

Why the Law is Just

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See Paul Johnson's comments on this in *The Spectator* January 29th, 2000, by typing 'Paul Johnson do we need a Legal Philosophy?' into Google. He seems to miss the point of my distinguishing between equality of outcomes and the human idea of 'treating other as equals' – what I call on page 7 'real equality'. It is ironical that Johnson is a well-known committed Catholic because I would have thought that real equality is at the heart of the Christian ethic, besides of course other religions.

Stephen Guest

I can't and would not attempt ever to convince you there aren't unjust laws. There are. But I think that unjust laws are, themselves, laws only in a secondary and unimportant sense. I suggest that this way of thinking about law would improve the way we use law – amazingly – to justify taking money away from people, putting them in prison, removing their children, distributing their property after death, and so on. It follows that my argument will not focus exclusively on the uses we just now happen to make of the word 'law'. In any case, these might reflect wrong understandings about law or, more likely, lazily mark acceptance of ways others have expressed their understandings.

In the film *Crocodile Dundee*, the hero, Mick, is confronted in New York by a Lower East Side hooligan who pulls a flick-knife on him in a dark alley. 'Call that a knife?' mocks Mick, as he pulls out a huge Bowie knife, almost a foot long. Although it's unlikely that the hooligan had studied philosophy, if he had, he might have said:

'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 said. He charged or loaded the word 'knife' with a meaning that reflected its purpose in that context. The hooligan perfectly well understood that, because he fled. To generalise from this, a charged meaning is one that achieves the most from the circumstances. Mick is in potential danger, and 'knife' takes on the meaning, in this lower East side context, of 'that sort of knife, the pulling of which, wins fights. Other sorts of knives aren't properly called knives'. You can see where I'm heading. Law is a 'charged' concept. Like Mick Dundee, we can say of unjust laws 'call that a 'law'?!' or, as we might have said, perhaps following Fuller, of the Nazi legal system, 'call that a 'legal system'?!'

One answer to this seemingly simple point is that I'm really talking about what the law ought to be - as though Mick Dundee were really saying 'that tiddley thing oughtn't to be called a 'knife''. And, this argument might go, I can't do that unless I have some idea of what law is. So I require an analytical account of how we use the word 'law' and 'law-related' terms, which is quite separate from the purposes to which law is put.

This theory, that the 'is' and the moral 'ought' of law are separate, is famously known as 'legal positivism', from the idea that laws were identified by their having been posited by man alone. On the reasonable assumption that men are often unjust, 'positivism' stood for the doctrine that it does not follow that if something is law, it is,

therefore, morally right. Indeed, positivists are keen on declaring that there is valid law even when it is so thoroughly evil that it would be morally wrong to conform to it. I should emphasise the importance of the Nazi legal system example to positivists, for it establishes the meaning of the separation of the 'is' and the moral 'ought' in the clearest possible way. Moreover, it is easy to concede that Nazi law was law in some significant senses. There were courts, sort of, there was a law-making body, sort of, and there was, in use, that vast array of normative language that the law uses – the language of duty, or permission, or obligation, and so on – a language of very great power.

Nevertheless, there are, too, all sorts of obvious connections between law and justice. Indeed, as Hart, the author of *The Concept of Law*,¹ in which the classic statement of this theory of legal positivism is to be found, said himself, justice was the most 'peculiarly' legal of all the moral virtues. And we might note the following. 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 the Old Bailey. Ministries of justice exist in many, many legal systems, and I'd be very surprised if the Lord Chancellor's Department here, thought that its function had little to do with 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 isn't so unreasonable to conclude that people go to law to get justice.

Legal argument is also soaked with justice and its cognate ideas, in requirements, for example, that people 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 enrichment of English law by Lord Denning was through his understanding of this sort of fact – that it was justice which drove the conclusion in the famous *High Trees* case,² or the *Bundy* case,³ 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 is in terms of whether such decisions are just, or unjust. And, of course, the phrase 'miscarriage of justice' is undeniably part of public criticism of what judges and other legal officers have done.

