has been a failure to appreciate the identity of human value in both perpetrator and victim.

The nature of the other. A short sketch of the characteristics of the object of our enlightened empathy is possible. Important to these considerations is the idea of self-sovereignty, or self-direction in a conscious plan for living, even if this is only very limited. Enlightened empathy must require recognising the other as a self-initiator of action in some even very limited sense, since we could not understand ourselves without this capacity. It will also

[20] *Ethics and the Limits of Philosophy* 91

require recognising another as capable of suffering as we do, through frustration, physical pain, etc. Self-sovereignty is reasonably well captured in the idea of sentience, which supporters of animal rights use. 'Sentience' brings with it the normative force of 'having interests'. We well understand what pain is, what it is to be frustrated, and we know particularly well what it means not to be able to 'be oneself'. And we understand that freedom is important to everyone when we are able to see others, not only ourselves, as trying to live their own lives and be themselves. An approach to freedom might be made from the basis of understanding ourselves and, through an enlightened empathy, appreciating others as equal to us.[21]

Delegated respect. The account I have given so far rests upon a relationship between two people, myself and another. Real equality, as I have called it, requires that I never treat another as anything less or more than an equal, as I most obviously do not where I intentionally blind someone. But have I failed in an equality duty if I *fail* to act to alleviate the condition of a stranger who is blinded by natural causes? Has the *community* failed in any duty by omitting to rectify naturally arising circumstances, such as being blind, or poor, or black? The questions are reasonable since there is an intuitive leap from the recoil we clearly feel when we observe blinding another, to what we might feel about the community failing to make any provision for blind people.

We only have to accept two propositions to move from individual act to community omission. First, we should accept that there is no distinction in moral principle between acts and omissions, and second, we should accept that the community has a responsibility *vis-à-vis* each one of its members to treat each as an equal. We can try these two objections. I am morally responsible for causing (real) inequality when, for example, I do not spend money to cure my sick child. So it is clear that at least some omissions are morally blameworthy. What moral difference could there be between the following two examples? Someone, with intent to kill, next to a patient on a life support machine switches it off. Someone, with intent to kill, next to a patient on a life support machine with an emergency generator, fails to move his finger the one-inch necessary to push the on button of the generator. This must be murder, too. It just cannot be that the difference is marked by the difference between finger holding back and finger pushing. Do I, for example, have a duty of equality in relation to a stranger, in which case, like the priest and the Levite and the, I fail in my duty when I omit to treat another as an equal?[22] There are reasons of a contingent sort that explain our reluctance on many occasions to ascribe responsibility for omissions. Assertion of a causal connection between what was not done and what happened is difficult as it really only rests on a hypothetical assertion of what would have happened had it been done. That it is difficult affects a person's awareness of consequences that can be ascribed to him, and that affects his culpability. In many criminal codes there is a requirement of 'reasonableness' that determines whether the person omitting to act was reasonably 'proximate' to the victim; most often what is 'proximate' is defined in specific duty relationships, such as parent/child, contract, and specific duties to provide medical care and to mitigate the effects of a dangerous situation. The idea of proximity shows how there are limits to the duties that we have to rectify wrongs and here is only so far that we can personally protect others from harm.

[21] Paul Johnson said that this idea encourages evil regimes such as that of Soviet communism in which there was repression of freedom, and marked disrespect for human rights. But the equality I clearly favour is not of lowered outcomes, nor do I suggest that freedom is at odds with equality, and my account of equality is an account of the value we must respect in people. But Johnson is a Catholic and what I say about equality sits squarely with the *New Testament*. See *The Spectator, 29th January 2000*.

[22] The Samaritan, incidentally, was considered of lower grade than the priest and the Levite, the passers-by who omitted wrongly to assist the person who had been robbed.

Second, the principle that we should treat others as *our* equals makes good sense of the public structure of justice, and just institutions and, further, the distinction between our public and private duties. It cannot be our duty personally to look after *every* other single person by treating them as equals. One argument is just that such a feat would be contingently impossible. Another argument is that real equality cuts both ways and, since we ourselves are of value, we have some duties to ourselves to ensure that we at least remain of value. Yet another argument might be that paying attention to the 'sameness' of other people will require our paying special attention to those people immediately proximate to us. It is clear we have duties towards our family, our friends, our associates, our neighbours, and so on.[23]

It is our ready perception of real equality in these personal relationships which motivates, I suggest, our acceptance of a public structure of justice. At the point at which neighbourly proximity is exceeded, the duty to treat others becomes a communal and public duty. We have a duty towards those people who are not our neighbours in the important and significant sense that it is as though we had delegated that task to the communal institution of the state. It follows that if we take seriously the idea that we should treat others as our equals, we must also support a political structure that imposes a duty on the state to treat all of its citizens as equals. That duty, like the duty in tort, extends to a duty not to omit to treat its citizens as equals. We should go further than this. If the state is our delegate for treating people as equals, then each of us has, as part of our own duty of equality, a duty to ensure that the structure of delegation, the process of decision-making, as well as the decisions themselves, are consistent with that duty. The closest approximation of this principle of delegation in the real world are those democratic structures in which members of the legislature are reasonably representative of members of the community, and in which the principles of voting, creation of legislation and so on, are governed by egalitarian principles of public choice. Respecting people as equals, with their own points of view, with their own sense of what they wish to endorse in their own lives, will naturally result in a political structure designed to treat people as equals. Obvious ways in which we engineer that respect is by recognising, in the idea of 'one person, one vote', that each person has an equal say in who becomes a public official, and that official powers will derive solely from the requirement that people be treated as equals. My duty to respect others as equals imposes a duty on me to establish, or contribute to, those powers necessary to carry out my duty. A lot follows, since official duties and powers will be justified derivatively from equality of respect. The 'democratic' objection to hereditary powers is based upon the idea that it is wrong that some people have a status that implies grading. And official powers will only extend as far as making decisions consistent with treating people with equal respect.[24] The elaboration of this idea has been, of course, the often unrecognised background from