What the Nazi legal system 'authorised'

With these connections between law and justice in mind, we should now return to the Nazi legal system. If that legal system excelled at anything at all, it excelled at being a legal system which, through and through, instituted practically every form of injustice which human beings have ever devised. And so there must be at least a *prima facie* artificiality in legal positivism's account of law.

Let us contemplate the consequences of the positivistic way of thinking with a real example. The Legislative Council of Ministers in Berlin, chaired by Hermann Goering issued, on December 4, 1941, the 'Decree on Criminal Justice Regarding Poles and Jews in Incorporated Eastern Territories.'⁴ S.1 made it an offence for Poles

¹ HLA Hart *The Concept of Law*, 2nd ed. 1994 Oxford: OUP

² *Central London Property Trust, Ltd v. High Trees Ltd* [1947] 130

³ *Lloyd's Bank v. Bundy* [1975] QB 326

and Jews, punishable by death, to quote, ‘if they demonstrated an anti-German attitude through malicious acts’ such as ‘making anti-German remarks’ or ‘acting so as to lower the prestige of the German people’. Many thousands of people met horrible deaths by virtue of this decree, over a period of more than three years.

My response to this is straightforward. The legal discourse is charged. There was and is no meaningful sense in which we can say these murders were authorised or justified. Killing people, using the ‘reason’ of this ‘law’, makes only the most trivial sense of the ideas of authorisation and justification, two ideas so fundamental to law and so fundamental to morality. So, given the Hell of the Nazi experience, what could inspire us to give any sense to the idea that such punishment was authorised? In what sense could we seriously say: this was evil but it was legally justified?

We can argue it as follows. Hitler’s cabinet had the legal powers of the German constitution, according to the 1933 Enabling Act to do it. The Council of Ministers had the appropriate law-making powers delegated to it by Hitler. And so, those people passing the death sentence in accordance with the Decree of 1941 could say ‘I have a document here which ‘empowers’ me to do this. Look, here it has Goering’s signature. And look – hey – its got the German eagle on it!’

I don’t believe it’s necessary for me to labour this obvious point. It wasn’t permitted at all. It was a scrap of paper that signified nothing about how people were empowered to act.

I can make the same point about the unconvincing defence of the Nazi war criminals at the post-war trials. Nothing was being said, by way of defence, when with reference to laws requiring and permitting terrible acts, a defendant would say ‘what I was doing was authorised by laws in force at the time.’ This is not to deny there were other defences, such having to do something out of necessity, or being duressed into it. Of course, it is persuasive to say, in such circumstances, ‘I was scared out of my wits, for myself and my family, if I didn’t do what I was told’. But an appeal to the fact that ‘I was legally authorised’ cuts no ice at all.

I conclude that a legal positivist has to show us why, in the real world, it would be useful to teach ourselves to think that there is a sort of justification, in these cases. And, I think, Hart appreciated that his own theory had to say why it was advantageous to think in this way. In Chapter 9 of *The Concept of Law*, although not before, he confronts the question directly and concedes that the choice between possible theories of law - those that include justice as a criterion of validity and those that do not - is not, to quote him, ‘one concerning the proprieties of linguistic usage’.⁵

He then went on to make it quite clear that he thought that positivism enabled us to mark out a healthy distance between ourselves and the demands of the state. He thought that if we viewed questions about legal validity as something separate from our own moral judgements, we would thereby create a liberal ‘wedge’ between our moral conscience and those in power who were capable of abusing it. The great merits of, to use his words, ‘clarity’ and ‘candour’ would be secured by viewing law this way, because it would enable us better to confront the ‘official abuse of power’. To quote, he said that we ‘should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience...’⁶ So Hart thought there was moral point in regarding, say, the Poles and Jews Decree, as ‘law’

⁴ *Reichsgesetzblatt* (1941), I, 759

⁵ ‘Plainly we cannot grapple with this issue if we see it as one concerning the proprieties of linguistic usage.’ *The Concept of Law*, 2nd ed. p.209. Compare this with what he says in the Preface about the importance of examining ‘standard uses of relevant expressions.’

⁶ *The Concept of Law*, 2nd ed. p.210.

quite independently of morality, because then we can confront it with our own separately justified moral outrage. In a sense, it gives us a clear position of where we stand.

I conclude that attention to language - or as it is sometimes called, and differently understood as, 'conceptual analysis' - therefore doesn't prevent us from saying that law is just. And I point to the fact that Hart himself thought moral reasons determined how we should think of law. So let us confront moral reasons for seeing whether thinking that the law is just serves a better purpose than thinking of the law in a way that is clear and candid.

Positivists sometimes concede that there is a moral content to law in one sense, that where it has been 'incorporated' into law. But they say, too, that such morality is 'internal' to the law, that is to say, entirely posited by those who do the incorporating. It derives its legal status, therefore, not because it engages our convictions directly but simply because someone else has inserted it into the law, let us say, for our benefit.

But putting it this way comes at a cost. What, for example, makes the law of restitution vital is its brute engagement with genuine situations of injustice. Take the practical question of what to do where someone makes a profit out of running a business without permission on another's land. The interesting question is not, directly, what a judge said, or posited, about whether some, or all, profits, should go to the land-owner in the past. In all probability, no judge had said anything on the matter. The interesting question, rather, is about the justice of such a payment. Again, where police act illegally to gather cogent evidence in the course of a criminal investigation, the interesting point is directly 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 is directly, again, whether it is morally right to send a person to prison for life in such circumstances.

The kind of clarity and candour which is necessary to establish the liberal 'wedge' between citizen and state that Hart was talking about, has little or no place in these fairly typical sorts of case. They each require direct engagement with the justice of what the state, through its judges, is entitled, or has the duty, to do. And, given this, it is not surprising that Hart relegated these sorts of arguments to the periphery. He thought these cases were not the cutting edge of law, but the back end of the knife.

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 accepted by everyone to be a controversial matter.⁷ Such cases bring out the 'argumentative' side to lawyers - their skills to argue for - as I've suggested sounds sensible - a just decision. These skills, I believe, are integral to a good lawyer's convictions and, for a large part, arise from their innate, and then matured, sense of what is just.

So I urge an attitude here, an 'argumentative attitude' to law that unites both knowledge of law and a commitment to it morally. This, I suggest, is what the fully formed ideal is of being 'lawyerlike'. It urges a seamless connection between those judgements lawyers make about what the law requires or allows, and those moral judgements, of personal conviction, lawyers make about justice.

The judicial role. All the arguments I've so far touched upon introduce the idea of the judicial role, upon which all other legal arguments depend, including those of the advocate, of the academic, and of the law student. The judge's role is to dispense

⁷ Dworkin RM 'The Model of Rules' 35 *University of Chicago Law Review* (1967) p.14

justice, in the same way as the doctor's role is to heal. The idea of a judge who always dispenses injustice turns the idea of judging onto its head. It is therefore not surprising that the overriding judicial discretion a judge has is not to allow his court to become an instrument of injustice.

The analogy with doctors supports this argument well. Take 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 under-rated book *Time's Arrow*.⁸ The camps were about the worst of human nature, and the role of doctor had become a work of savagery. Amis concludes that the only logical way to understand what happened is to assume, absurdly, that, somehow, Time had started to go backwards. 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, Amis concludes, is the only sense that can be made of such a monstrosity of justice and healing.

If we believe that legal judgements cannot directly engage our moral convictions, we lay the ground for an undesirably detached form of judgement. If you are a judge, positivism erodes your understanding of the judicial role. If your moral attention doesn't engage with your understanding of what the law is in hard cases, you are more likely to look outside your own judgement as to what the law permits or requires. You are likely to succumb to the disease of unqualified deference to the judgements of others. And the sinister form of that, as we've seen, lurks in the defence 'I was only obeying orders.'