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[23] The idea of having special duties to those around us provides, I believe, a good beginning towards the justification of the legal doctrine of negligence in Anglo-American legal jurisdictions. The famous neighbour principle in tort was formulated in *Donoghue* v. *Stevenson* [1932] AC 562. We have duties to others not to omit to treat them as our equals. The neighbour principle makes use of this idea because it relies fundamentally on the test that who is your neighbour is not the person who you actually thought would be affected by your act. It is, instead, the person whom you ought reasonably to have contemplated. So, when you breach that duty, liability is imposed for your omission to act properly. But personal liability ceases just at the point beyond reasonable contemplation. We should not assess personal liability by a crude cut-off point, say, to prevent too many litigants coming to court, or the cruder yardstick that blocking the path to justice would contribute ultimately to the gross domestic product. Rather, a person's liabilities should be determined by what is just, fair, and reasonable - in short, by considerations that regard him as an equal. See *White* v. *Jones* [1995] 2 AC 207 where Steyn, LJ says: 'The element of a close and direct relationship is present and satisfies the requirement of "proximity" or "neighbourhood". The real question is whether it is fair, just and reasonable that the law should impose a duty.'

[24] See generally Dworkin *Freedom's Law* in which there is a powerful argument for a version of democracy drawn from a right to be treated as an equal.

arguments about the extent to which the public is entitled to know things that the state knows, to arguments about the proper extension of the criminal law in limiting people's decisions about their private lives.

So there is a general structure of government that justice warrants. It has built-in constraints, the most obvious being that powers are not justifiably exercised when they violate real equality. Since judgments of real equality would not allow me to discourage homosexual activity, a just government cannot be empowered to make such judgments. A less obvious but just as important constraint is built into the idea of delegation itself. The delegate is my agent, and it is in the nature of things that my agent cannot make private and partial judgments on my behalf. Just as he cannot form a taste for olives for me, he cannot become Christian for me and so cannot enact legislation requiring people to abandon their beliefs. We can go further. It is difficult to see how my agent could display certain purely personal virtues, such as charity and courage, unless they were clearly within the authority of real equality. Since it is possible to be 'charitable' with money that is not our own, or 'courageous' in an unjust cause, a government that displayed such qualities in its legislation without regard to justice, would act irresponsibly, well outside its remit.[25]

Equality and the judiciary. The argument from equality goes even further. Equality grounds institutions more appropriate to monitoring equality of respect than legislatures, such as the judiciary. Take, for example, the idea of judging as having meaning and force independently of any institutional design - as when a mother acts as a judge in a dispute between her children, or someone judges the local flower show. The mother cannot resolve the dispute in favour of one child on the ground thats he likes that child better. The flower show judge cannot say that the prize goes to someone solely on the ground that she is his wife. To judge means being impartial in that way that does not allow one of the parties a special step – or grade - up. To do otherwise, I think, contradicts the requirement for equality of respect that is fundamental to the idea of judging.

What would the argument be to say that the situation is in principle different when a judge is part of the institution of the law?[26] No judge of any sort will deny that it is his duty to be fair and impartial. I doubt, moreover, that any judge could honestly say that his legal system was systematically and unchangeably unjust but that he was committed to it. Therefore, if any institution morally coheres with democracy, in the sense in which I have characterised it, it is the judiciary. It is not surprising, therefore, that in totalitarian regimes, or regimes which are on the perilous slope towards them, we make criticisms that the judges are partial, or that they have become 'mouthpieces for the government.' Sometimes we say they are 'puppet judges', or run 'kangaroo courts', or, more generally, that they have 'lost their independence'. These ideas are part of what we mean by the corruption of the judiciary. Looked at in the ideal, the judiciary derives its moral legitimacy from the same equality source as legislation. It follows that there is an argument for saying that judges can, in principle, assess whether legislation meets the test of equality of respect. But there is an argument from the real world, too. There is good evidence that majorities have an inbuilt tendency to bully – what John Stuart Mill called the 'tyranny of the majority'. Then, we might ask which body would best determine whether legislation meets the equality test? Surely not the legislature. We need a body that is as impartial, as objective, as experienced

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[25] See Gardner 'The Virtue of Justice and the Character of Law' *Current Legal Problems* [2000] 29. Gardner lists the following virtues that law could have *in addition* to justice; all of them are consistent with understanding justice as real equality: honesty, humanity, considerateness, charity, courage, prudence, temperateness, trustworthiness. In the lecture on which this article was based he also mentioned courage and spontaneity.

[26] See Murphy, *Philosophy and Public Affairs* (1998) 251

with determining questions of real equality as possible. So why not an institution whose direct responsibility is, and always has been, to the ideal of acting impartially in considering the point of view of a person who has come to 'get justice'? Judges seem to win easily. The argument that judges should not make judgments about flawed legislation because they are not elected can be turned on its head. There seems to be a good argument that democracy, properly understood as a political structure that derives from real equality, requires that judges should not be elected.

Justice as the basis of law

Rules as the descriptive aftermaths of decisions. My two claims that justice is part of law, and that equality is central to justice can be brought together through the idea that legal rules express equality by requiring that like cases be treated alike. True, when taxed by Fuller that justice was integral to law, Hart answered by drawing a distinction between 'formal' and 'substantive' justice. Rule-following, he said, was a central feature of law, and the idea of 'treating like cases alike' belonged to both justice and rule-following. The idea of treating like cases alike was part of the idea of justice but only the formal part, which was not real justice. Formal justice was, he said, 'compatible with great iniquity'. In apartheid South Africa, judges would stick to the formal requirement of treating like cases alike, by applying the appropriate rules to blacks and then the appropriate rules to whites. Hart concluded the apartheid law could be substantively unjust, which was its significant failing, but formally just.