Don't expect a set of guidelines! You'll only get what someone else says, and that must be the wrong way to deal with fundamental moral issues. No one thinks that it is a sufficient justification for taking a moral position to say, 'it was what I was told', or 'it is what other people think'. It can be a subsidiary justification, as where we defer out of moral respect for others, but that employs moral respect, not what others have said or thought. Like all of us, 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. My point, though, is that whether such deference is right, is a question that employs moral conviction.

Real justice is about real equality.

I now quite clearly need to tell you what I think justice is. That idea is concerned with that dimension of morality that brings proportion, balance and distribution into our dealings with each other. I think it is fundamentally about equality. I think, too, that by understanding equality properly we get insights into the importance we attach

⁸ 1991 New York: Vintage International

to freedom, although it is not my plan here to tease out that particular connection beyond a sketch. I think, too, that rules loom large in all accounts of law because they instantiate the moral injunction that like cases be treated alike, so preserving justice's concern with proportion.

Unfortunately, the idea of equality appears to clash with that of freedom. Equality makes people think of bureaucratic, freedom-squashing levelled-down socialism. Freedom, on the other hand, makes people think of an entrepreneurial freedom to exploit. And so people think, stereotypically, that equality and freedom oppose each other.

But no one wants the 'levelled down' society. Nor, I believe, do any of us want a society in which we must consider the psychological type of the entrepreneur a grade up from the rest of us. I think the reconciliation of the ideas arises from a proper understanding of the meaning of equality.

We should first be aware of the comparative nature of equality, that idea of proportion or balance, to which I referred. People aren't just 'equal' but have to be 'equal to' or 'equal with' someone else. This idea of comparison causes problems because, in obvious ways, thinking of human beings as 'equal' is absurd. They are so very different. Some are big, some are idiots, some are truly horrible, yet others are really, really, nice. Some are insane. John Minnoch of Washington State weighed over 1400 pounds. Princess Pauline in the Guinness Book of Records was only 23 inches high. There are ugly people, nasty people, atheists, rich people, beautiful people, wicked people, and a whole lot of people who have absolutely no distinguishing feature at all. These reasons have made many reject equality as an ideal altogether.

Jeremy Bentham – who was the founder of the utilitarian doctrines so widely used by governments throughout the world today - firmly rejected basing equal rights on physical difference, or circumstances. In his work *Anarchical Fallacies*, in 1795, he exclaimed that, if we really were to regard people as equal in these sorts of way, it would follow that we would have to equate the sane with the insane. If we did that equation, he said:

'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's objection is that what is common to all people is their humanity - everyone is a human being - and it is that in respect of which each person is equal. Thinkers have pointed out, however, 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, in other words, is only that you should treat people with the respect that humanity requires. 'Equal' adds nothing more, it is said, than a reminder that it is all people, not just some, who are entitled to respect.

Given this criticism, we can try to give a more substantial account of equality by judging the worth of a person's life and then employ equality's comparative idea. We would compare the worth of one person's life with the worth of another's say, by comparing people's happiness or even just how much money they have. We compare proposed government policies and then say: 'this is the better policy from the point of view of equality because it will bring about more equality than the other.' In this way, we give an equality content to the idea that 'human beings should be treated with equal humanity'.

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

But trying to isolate a distinct moral principle of equality in the outcome for people of their overall feelings of welfare, or their wealth, doesn't work. If you compare two outcomes, say of well-being of differing 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.

It follows, in my view, that if we are to hold fast to an ideal of equality, it cannot be to equality defined as outcomes for people's lives. I suggest, instead, that we need to know more about, not the outcome for a person's life, but how that person has been treated.

This approach to equality understands it as a relationship between ourselves and others. If we have genuinely been treated with respect - if we have been treated fairly - then we don't have a grievance about justice. When I turn the focus this way, we see that equality is implied 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.' Seen this way, I think, treating a person as an equal means 'acting in a way in which at the forefront of your mind is the fact that the other is, in some important aspect, equal to yourself'.