But Hart's argument is not complete. The apartheid example employs the idea of rule following. He refers to people's being black or white as irrelevant differences, but this presupposes that people are alike in other respects, and that not discriminating against people is a rule we must follow. He therefore presupposes a rule that people must not be discriminated against on the grounds of irrelevant differences. The only irrelevant difference to which he refers is that between being black and being white. If he had not specified any likeness at all between people, there would have been no use for rules at all. To each person, only arbitrary, singular, particularistic directions could have been applied.[27] Put another way, to say that rules apply to people is already in some sense to recognise people as equals. Similarly, when we say 'thousands died in an earthquake in Turkey', our use of the numerical term implies our acceptance that the differences between people in a tragedy like this are irrelevant. It would be quite different if we said '30 politicians and high-ranking military personnel' died and then, as an afterthought, said 'and quite a few thousand peasants'. Or, to use the example Hart uses himself, from *Huckleberry Finn*. When Aunt Sally asked Huck if the explosion of a steamboat boiler had hurt anyone, he replied 'No, m'm. It killed a nigger', to which she replied 'Well it's lucky because sometimes people get hurt.' In terrible situations, this way of talking degenerates to the point where people are characterised without even their most basic bodily identity. Kutzenov, in his book *Babi Yar*, an account of life during the German occupation of Kiev during the Second World War, described how the Ukrainian police would refer to prisoners condemned to death as 'shapes' or 'shadows'. We are also familiar with the description of human beings as 'black' or 'white trash'.

The meaning of 'treating like cases alike' in the legal context is to be found in real equality. Using Wittgenstein's example, how do we discover the rule by virtue of which we

[27] Towards the end of the Nazi era, directions to Jews married to Aryan were non rule-like. There were special provisions for such Jews, but after a while general directions, if there were any were not published, and many of the orders seemed to be generated locally and with a lot of discretion. Sometimes police would just arrive at the house and deliver a specific order; other times, such Jews had to report periodically to the police to see if there were any directions. See *Otto Klemperer's Diaries* 1999.

continue the series 2, 4, 6...? We don't find it by just *looking* at the pattern, for any number or symbol (or nothing) could follow the number six. The series could be 2, 4, 6, *8*, *10*, *12* …but it could just as well be 2, 4, 6, *2*, *4*, *6* ... or 2, 4, 6, *6*, *4*, *2*... We cannot know, until we have identified the principle that directs further decisions about what follows, and until we have done that, the correct decision is not apparent just from looking. Many black-letter lawyers make the mistake of assuming that, by looking - by only looking - at cases, they will 'find' the right application. The result can be arbitrary and, therefore, unjust. Sometimes, lawyers will intuit the answer, of course. But there is then the problem of justifying it. If a lawyer concentrates too much on what he supposes the rule to be independently of its justification, the danger is that he will act arbitrarily. He might fix the justification in some non rule-like explanation such as, for example, that it is a matter of 'public policy'. But to say 'the rule is, say, the addition of "2", each time', is to have made the decision about the principle that determines the next step, and so 'the rule' is merely the descriptive aftermath of the decision.

So, I suggest, in law, real equality and rule following are closely connected. In one direction, concerns of real equality determine the rule-like quality of law, for decisions should be made according to the principle that (ultimately) people be treated as equals. In the other direction, the common perception that rules are fundamental to law, is explained by the principle of real equality that creates them. The more rule-like our understanding of law is, the less it is about deferential grading and arbitrary distinctions. Fuller was groping for this point when he said that evil aims – and he had here in mind the Nazi legal system – 'lacked an inner logic'. To be put in its place, he thought, was a set of principles defining a clear 'consistency in dealing' between the state and its citizens. And although Fuller did not go far enough in specifying the correct conditions of justice in equality, it is not difficult to discern a reference to humanity's requirements of communication of intention, or advance notice, or fairness in treatment, in his account. This set of ideas that emerge from equality, properly understood, gives rise to the appeal of the 'rule of law' which is more human than the austere and uni-directional idea it is often taken to be. It is the idea that each person is to be treated as a person in his or her own right, equally deserving of dignity and respect, and that no person is either outside the law, nor above the reach of the law, since these latter ideas imply grading.

The distribution of decision-making competence. A complication that now needs to be considered concerns other aspects of rules, and the direction they can give. So far, I have provided an abstract account in terms of the fundamental motivating force of justice. However, although the thrust has been to establish equality as the background force, that principle is often submerged beneath other considerations, although they are related. The structure of justice requires a distribution of the power to make decisions about equality to officials.

We should be clear that the democratic principle means: the fact that the legislature has acted itself instantiates equality, since the weight of the democratic majority on principle requires deference to what the legislature has done. Nevertheless, the legislature has a right that we assume that what it did was within the perimeters of justice. That must be what we mean by the legislature's competence to pass legislation. If the judiciary is to be deferential, it is to that competence, realising that the right is itself an elaboration of equality. In clear cases, in other words, where the legislature breaches equality dramatically – for example, it abolishes the right to vote – then the judiciary must, in principle, be able to revert to the fundamental principles legitimising the legislature's right and declare such legislation

invalid.[28] A similar point obtains for the common law, for as a result of distribution, the judiciary holds the power to decide what is just, but with due deference, as I just described.

This way of understanding matters makes what judges do much clearer. It means that a judge sometimes has the duty in equality to ignore a breach of equality at a less fundamental level, and to follow a bad precedent set by a higher court. This seems paradoxical, but it is a consequence of accepting an equality justification for distributing the competence to decide. Dissatisfaction with a decision should be resolvable at the deeper level. Nevertheless, there are other principles, such as the commonly invoked and important principles of certainty and proportionality. But these have no meaning unless they are derivable from real equality. Note that being certain that you will be treated unfairly is as just as certain as the certainty that you will be treated fairly. Being treated in proportion to what you did is consistent with treating you proportionately *either* way, say, where punishments become greater the less serious the offence. But certainty does make sense when we see it as a way of treating people as equals. If people are led to believe that they will be treated in a particular way, then treating them fairly may require that they be treated that way. This is the basis of what lawyers call the 'reasonable expectation' principle.[29]

Where the previous decision is right, or where there is no issue of reasonable expectation that justifies following a wrong decision, real equality should be the driving force in judicial decision-making. X cannot argue for the same treatment as Y, if Y was treated wrongly. Moreover, she cannot argue that she should be treated the same as Y, if Y was treated rightly, for there is no need. She can simply make the direct claim that she herself should be treated as an equal. Popularly, this means that each case should be considered on its merits, and that exceptions should be understood as either more precise, or more economically expressed, applications of the rule.[30]

Interpretation: thinking alone. Dworkin says that to interpret a practice 'constructively' or 'creatively' is to 'make sense of it' or to 'grasp its point'. The attractiveness of this idea lies in its ability to unite a description of some existing practice with an account of what that practice ought to be. At least to begin with, there is something 'there' about which the interpreter says or does something that puts that 'thing there' in a particular kind of light. (At

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[28] See Laws, 'Is the High Court the Guardian of Fundamental Constitution Rights?' [1993] *Public Law* 59, and 'Law and Democracy' [1995] 72.