The direction of our attention this way preserves the idea that equality is comparative, by making the comparison now between ourselves and someone else - and not between two people external to us. I could usefully call this idea 'first person equality', to distinguish it from the equality of outcomes in comparing second and third persons, or groups. But as it expresses what I think is the nerve of morality, I call it 'real' equality. Real equality could not possibly allow levelling down by physically disabling people. But it might allow levelling down on some occasions. For example, a community might be more equal in my sense if it did without a racially segregated skating rink. And, in many cases, it would be reasonable to assume a distribution of real equality from an initial survey that measured outcome equality. The point I want to emphasise is that equality of outcomes cannot be the test of whether a person has been treated with due moral concern, for only the deeper principle can decide that.

The directness of the appeal that others are 'the same as me' has a powerful intuitive hold on us. That intuition is powerfully expressed in terms of equality because it means denying the Nietzschean, and then Aryan-Nazi morality of grading people. Real equality prevents the mistaken and unpleasant way of supposing that because people differ in their characteristics they can be distinguished in terms of those less or more deserving of humane treatment. Essentially, equality as I've characterised it, is a principle of empathy.

Perhaps the brute sentiment of what I've expressed more formally is contained in the idea of 'he who is without sin, should cast the first stone.' As I've said, the test of treating another as an equal is to put you in their position. You then understand that others are not 'higher' or 'lower' grade people, merely because they have or lack certain qualities, or their personal circumstances are different. You can have contempt for others' dispositions, tastes, actions, omissions and styles, but not contempt for the person in whom these dispositions, tastes, and so on reside.

Although it is not strictly necessary for my overall point, I should make a short remark about what I think are the characteristics of the object of our empathy. I think that it means recognising the other as a self-initiator of action, as having its own will. It also means, I think, recognising another as a being that can suffer in a number of

ways through physical pain, and through pain's psychic cognates, such as hunger and frustration. Important to these considerations is the idea of self-sovereignty, or self-initiation directing a - perhaps very limited - conscious plan for the future.

We well understand what pain is, what it is to be frustrated, and particularly that state where we are unable to establish ourselves in a way that marks us out as our own. And, it is in this ability to understand the other in terms of their being able to initiate - or endorse - what marks out their life as their own, that, I think, shows us how important freedom is. From that idea, I think, the richness of liberalism flows, in the possibilities of diversity, cultural or otherwise, and what thinkers now call - often unclearly - moral pluralism. But, as you can see, I derive freedom from equality and do not set it up in opposition.

Democracy and the public and the private. You might note that the appeal I make here, is not quite an appeal to rationality. I believe recognition of this point is more strongly asserted in the philosopher David Hume than elsewhere and I concede that, in the end, you cannot appeal to more than this, and that some people, such as Fred West, just do not see. Many feminists, though, identify this point in the idea of 'caring for others'. However, I think that requirement is too psychological, and probably too self-indulgent, for recognising another is more than just identifying a feeling in oneself. But caring's general tenor is right because of its identification of morality with directing people to the particularity, or uniqueness, of people.

This 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.

First, we can't personally look after every other single person by treating them as equals. In fact, our treating people from their point of view will often require that we pay special attention to those people immediately proximate to us. It is clear, too, that we have special duties towards our family, our friends, our associates, or, in short, our neighbours, although those duties themselves require equality of respect.

This idea, I believe, best explains the famous neighbour principle in the law of tort first formulated by Lord Atkin in 1932 in *Donoghue v. Stevenson*.¹⁰ We have duties to others not to omit to treat them as our equals. That there are such circumstances of responsibility for omissions is supported by the intuitive trust we have in the parable of the Good Samaritan. The neighbour principle makes use of this idea because it relies fundamentally on the test that who is your neighbour is not the person whom you actually thought would be affected by your act. It is, instead, the person whom you ought reasonably have contemplated. So, when you breach that duty, liability is imposed for your omission to act properly.