[29] That principle lay behind the case of *Lloyd's Bank* v. *Bundy*. A trusting old man, concerned for his son's business, put full trust in his bank to give him advice as to whether it was wise for him to raise money to lend to his son against the security of his own farm. There was, perhaps, an element of duress, and perhaps a conflict of interest on the part of the bank. But the money was handed over, the son's business failed, and the old man was faced with the forced sale of his farm. From the bank's point of view, there was a reasonable expectation that its money would be secured according to securities law. Bundy's point of view is in competition with this view, and so certainty could not be a foregone conclusion, although it weighed heavily.

[30] One consequence is that mercy does not temper justice but is, instead, part of justice. The familiar idea that justice and humanity can conflict completely disappears. For, if mercy really is required in order to treat someone as a person, justice should have taken account of that fact. This point makes practical sense. In *R.* v. *Dudley & Stephens*, in terrible conditions of deprivation, the defendants killed and ate the cabin boy of the ship which had sunk leaving them together in a lifeboat. They were convicted of murder, but their life sentences were commuted by pardon because, clearly, these were extreme circumstances. Why this elaborate way of doing things? Why say 'justice required conviction' but 'mercy' required a pardon? It shows, I think, a basic misunderstanding of the nature of both law and morality to suppose that one might say 'but that would mean the English law allows people to eat people', although that kind of sentiment is often expressed in these sorts of case. Of course, no such rule could be drawn from a decision in favour of Dudley and Stephens. These were exceptional circumstances, and not difficult to understand from their point of view. A decision in their favour would have meant, not that there is an exception to 'the rule' about murder, but that, properly understood, the rule prohibiting murder does not extend to the sorts of circumstances in which Dudley and Stephens found themselves.[30]

least this is the case with 'scientific', 'conversational' and 'artistic' interpretation). But this does not just mean that we are enabled to look at the thing from some special sort of angle, or new perspective, or point of view. Interpretation, rather, allows you to suppose, not only that there is something there with which you engage but also that you can 'make it your own'. Your convictions about things – about what law ought to achieve, or what art is about, and so on – are brought to bear in a way that, when properly understood, the gap between the interpreter and the 'thing interpreted' narrows.

All forms of interpretation seem to require something outside interpretation, which stands in relation to the interpreter in a relatively fixed way. One way of fixing the 'thing to be interpreted' would be to assume the truth of some account of it.[31] So a detective might ask himself, 'Assuming the suspect did commit the murder, how would he have disposed of the body?' Thinking like this sensibly drives the imagination and intellect towards conclusions which only *might* later turn out to be true. Assuming that *The Merchant of Venice* is a genuine play as opposed to an anti-Semitic political tract, to give another example, we can get on with discussing whether it is a good play or a bad play. Just as in the case of the detective, this is not to say that the assumed proposition is unarguable or uncontroversial. Rather, it is accepted for the time being, as sufficiently true for considering its merits *as a play*.[32]

Law is different, as 'the thing to be interpreted' is less clear. Say you are faced with Hart's famous statutory provision in which vehicles are prohibited in the park. The interpreter's relationship with the words of the statute is what we would most readily come up with to make the relationship between the interpreter and something 'there' intelligible. We would visualise the interpreter (a person) and the 'words' (the actual black letters on the page). But the words on the page mean nothing significant as 'the law to be interpreted' until they are already invested with the quality of being 'a statute'. They have to have the status of law in order to become the subject of interpretation. Interpretation goes further down.[33] The black letters have significance because they issued from the legislature. But the words these letters constitute are the subject of interpretation only because they are the words of the *legislature*. I have supposed that the right way to understand these words as legislative, if the legislature is properly democratic. So my understanding of what is required in this case about vehicles, expressed as a normative proposition about what people should do, derives from a general moral position I hold about the moral force of democracy and that, ultimately, I have derived from justice. But if I am right, it seems there is no empirical reason, no reason 'out there', which morally justifies democracy, for only I can do that (perhaps unsuccessfully). Ultimately, I am driven to an account of democracy, the truth of which depends on real equality.

It is difficult to base interpretive judgments about what justice and democracy require on an empirical ground. In some senses, 'what people in fact accept' can be empirically determined. One problem with the idea of empirically identifying people's acceptance of an idea is that it is unclear which interpretation of that idea they accept. Amongst any group of people there will be different ideas of what democracy means. For some it will be just rule

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[31] See Dworkin, *Law's Empire*.

[32] 'Sufficiently', since it could be argued that *The Merchant of Venice* is not such a good play because it teeters on the political tract end of the spectrum by caricaturing Jews, and so is a play, but a 'political tract sort of play'.

[33] This point is not just about the status in the material world of a 'type'. The black letters of this particular provision are repeated at least as many times as official copies of the statute exist. It extends plausibly to all copies and, even, mental states contemplating the meaning of the words, and it is wrong to suppose that a different law with identical content exists – as silly as thinking that when someone says 'that is *the* Ferrari Dino' he means there is only one in existence. The different point is that it is a matter of interpretation, of making sense, by virtue of which we understand that judgment that a particular set of words expresses the proposition that people taking vehicles through the park are either prohibited by law from doing so or they are permitted.

by majority and for others it will have a more elaborate meaning about the importance of equality or freedom. When you try to find out what people 'accept' you find that you are tempted to engage in arguments with them; 'no, that does not count, you might want to say, or 'you have made a wrong move there', or 'you have not thought about it enough'. It must be possible to formulate meaningful propositions about the coincidence of beliefs of large numbers of people. It would otherwise be wrong – and this seems unlikely – that we can say confidently, as we can, that 'people in the United Kingdom, on the whole, believe in democracy'. But this account of democracy would not be useful for it is natural to want to keep asking what it is that people accept when they accept democracy, and what is it that counts as people's acceptance. Each conviction can, in other words, be examined and ignored if they are unjustified (for example, the view that 'democracy is government in which officials steadfastly ignore my views'). If no-one held any views that the government was about representation, then we have good reason to think that there is no democracy this community and, therefore, according to my argument, no legal system. In the other direction, the ideal legal system will be the one in which all of the officials (at least) have the right convictions.

Is the interpretive process for democracy, and therefore for law, no more than a psychological description of how people make moral judgments ('the human mind is capable of holding more than one proposition at a time'). 'Interpreting democracy' can readily convince us that interpretation is a mental - or committed - activity contained, as it were, within ourselves. We make sense of the external world (black marks on white paper), but then the external world appears just to be the result of another mental act - an interpretation - and our interpretation is really an interpretation of an interpretation. The subjectivity of this is odd because it does not quite correspond to the initial picture of the interpreter interpreting a thing 'there'. The picture is rather one of a person conducting a conversation with herself. 'Given this proposition' she says 'this other proposition other proposition would be true … although let me check another proposition. Yes, it is true, and let me check the one below (or above)' and so on. Interpretation cannot account for the distance between the interpreter and the thing interpreted merely by the device of holding interpretations in check. Otherwise, it seems that interpretations go down and down (or up and up) and we get lost. We feel the pull that the thing interpreted is something existing in the real – material – world. But to our puzzlement, as we pursue interpretation down, things become, not more concrete, but more abstract. We can draw a line. Things cannot go down and down. And so there must be something in the outside world in which interpretations anchor.

Since we cannot draw a line for justice, we must conclude that justice (and, therefore, democracy) is not an interpretive idea. For there is no *practice* of justice as there is no practice of morality. Justice is an ideal. And so, if law is a form of justice, law is not an interpretive practice, at least in the 'artistic' or 'constructive' sense where there is a sense of 'real world' existence in the raw material of the artist's intentional endeavours. Obviously, a judgment is required about the status of that raw material as art, and it may turn out that it is not art at all, in the same way as a judgment about justice may discount entirely some putative law. But I think that the artist's raw material takes a central stage in way statutes, etc, do not.

By contrast, we make a judgment about the legislature's 'raw material' as 'putative law', only as preliminary judgment of morality to some later one. We do the same sort of balancing act in morality. Take A, who utters the words 'I promise you £1000 if you break into X's repair shop and get my car back' to B. Does A believe he has the right to his car although he has not paid for the repair, and is aware he has not got the money to pay? We make a judgment about someone's utterance as a 'putative promise', but only as a threshold to determining whether he had a right to make it, what the content of the promise is, and so

on. True, there might be some use in describing this form of moral judgment as an 'interpretation' of the promise, but it seems more easily described as a straightforward judgment of the rights and obligations of A and B, given what A has said. Describing the judgment here seems different from the interpretation of artistic texts, where there is a stronger sense of 'real world' existence in the raw material of the artist's intentional endeavours. Obviously, a judgment is required about the status of that raw material as art, and it may turn out that it is not art at all, in the same way as a judgment about justice may discount entirely some putative law. But the artist's raw material takes more of a centre stage. That piece of work exists before you, demanding to be understood, in a way the putative law does not. Ironically, the idea of artistic interpretation, preserving more clearly the relationship between the interpreted and 'the thing interpreted', seems to have a surer foothold for legal argument if we assume the 'sources theory' be true because that theory supplies the 'out there' quality of the 'thing to be interpreted'.

Ideal integrity as compliance with real equality. Dworkin uses the idea of integrity as the special 'virtue' of law. He discovers integrity from observing what is familiarly thought to be a collision between fairness and justice. We cannot obtain justice in the *real* world because people have different views about what it is. Counting views equally is fair, in the real world, and so laws could be devised that reflect, fairly, the division of opinion about what is just. To use his example, a law might allow two out of three women abortions (in specified circumstances) under some fair procedure such as drawing lots. We then ask ourselves whether a law like this conforms to our intuitions how laws should be ideally. It is better that laws 'speak with one voice' to all people 'equally', than to have this 'checkerboard law'. Hence, integrity is the main virtue of law, discovered by working out the respective 'gravitational forces' of justice and fairness, in the same way as Neptune was discovered by examining the gravitational forces of Pluto and Mars.

But an asymmetry in intuition appears here. The law speaks with one voice if it prohibits all abortions and *that*, most people say, contradicts fairness to those who want abortions. Fewer people say, if the law speaks with one voice towards all women by permitting all abortions that contradicts fairness to the foetus. That is, many people are content to derive integrity only when the law is just. Women are entitled to abortions, they think, and so, of course, the law should allow all of them to have abortions. But this means no derivation of integrity at all. It is clear that Dworkin's derivation of integrity relies on the drawing of a sharp distinction between justice and fairness, and emphasises the importance of consistency of following procedures. In exploring the virtue of integrity we need to ask: what virtue is there in treating like cases alike if the decision in a previous case is substantively wrong? For integrity appeals to distributive equality rather than real equality. Integrity therefore uses the idea of equality of outcomes rather than real equality. This can be illustrated as follows. The particular virtue of integrity is that it 'speaks with one voice' to all members of the community. That virtue is displayed even where the community speaks with the wrong voice to all members of the community. It is more in accordance with our intuitions about what law is to suppose that it should prohibit all abortions, than that it should randomly permit abortions for some but not others, Dworkin says. So integrity must, for that reason, employ what Dworkin describes as 'treating people equally' rather than 'treating people as equals', and so can be attacked on the familiar ground that it can level down as well as up.