But personal liability ceases just out of reasonable contemplation's reach. We should not define that point by a blunt standard such as what would prevent the courts from clogging up with too many litigants seeking justice. Nor do I think we should define it by the even cruder yardstick of what judicial decision would contribute most to the gross domestic product. Rather, I think, as I have argued, a person's liabilities are defined by respect to him, as a person, by duties that are just, fair, and reasonable to impose upon him - in short, by considerations that take into account his own point of view.

Second, however, it is our ready perception of real equality in these personal relationships which motivates our acceptance of a public structure of justice. At the point at which neighbourly proximity is exceeded, the duty to treat others becomes a

¹⁰ [1932] AC 562

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, metaphorically, we had delegated that task to the communal institution of the state. It follows, I think, 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 can go further than this. If the state is, in the sense I've described, a metaphorical delegate for treating people as equals, it must also follow that 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 we have got to a structure which expresses this principle of delegation is, I believe, that of democracy. Respecting people as equals, with their own point of view, with their own sense of what they wish to endorse in their own lives, will naturally result in a political structure which respects the individual. 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.

A lot follows, since official duties and powers will be justified derivatively from equality of respect. So 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. Fleshing out that idea has been, of course, the often unrecognised background from 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.

The judiciary. The argument from equality goes even further, I think. Equality grounds institutions that are more appropriate to monitoring equality of respect than legislatures. I have in mind the judiciary. Take, for example, the idea of judging as having meaning and force independently of any institutional design - as when a father acts as a judge in a dispute between his children, or someone judges the local flower show. The father can't resolve the dispute in favour of one child on the ground that he likes that child better. The flower show judge can't 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.

It is no different when a judge is part of the institution of the law. No judge of any sort will deny that it is his duty to be fair and impartial. Nor will a legal judge say that the legal system of which he is an integral part is systematically unjust. Therefore, if any institution morally coheres with democracy, in the sense in which I've 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. I think 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 simply, which body is the best one, empirically speaking, for determining whether legislation meets the equality test? The elected body that enacted it and which has therefore already submerged the minority point of view? I’m afraid that cannot be a foregone conclusion. The Council of Bishops? The National Union of Journalists? The East Cheam Conservative Club?

The following sounds more promising: 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’. Empirically, it seems to me, the judges win hands down. If so, the argument that judges shouldn’t make judgements about flawed legislation because they aren’t elected can be completely turned around. Considerations drawing from the real world might now compel us to say that it follows from properly understood equality of respect that democracy requires that judges not be elected.

Real equality is what rule following is about.

I need now to bring together my claims that justice is integral to law and that equality is integral to justice. I’ll do this by saying that I think that rules, which are clearly integral to law, express equality, by applying a moral principle of treating like cases alike.

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 integral to law, and the idea of ‘treating like cases alike’ belonged to both justice and rule following. This idea, of treating like cases alike, was part of the idea of justice, true, but only the formal part, which was not real justice. Formal justice was, he said, ‘compatible with great iniquity’ as where, 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. So, Hart concluded, the apartheid law could be substantively unjust, which was its significant failing, but formally just.

I can’t accept Hart’s argument. Colour was only one of several irrelevant and very wrong distinctions. But rules operated with those distinctions, and that they operated was of course, necessary to make his argument compatible with his saying that there was rule following at all in South Africa. Take the argument to its extreme. If Hart hadn’t specified any likeness at all between people, he would have ended up without rules at all, only arbitrary, singular, particularistic directions.¹¹ Put another way, to say that rules apply to people is to recognise people as equals in some, admittedly rather unspecified, sense. But 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 ‘532 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

¹¹ Note Lon Fuller’s claim that the less rule-bound, the more arbitrary and terrible rulers become, at which point he asks whether we should be talking as if there were law at all. *The Morality of Law*, rev. ed. (1969) New Haven: Yale UP.

nigger’, to which she replied ‘Well it’s lucky because sometimes people get hurt.’ In really terrible situations, this way of talking degenerates utterly, to the point where people are characterised without even their most basic spatio-temporal identities. Anatoli, in his great book *Babi Yar*,¹² 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 too familiar with the description of human beings as black or white ‘trash’.

A general way of putting this point is to say that we cannot discover what ‘treating like cases alike’ amounts to unless we first choose some way of identifying what treating like cases alike means. For law, given the moral reasons I’ve put for saying that we should think of the law as just, I think the meaning is to be found in the idea of real equality. This general point about rule following was brilliantly put by the German philosopher Wittgenstein.¹³ How do we discover the rule by virtue of which we 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 equally be 2, 4, 6, 2, 4, 6 ... or 2, 4, 6, 6, 4, 2 ...

We don’t know, until we’ve identified the principle which directs further application of the rule, and its identity is not apparent just from looking. Many black letter lawyers make the mistake of assuming that, by looking - by only looking - at the pattern, will they find the right application somehow presented to them. The result must frequently be arbitrary, and, therefore, unjust. Or somehow the lawyer intuits the answer but fixes the justification in some unrule-like explanation that, for example, the answer is one of ‘public policy’.

I believe that, for law, the subject matter of which is the directing and empowering of people, the ideas of real equality and rule following are closely connected. In one direction, impartial concerns determine the rule-like quality of law. In the other direction, the rule-like quality of law shows an analytical connection between the concept of law and what I’ve called the nerve of morality. The more rule-like is the law, the less it instantiates the callous unconcern of deferential grading and the drawing of arbitrary distinctions. I’m sure that 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 I don’t think Fuller went far enough in specifying the correct conditions of justice in equality, one can discern a reference to humanity’s requirements of communication of intention, or advance notice, or fairness in treatment, in his account.

It is, too, in the set of ideas that emerge from equality, properly understood, that I think the appeal of the ideal of the ‘rule of law’ lies. This is not the seemingly uni-directional, austere and iron-like sign it is often taken to be. It is more human than that, and communal in concept. 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.

Equality’s distribution of decision-making. Now, a complication I’ve so far left untouched – on purpose, because it is not in conflict with what I’ve argued to be the fundamental moral principle behind law - concerns other aspects of rules, and the

¹² A. Anatoli (pseudonym) *Babi Yar: a Document in the Form of a Novel* trans. Floyd New York: Farrar, Straus and Giroux, 1970.

¹³ *Philosophical Investigations* (1953) para. 201a

direction they can give. I've focused so far exclusively on the idea that real equality is the major determinant of the content of rules. I've done that because I think that too much jurisprudence focuses on the narrower issues raised within an assumption that law's existence is a foregone conclusion, one of historical fact. I've sought a more abstract account in terms of the fundamental motivating force of justice. However, although the thrust of my lecture has been to establish equality as the background force, that principle is often submerged beneath surface considerations. This is because the structure of justice requires a distribution to officials of the power to make decisions about equality.

We should be clear that the democratic principle means: that the legislature has acted, itself instantiates equality, since the weight of the democratic majority requires great deference to what the legislature has done. Nevertheless, the legislature can only have the right to act within the perimeter fence set by justice's requirement of equality of respect. So the legislature has the right that we assume to a high threshold that what it did was within those perimeters. That must be what we mean by the legislature's right to pass legislation. If the judiciary is to be at all deferential, it is to be deferential to that ideal, but it should be, too, in the realisation that that ideal is itself an elaboration of the principle of equality. Of course, judges should follow statutes, but it means that where there is a difficulty of interpretation, the right interpretation will be that which best instantiates the requirement of justice. In clear cases, in other words, where the breach with equality is stark and obvious – for example, where the legislature abolished the right to vote – then the judiciary must, in principle, have the power and duty to say that such legislation is invalid.

I'll make a similar point about the common law, for the judiciary holds the distributed power to decide what is just, but duly deferential in the way I just described. This way of understanding matters makes what judges do much clearer. It will mean that sometimes, in breach of equality at a less fundamental level, a judge might have the duty, in deference, to follow a bad precedent set by a higher court.