Integrity, as first pictured by Dworkin, appears halfway between the two extremes I described for interpretation. In the evil legal system there are rules, sanctions, officials, proffered justifications, criteria of legal validity - the paraphernalia we loosely associate with law. It lacks justificatory 'force' because the convictions infecting the legal structure are

evil.[34] If real equality is missing – there is no point to making out the grounds of law. So this legal system is not one of (proper) law because there is too great a departure from right convictions in this system. Instead of saying that there is an interpretive judgment to be made, we only need to make the moral judgment that its officials share the wrong convictions. The other extreme is where every official has the morally right convictions. We *could* interpret 'the rules that officials accept' or 'what the officials have done' and conclude that 'what we interpret' makes the best moral sense. But this is an elaborate way of putting things and it seems clearer just say that the ideal system is properly law because the officials have the morally right convictions.

As far as the legislature is concerned, integrity is an injunction to legislatures to treat people as equals. This requirement is sufficient to rule out checkerboard statutes and, crucially, it rules out outlawing abortion, and so removes the problem of the asymmetrical intuition many have about the Neptune argument. The injunction that integrity has to judges is different. It is that judges should *assume* that previous decisions, either legislative or judicial, 'speak with one voice' to all members of the community. For statutes, judges should assume in interpreting law that the legislature was acting consistently with real equality.[35]

Let us look at two cases involving a statute. In *Registrar of Births* v. *Smith*. Smith, who had been adopted, was in a secure psychiatric hospital because he had twice tried to murder someone he believed to be his natural mother. There was substantial evidence that he would murder his natural mother if he had the chance. He did not know what her name was, or where she lived. A statute said that 'any person' who was adopted 'had a right' to obtain the birth certificate of their natural mother and there were no further qualifications on this right mentioned in the statute besides filling in the prescribed form. Was it possible to read this statute in a way that said he did not have a right to the birth certificate? Easily and obviously, if we assume the statute 'spoke' to all people as equals. If the legislation were read so that it enabled a mentally disordered person to attempt murder, that would ignore the legislature's duty to treat people in accordance with real equality. It would wrongly imply recognition that the legislature did not have a duty to prevent the avoidable high probability of an attempt at murder (Smith had already escaped before).

It is useful to contrast *Smith* with *Riggs* v. *Palmer*. Here a 16-year old youth called Elmer, a beneficiary to his grandfather's will, murdered his grandfather, with the motive of making sure that he received the estate before the will was changed (there was some evidence that this might happen). It was held that he could not receive the money as 'no man could profit from his own wrong'. This principle prevailed over the principle that the strict terms of a will should be observed (and is, indeed, a classic case where some non-social source identified law determined the decision). Elmer's case can be distinguished from *Smith*. The question to be asked is again one of real equality. Was Elmer treated callously in being denied the money, in the same way as Smith's mother would have been treated callously had Smith been given her identity? In one crucial respect, Elmer was treated callously. Elmer had already been punished for his crime (he was in the state penitentiary as a minor) and here,

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[34] It is difficult to see how one could 'ground' a legal argument by using a principle of, say, racial 'purity', based on hate, prejudice, mistake, mere repetition of the views of others, cosmological 'truths', weird psychology, and so on. Could you coherently determine whether a racially 'pure' citizen had been 'prejudiced' by the incorrect application of such principles? It makes neither rational nor moral sense.

[35] The assumption is a 'psychological' strategy because it suggests how one might frame one's mind to approach the problem; others might find it too philosophical ('how could you assume such a thing?' they might ask; instead, they might find it easier to talk in terms of a. 'there being a principle of the common law that the legislature did not intend to override' or b.'if the legislature were here in court faced with the problem how would they decide?' or, very commonly, c. 'what public policy was promoted by the statute?'); a. and b. are psychological strategies employ the idea of a metaphorical group state of mind; but the idea of assuming what only might or might not be assumed, is similarly psychological.

in addition, he was being denied property, as in the old days when forfeiture of property was a corollary of punishment. The right way to argue it, I suggest, is to say that he is, in effect, being punished twice and that is unfair to him. This way of putting it is to show that there is a reason independent of how others have been treated to justify the decision, although, of course, how others have been treated in like conditions is useful in coming to the decision on what independent fairness (real equality) requires (for example, forfeiture of property on proof of crime was long ago thought wrong). As Gray, J. who dissented in the case asked 'What power or warrant have the courts to add to the respondent's penalties by depriving him of property'? We can therefore distinguish this case from *Smith*. Smith was not denied respect because his purpose was to commit a serious crime and, in effect, the legislature would have been handing him a gun. But respect was denied to Elmer because his intentional act had already been punished.[36] In both of these cases about statutes, real equality provides the ground for the decisions. Ideal integrity applies in the common law, on the other hand, by informing judges that they should decide on the basis that the previous court acted in accordance with real equality. But this, too, turns out to be no more than deciding each case afresh on the grounds of real equality. For example, in the common law it was clear from at least 40 reported cases that where a person negligently caused an accident and an observer at the scene of that accident suffered nervous shock at seeing it, the observer could claim damages from the person who caused the accident.

In *McLoughlin* v. *O'Brian* there was a difference, because Mrs McLoughlin was not at the scene of the accident when she suffered shock, but several miles away, and it was several hours later, as she confronted the aftermath of a car accident at a hospital at which members of her family had been taken.[37] What does ideal integrity say here? We assume the previous decisions were right and so we assume that there is recovery for nervous shock. That is to say, we are disallowed the argument that, merely because Mrs McLoughlin suffered this unusual form of injury, she would be denied relief. We then say 'given that the others received damages' what distinguishes her case from the others, and conclude that there was no morally relevant distinction in her being in the 'aftermath' (which was the word the court used) of the accident, as opposed to being actually at it, especially given her special relationship with the victims.

Of course, if we assume the previous decisions were right, then it should have been possible for the court to determine the decision without recourse to precedent. Should people be compensated by those who negligently make them worse off? Yes, for otherwise it would be to treat the person or property of others callously. Is there a difference between physical injury and psychological trauma? No, if each causes suffering and financial loss. Is there a relevant difference in cases such as Mrs McLoughlin's where the precise location of the suffering of nervous shock occurs? No, … and so on. See, for example, how Lord Denning displays direct, non-callous and empathetic concern for the defendant in *Bundy*.

> 'Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that when he executed the charge to the bank he did not know what he was doing; or at any rate the circumstances were such that he ought not to be bound by it. At

[36] See Dworkin's discussion Ch.1 *Law's Empire*.
[37] *Law's Empire* Ch.7.g

> the trial his plight was plain. The judge was sorry for him. He said he was a 'poor old gentleman'. He was so obviously incapacitated that the judge admitted his proof in evidence. He had a heart attack in the witness box. Yet the judge felt he could do nothing for him. There is nothing, he said, 'which take this out of the vast range of commercial transactions'. He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank.'

The Court of Appeal allowed Bundy's appeal. Lord Denning steers our feelings, perhaps too much. But it is clear that he considers the question to be driven by justice. Give what Bundy was like, it was not fair to him to say he was too trusting. In any case, he had been heavily influenced by the advice of his bank who, of course, had its own interest to protect. And so Lord Denning said 'as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall':

> 'the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance of infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.'

This case raised a lot of concern at the time amongst financial institutions since the decision seemed to commercial concerns and their solicitors to overturn well-established rules about enforcing securities. But the Court of Appeal's justification seems much less novel now, resting on the principle of allowing relief where there has been an 'inequality of bargaining power'.

Real integrity. Integrity can only have independent force from real equality where the previous statutes or cases have been wrongly decided. Say, for example, in the nervous shock cases it has been clearly decided that the plaintiff's not being at the scene of the accident was a bar to damages. The court's decision must be placed on another footing. For a start, it will be impossible to *assume* that the previous decision was rightly decided. To consider this we can usefully distinguish between two levels of decision-making, decisions relating to 'fit' and those relating to 'substance'. Arguments that a proposed decision would not 'fit' the law are arguments that ignore the deference due to institutions that have a superior right to decide. Any proposed interpretation must 'fit' the pre-existing law, such as precedents and statutory provisions. So, for example, it was not possible for Mr O'Brian to argue that Mrs McLoughlin could not claim damages for nervous shock because it was not a physical injury. There was an established line of cases that allowed damages for nervous shock. We can take the 'existing' rules into account by saying that, although real equality would not recommend those precise rules, the fact that other judges or officials have pronounced them, or the legislature has accepted them, means that the existence of those rules generates their own moral force. They were decided by an institution who had been properly distributed the right to decide. This moral force means that any interpretation of the law must consider these decisions because that is what morality (real equality) requires.

In practice this will mean overturning a line of authority, or setting aside a statute at thresholds where the wrongness of the legislative or judicial decision outweighs the wrongness of not giving effect to a properly distributed right to decide. The wrongness of the legislation that prohibits women from having abortion (because it is contrary to real equality) must be then be weighed against the wrongness of not paying 'due deference' to the legislature (and thus to real equality). It may be that some test can be devised for measuring the point of threshold. One such might be that (the right to) real equality overwhelms any

right to decide (since the right to decide only acquires its moral force from (the right to) real equality.[38]

But this all amounts to saying that where laws appear contrary to morality, an enlightened understanding of justice, through equality, shows they are not. If we understood morality properly, we would see that the kinds of rules that are necessary for organising the community might embody a moral content alien to what, in the ideal world, we think are right. Much of this follows from real equality. Rules only seem wrong because it is only at one level they run counter to our personal convictions. Communal life, then, means that rules that others create generate their own force of morality and so, so some extent, our personal convictions should be adjusted to take account of the fact that we are, too, members of the community. This does not mean a submergence of our personal convictions, however. In a democracy, each person also has a fairly distributed right to decide for himself, although that has to be balanced against other fairly distributed rights, in which there is a superior right to decide. We take into account in the way we think it right to behave, those decisions made by others whose decision-making powers are morally justified. This does not stop us engaging in argument. Indeed, since there is a connection between us all through the ideal of real equality, argument does not stop at any level. The prohibition of a limited right to abortion is bad law, because it offends real equality, and remains bad law even although the legislature had the right to decide. Talking in this way is advantageous, for it allows us to see that law is identified through argument, and not just through institutional fiat.

Nevertheless, in many cases we simply accept statutes and cases. ‘This is what the legislature said’ expresses in uncontroversial cases what democracy requires. That means taking into account as an ingredient of our view of what is – all things considered - morally right. Where explicit interpretation is required, as where it is not so easy to refer to an overriding principle such as ‘democracy requires I accept this’, our more complex interpretation will require an examination of what democracy means. The idea of ‘what the legislature intended’ places us in the position of the legislature, taking into account why that institution is justified.[39] Likewise, the moral point of applying precedents is often overlooked in accounts given of legal reasoning because the form of reasoning is clear. No one distinguishes a case because, say, the defendant’s name is different - imagine arguing that Mrs McLoughlin had no right, because no previous plaintiff in a nervous shock case was called McLoughlin - or the accident was on a Tuesday, and no precedent was founded on an incident on a Tuesday.

If the above is right, interpretation of law requires understanding the relationship between the justification of the powers of the decision-maker, whether legislature or judge, and the justification of *what has been decided*. Since in legal systems such as the US or the UK, the moral status of the decider is relatively uncontroversial, the interpretation of the law requires not much more than working out whether the content of the law respects people’s rights to real equality.

Interpretation and integrity: strategic integrity. But maybe integrity has a real world strategic aim. The ‘virtue’ of integrity may be to ‘smooth’ disagreement out. People

[38] See Radbruch, from his *Rechtsphilosophie*. ‘… where no attempt is even made to achieve justice, where equality, which is at the heart of justice, is consciously denied in the creation of positive law, then the law is not merely to be called “incorrect”, it entirely loses its character as law.’ Robert Alexy says this is ‘arguably the most-quoted passage in German legal philosophy’. See Dyzenhaus *Recrafting the Rule of Law* 1999 42.