The judge interprets the previous cases in other ways, equality, however, again being the driving force. There is, for example, the commonly invoked and important principle of certainty. This principle, however, like the increasingly recognised principle of proportionality, and, incidentally, as I've argued, equality of outcomes, means nothing unless the moral principle behind it is spelled out. Being certain that you will be treated unfairly is 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 the other way from what you'd expect, say, for example, 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 kind of way, then treating them fairly might require that they be treated that way. This is the basis of what lawyers call the 'reasonable expectation' principle. That principle underlay the case of *Lloyd's Bank v. Bundy* I mentioned earlier. 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. But, if I'm right about equality, Bundy's point of view is

in competition with that, and so certainty could not be a foregone conclusion, although it weighed heavily.

It is also a generally under-recognised point that judges pick the brains and borrow the perceptions of other judges. Certainty is often not an issue in such cases, particularly those cases lacking a property element. Frequently, I think, the judge understands the previous law as an already morally worked-out example, in much the way that a scientist will build upon other scientific experiments. The previous judge has dealt with a similar sort of case and the instant judge wants to borrow from that other judge's experience and moral perception. This is natural and, indeed, economically wise, for it saves a great deal of time. It explains the attractiveness, indeed relief, in finding a case in the reports in which the facts are almost the same as your client's. You can now see the way to argue it from what has gone on in that case. You don't have to assume it states the law, just that the participants in argument in the case have been through this sort of thing before. You now use their research and judgement to make your own judgement as to what equality requires.

This rather straightforward way of using precedents to produce arguments explains why 'persuasive' precedents - that is, precedents that the judges supposedly don't have to follow - are so important. The fact that this happens only obviously when judges refer to cases outside jurisdiction, should not hide this prominent use of jurisdictional precedents. Here, Blackstone's much derided reference to the 'accumulated wisdom and tradition' of the common law makes a lot of sense.

Above all, though, I want to emphasise real equality as a direct driving force in interpreting the common law. It should be in all of the truly innovative cases. X can't argue for the same treatment as Y, if Y was treated wrongly. Moreover, he can't argue that he should be treated the same as Y, if Y was treated rightly, for there is no need. He can simply make the direct claim that he should be treated as an equal.

The implication for judging is that it means there is no justification for following precedents blindly. Popularly, that means that the merits of each case should be considered and exceptions should be understood as either more precise, or more economically expressed, applications of the rule. Mercy therefore won't temper justice but, instead, be part of justice. The idea that justice and humanity can conflict, therefore, 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.¹⁴ 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'. Of course not. This was a truly exceptional set of circumstances, and one which, if we think humanely, meaning - from the points of view of the defendants, as like us - we can understand. This means, 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.

¹⁴ (1884) 14 QBD 273

Conclusion

I must now wind up this abstract story. I have argued that neither the way we happen to talk, nor advantages of clarity and candour about ways in which the state manipulates its huge coercive powers, are sufficient reasons for submerging our direct engagement, as lawyers, in questions of justice. I've also argued that, as the nerve centre of morality, equality drives our structures of justice in a way that makes sense of the fact that law is primarily a rule-centred activity.

I think two things follow from my account. First, that we should face disagreements arising in the long running debate between the legal positivists and their critics, primarily as disagreements about moral merits. Too many positivists shy from expressing first-order moral judgements in their theorising about law. Perhaps many sense the undesirability of a perceived subjectivity of it all. They might want to say 'adding a charge to language' adds no more than a kind of 'feel' to it, which lacks objectivity. But I think that wondering how knowledge is possible about moral perception is a pointless exercise in this field. No theory of morality will convince me, for example, that torturing children is permissible. I feel that epistemological worry here is a little like thinking that because the thermos flask doesn't know when to keep things hot and when to keep them cold, it follows that nothing will ever be hot or cold in a thermos.

Finally, I think that judges determine all things legally valid, and their decisions, therefore, create the subject-matter for the lawyers, and all that goes on in law schools. I therefore think that judges, above all, can't do their job properly unless they are prepared to join their convictions about morality, about democracy, and, above all about justice, to the decisions about how we are all to live as equals.