[39] Here is how it can be done with Hart’s provision about vehicles in the park. Imagine yourself looking at the question from the legislature’s point of view. You think democracy gives force to the legislature, and democracy can be explained by equality and freedom. You made your statute in a context in which freedom is assumed unless clearly curtailed, and equality demands that people be given fair notice of any curtailment. Therefore, since ‘vehicle’ is ambiguous, that ambiguity should be resolved in favour of the defendant.

disagree about what justice requires, in circumstances where there is sufficient rough consensus, about democracy, say, for stability. The rough waves of disagreement are smoothed by general acceptance that 'laws must speak with one voice'. This is not consensus in the right way of doing things (which is never to compromise real equality), but just acceptance of a common ground. If the law applies to me, then it must apply to him, people might say. Integrity would then allow, ex hypothesis, for the continuance of some bad laws, but allow for a co-ordination of activities in a consistent way. This would be, in Waldron's terms, the best way law could 'promise justice'. He says '… if law does promise anything in regard to justice, it seems to me that this is what promises: not that the legally designated scheme is the most just, but that the legal designation will secure the coordination that any doing of justice requires.' Waldron's main reason is that:

> 'Parties compete for the right to make and interpret law; and … the laws in force in a given society will include disparate norms based on mutually opposed conceptions. Since these norms cannot all be just, no credible claim made on behalf of them all can be a claim that they should be obeyed on account of their justice'.[40]

If law has a moral basis as I have claimed, just pointing to disagreement will be insufficient, as we can and do make moral judgments demanding conformity whether or not others agree. My judgment that abortion is sometimes morally permissible is, I suppose, made 'on behalf of' all the members of the community. Or at least what I mean is that, although the judgment is mine, it is not personal to me. Of course, I am not making law when I form this judgment, but that is because I am not part of the relevant institution (the legislature, the judiciary, etc). Why are members of these institutions different in principle from ordinary members of the community? They make judgments about what is just and these judgments stand as *their* judgments of what justice requires. Of course, they could be wrong, but no one should suppose that thinking of law as just means that no one ever made a mistake in determining what the law was. There are good reasons of morality why decisions should end somewhere, but they can – as they often are – criticised. To say: that is the law but is unjust, sounds as though the criteria for recognition of the law were independent of justice. No. This does not describe the reality of legal argument. Politicians will say of statutes that 'they got it wrong' or 'we think we got that one right'. Lawyers of course will say, immediately after the highest court has decided, that the decision was wrong in law. It is law, they will say, but that means only that a decision has to be made and it is *only* by virtue of that that this is law. This does not draw sufficient a distinction between that kind of law where we say it is law, by virtue of the decision, and that is law by virtue of the content of that decision.[41]

Waldron's view that integrity is strategic is, nevertheless, links integrity to respect of the views of others. Intentionally, he does not distinguish between the different conceptions of justice people have, and so the form of respect is identical to real equality. You accept what people think, right or wrong, as a way of treating them with equality of respect. But this equality is the roughest imaginable. It might require acceptance of views contrary to equality, when it is impossible to change people's views about how it is wrong that, for example, that democracy is not merely majority rule, or that abortion is sometimes permissible, or that watching pornographic films can be a person's right.

Law as faith in 'what has been done'. There is yet another aspect to integrity, I think, which is that integrity requires us to shape our present understanding of law by reference to things that actually happened, irrespective of their moral status. One way of portraying it is as a

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[40] Selznick *Festschrift*. 'Does Law Promise Justice?'

[41] See Hart ch.1 *Essays in Jurisprudence and Philosophy*, and Dworkin's second weak sense of discretion.

moral doctrine on its own. Sometimes events occur that have certain ramifications for our lives such that the effects must be protected even if those events were morally wrong. Good examples occur where there are military take-overs of democratically elected legislatures and governments and judges are faced with deciding on the legal status of decrees issued by the usurpers. The law abounds with examples. Some judicial determinations occur well after usurpation of power when things have been restored to the status quo. For example, in the Civil War in the US when it had to be decided whether confederate currency was valid at the time it was obtained after the confederate states had become part of the Union. Some determinations occur during the events themselves, as was the case in Southern Rhodesian after the Ian Smith government unilaterally declared independence from the UK. Consistently, courts have used a very basic principle in their decisions, by asking themselves whether the decrees issued by the usurper government were 'necessary' for ensuring civil stability. If they are found to be, then the decrees are endowed with legal status. If they are not, for example, where they are found only to have been made with the intention of entrenching the usurper's illegal position by permitting the detention of political opponents, the courts will not recognise the decrees.[42] These sorts of 'revolution' cases show how courts will assume in an emergency that centrally organised coercion must help to maintain stability, for stability is the foundation without which decisions about real equality can be made. So this type of integrity – a response to the requirement that past events must be recognised to have some input into present decision-making – is also founded on a moral principle, that of necessity, albeit one that is background only to decisions of real equality.

There is a more direct way of portraying integrity – brute integrity - which is to say it preserves the overall architecture of the law. A good metaphor is a ship, say, the *Argos* of Jason and his compatriots, the Argonauts.[43] The voyage, particularly between the great Symplegades at the entrance to the Black Sea which clashed together at frequent intervals, took bits and pieces (including the rudder) from the Argos. Brutal integrity would require that, during the voyage, the Argonauts should have preserved the integrity of the ship (which perhaps could have been called 'Neurath's ship', too) by replacing the pieces torn off by pieces identical to them (the rudder in the original oak, with the original carvings, etc). It is a principle of the deepest conservatism since it offers no independent meaning for integrity other than to preserve. A form of integrity allowing modifications to the rudder, a more streamlined hull (perhaps the Argonauts found titanium and learned to work it on their trip), etc, to enhance speed and safety, would be less conservative because it would that measure the repairs to the ship against an overall account of what the Argonauts hoped to achieve. I do not think that brute integrity has any part in Dworkin's theory of law, for brute integrity bears too close an analogy to reasoning of the 'out there' sort. Certainly, I do not think that the 'rule of law' could lie in acceptance of the fact that mere force has been applied in the past and is likely to be applied in the future in a consistent and 'rule-like' way. Instead, there must be some moral underpinning, if not in a requirement that compliance with some generally enforced rule will further real equality, then in a requirement that a stable base be supplied in which judgments concerning real equality can be developed.

[42] See Southern Rhodesia (*Madzimbamuto*, *Ndhlovu*), Uganda (*Matovu*), Pakistan (*Jilani*), Nigeria (*Lakanmi*), Grenada (*Mitchell*) and others.
[43] William Twining's suggestion to me.